

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Compagnie de Navigation Mixte (Compagnie Touache) v. The Ship "Silverton" and freight, from the Supreme Court of Gibraltar (P.C. Appeal No. 33 of 1912); delivered the 5th December 1912.*

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PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD MERSEY.

LORD MOULTON.

THE PRESIDENT OF THE PROBATE  
DIVORCE AND ADMIRALTY DIVI-  
SION.

*Nautical Assessors :*

ADMIRAL SIR ARCHIBALD L. DOUGLAS,  
G.C.V.O., K.C.B.

COMMANDER W. F. CABORNE, C.B., R.N.R.

[DELIVERED BY LORD MERSEY.]

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This was an appeal from the judgment of the Supreme Court of Gibraltar delivered on the 4th January 1912 in an action for damage by collision in which the appellants the owners of the French steamship "*L'Emir*" were plaintiffs and the respondents the owners of the British steamship "*Silverton*" were the defendants. The Court found the collision to have been occasioned solely by the fault of the master and crew of the steamship "*L'Emir*" and gave judgment accordingly.

The appellants first took the point that the learned judge in the Court below was wrong

in attaching any blame whatever to the "*Emir*" in relation to the collision. But this point was not seriously insisted upon, and when the evidence is examined and the careful analysis of it by the learned judge considered it becomes clear that the point is not tenable.

The real point taken was that though the "*Emir*" was in fault the "*Silverton*" was also in fault, and that the judgment should have been that both ships were to blame.

On this contention two questions arose and they were both questions of fact. The first was whether the "*Silverton's*" speed was excessive; and the second was whether she had neglected to pay proper attention to the regulations for preventing collisions at sea. A third question as to the "*Silverton's*" look-out was referred to, but nothing turned on it, and it is only mentioned in order to show that it has not been overlooked.

The "*Emir*," a vessel of 1,291 tons gross and 810 tons net register, was, on the early morning of the 9th August 1911, in the Straits of Gibraltar, bound with passengers for Tangier. Her course was S. 58° W., true. The "*Silverton*," a collier of 2,684 tons gross and 1,723 tons net register, was also in the Straits, making a course E.  $\frac{1}{4}$  S., and bound with a cargo of 4,000 tons of coal for Taranto, in Italy. Both vessels entered a dense fog at a point about four miles to the southward of Cape Tarifa. While in this fog the "*Silverton*" struck the "*Emir*," the result being that in less than one minute the "*Emir*" sank. Twenty-four of her crew and sixty-two of her passengers were drowned. The wind was light and easterly, and there was an easterly current running of about two knots.

These were the undisputed facts so far as they are material.

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The evidence as to the speed of the "*Silver-ton*" immediately before and at the time of the collision is contradictory. The witnesses from the "*Emir*" (the master, the chief mate, the second mate, the third engineer, and some others) speak of the "*Silver-ton*" "coming fast," or "coming at great speed." They describe the shock of the collision as severe, and they point to the character of the damage as indicating considerable speed. Their evidence when examined is loose and unsatisfactory. But in explanation it is to be remembered that some of those who could perhaps have given more definite evidence are dead, and further, that the time was short and the opportunity small for observing the "*Silver-ton*" from the deck of the "*Emir*." Hardly more than a minute elapsed from the time when the "*Emir*" sighted the "*Silver-ton*" to the time when she foundered. But, though loose and unsatisfactory, the evidence from the "*Emir*" was sufficient to put the "*Silver-ton*" on her defence on the question of speed. Her evidence is specific and clear. The master states that at about 4.5 a.m. he lost the Tarifa light by reason of the thickening fog. He then gave an order for the engines to be put at half speed. This order was obeyed, and the speed fell off to  $3\frac{1}{2}$  to 4 knots. Full speed was 8 knots through the water. At this time the master could see about a mile ahead. At 4.15 a.m. the fog got thicker, and he gave the order "dead slow." This brought the speed down to 2 knots, and the ship was moving at this rate when the "*Emir*" was sighted at a distance of 30 to 50 yards. On sighting the "*Emir*" the "*Silver-ton's*" engines were reversed full speed astern, but ineffectually, for within a few seconds the collision took place. Speaking of the manner in which this witness (the master) gave his evidence the learned judge says: "He

“ impressed me as speaking the truth without any reservation or exaggeration.”

