

## ADMIRALTY DISTRICT OF NOVA SCOTIA.

1898  
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 Oct. 26.

THE INCHMAREE STEAMSHIP } PLAINTIFFS ;  
 CO.. (LTD.) .....

*Against*

THE STEAMSHIP "ASTRID."

*Admiralty law—Collision—Rules 16 & 20 in force before July, 1897.*

*Held* (following *The Franconia*, L. R. 2 P. D. 8) that where two ships are in such a position, and are on such courses, and are at such distances, that, if it were night, the hinder ship could not see any part of the side lights of the forward ship, and the hinder ship is going faster than the other, the former is to be considered as an overtaking ship within the meaning of rule 20 of the Collision Rules in force before July, 1897, and must keep out of the way of the latter.

2. No subsequent alteration of the bearing between the two vessels can make the "overtaking" vessel a "crossing" vessel so as to bring her within the operation of rule 16 in force before July, 1897. (See now rule 24 of the Collision Rules adopted by order of the Queen in Council on 9th February, 1897, and which came into force on the 6th July, 1897).

THIS was an action arising out of a collision on the high seas.

The facts of the case are stated in the reasons for judgment.

*R. C. Weldon* for the plaintiffs ;

*A. Drysdale, Q.C.* for the ship.

*McDonald, C.J.* ; *L. J.* now (October 26th, 1898,) delivered judgment.

On the 27th June, 1897, at about 12 o'clock noon, about latitude 38° 56' N. and longitude 38° 37' W., the two vessels *Inchmaree* and *Astrid* came into collision, and each suffered serious damage.

The *Inchmaree* is a British steamship of 3134 tons register, and was on a voyage from Liverpool, England, to New Orleans, in ballast, and had a crew all told of thirty-six hands.

The *Astrid* is a Norwegian steamer of 975 tons net, and was on a voyage from Antwerp to St. John, N.B. She had a full cargo on board and was manned by a crew of twenty men all told. The *Inchmaree* in this action claims that the collision and consequent damage to her were caused by the fault of those navigating the *Astrid*. First, because, as alleged by the *Inchmaree*, the vessels were at the time of the collision crossing ships, so that the *Astrid*, having the *Inchmaree* on her starboard side, was bound to keep out of the way. This it is alleged she failed to do and thus was in fault. Secondly, the *Inchmaree* alleges that, when the collision became imminent, her helm was put hard to port; that if the *Astrid* had then kept her course no collision could have taken place, as the *Inchmaree* answered her helm, and the two ships were running parallel with each other; but that the *Astrid* wrongfully ported her helm immediately after the *Inchmaree* had ported and ran across the bows of the *Inchmaree*, thus causing the accident.

The contention of the *Astrid* is that she was not a crossing ship but an overtaken ship, that she was therefore, under the rule, entitled and bound to keep her course, and the *Inchmaree*, as the overtaking ship, was bound to keep out of the way. And as to the second contention of the *Inchmaree*, the people of the *Astrid* deny that the helm of the *Astrid* was ported when the collision became imminent, and allege that she kept her course unchanged until she stopped her engines after the accident. Our first inquiry then is were these vessels crossing ships under rule 16 of the regulations for preventing collisions at sea, or was

1898  
 THE  
 INCHMAREE  
 STEAMSHIP  
 COMPANY

v.  
 THE  
 STEAMSHIP  
 ASTRID.

Reasons  
 for  
 Judgment.

1898  
 THE  
 INCHMAREE  
 STEAMSHIP  
 COMPANY  
 v.  
 THE  
 STEAMSHIP  
 ASTRID.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

the *Inchmaree* an overtaking ship under article 20 of the same regulations. In giving the judgment of the Court of Appeal in *The Franconia* (1), Lord Esher, then Lord of Appeal, gave a definition of the words "overtaking ship" the first and only attempt at a judicial definition of the words of which I am aware. The learned judge said: "It seems to me that this may be a very good definition. I will not say that it is exhaustive, or that it may not on some occasion be found to be short of comprising every case, but I think it is a very good rule that if the ships are in such a position, and are on such courses, and at such distances, that if it were night, the hinder ship could not see any part of the side lights of the forward ship, then they cannot be said to be crossing ships, although their courses may not be exactly parallel. It would not do, I think, to limit the angle of the crossing too much, but a limit to that extent it seems to me is a very useful and practical rule. And then if the hinder of the two ships is going faster than the other she is an overtaking ship. Now if the *Strathclyde* was a mile or a quarter of a mile distant from the *Franconia*, and the *Franconia* was two points on the quarter of the *Strathclyde*, then the *Franconia* could not have seen any part of her side lights, and that, I think, is the opinion of the gentlemen who advise us."

It is true that in the subsequent case of *The Peckforton Castle* (2), some of the judges composing the court made observations in some measure qualifying their previously expressed assent to Lord Esher's definition. That definition has not to my knowledge been over-ruled or seriously questioned in any subsequent case, and it has been adopted in terms in the new rules confirmed by the Queen in Council on the

(1) 2 F. D. 8.

(2) 3 P. D. 11.

9th February, 1897. Article 24 of these rules is as follows: "Notwithstanding anything contained in these rules every vessel overtaking any other shall keep out of the way of the overtaken vessel." And then the rule thus defines what shall be considered an overtaking ship. "Every vessel coming up with another from any direction more than two points abaft her beam, that is, in such a position in reference to the vessel she is overtaking, that at night she would be unable to see either of that vessel's side lights, shall be deemed to be an overtaking vessel, and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaking vessel until she is finally past and clear, as by day the overtaking vessel cannot always know with certainty, whether she was forward or abaft this direction from the other vessel. She should if doubtful assume that she is an overtaking vessel and keep out of the way." Although this definition was not a part of the rules in force when the collision in question took place, its adoption in terms by the revisors of the then existing regulations justifies me, I think, in