Nevertheless, the credibility of his evidence was attacked on the hearing of the appeal. It was at first suggested that he and other witnesses from the “*Silverton*” had entered into a conspiracy to deceive the Court. Of this suggestion it is sufficient to say that there is nothing in the facts to support it. It was then said that in one matter the witness had departed from the statement in the Preliminary Act. In the witness box he described the “*Emir*” when he first saw her as  $2\frac{1}{2}$  to 3 points on the “*Silverton's*” port bow, whereas in the Preliminary Act she is described as then “about ahead.” A departure from the Preliminary Act is always a matter of observation, and in some cases it is of very real significance. But in the present case the point is of small importance as bearing on the questions in dispute. On cross-examination the master disclaimed any intention of departing from the Preliminary Act (*see* judge’s note at p. 34 of the record), and the judge evidently thought that the inconsistency if it existed was not of sufficient importance to cause him to doubt the witness’s word.

Other witnesses were called from the “*Silverton*” to corroborate the master. One of them (Thomas, the 2nd Mate, p. 36 of the record) refers to the ship’s log and another (Ellis, the 3rd Engineer, p. 42 of the record) refers to the engineer’s log as containing entries confirming the statements made by the master in his evidence. The 3rd Engineer, speaking of the orders from the bridge as to altering the speed of the ship, says:—

“These orders all entered up in engineer’s log book.  
“All these orders were carried out.”

Those who represented the “*Emir*” did not call for the production of either log. In

addition evidence was given of the character of the damage sustained by the "*Silverton*," and in the opinion of the assessors, who sat with and advised the learned judge, this damage was inconsistent with the suggestion that the "*Silverton*" was going at an excessive speed. In this opinion the learned judge concurred. Having regard to this evidence their Lordships are of opinion that the finding of the Court below that the "*Silverton*" was not going at an excessive speed is one which cannot be disturbed.

There remains for consideration the second question, namely, whether the "*Silverton*" neglected to pay proper attention to the regulations for preventing collisions at sea. It is alleged against her that she did not sound her fog whistle as required by Article 15 of the Regulations, and further that she heard or ought to have heard the whistles blown by the "*Emir*," and that she improperly failed to stop her engines as required by Article 16. Having heard the evidence the learned judge found that each vessel was in fact sounding the fog signals and yet that neither heard the other. He says:—

"I believe neither vessel heard the signals sounded by the other, though I am fully convinced that each vessel was sounding them and that they ought to have been heard for some little time before the collision took place."

It was suggested on behalf of the appellants that this finding was in effect a finding of negligence against both vessels, and that the learned judge misdirected himself in entering judgment against the "*Emir*" alone. But when the previous passage in the judgment is read—

"it is strange that neither vessel should have heard any fog signals from the other, but the witnesses from each vessel say this very positively, and the evidence on this point on both sides is such that I cannot disregard it,"

it becomes plain that what the learned judge meant was that the atmospheric conditions were such that the sounds did not carry from the one vessel to the other. This point was urged by counsel for the "*Silverton*," as appears by the learned judge's note (p. 50 of the record): "Marsden, p. 35, as to fog," and was no doubt accepted by the judge as explaining the fact that the whistles though blown were not heard by either vessel. It is well known that the Courts are unwilling to infer negligence from the mere fact that a fog signal though sounded was not heard. See "Marsden," Sixth Edition, p. 35.

All the questions raised on the appeal were questions of mere fact. The witnesses on both sides were seen and heard by the learned judge. He apparently carefully considered the evidence; and having done so he accepted the story from the "*Silverton*."

Their Lordships think he was right; and they desire to add that the nautical assessors who sat with them to hear the appeal are satisfied that the navigation of the "*Silverton*" was proper and careful.

In these circumstances their Lordships will humbly advise His Majesty that the appeal should be dismissed.

The appellants will pay the costs.

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In the Privy Council.

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COMPAGNIE DE NAVIGATION MIXTE  
(COMPAGNIE TOUTACHE)

2.  
THE SHIP "SILVERTON" AND  
FREIGHT.

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DELIVERED BY LORD MERSEY.

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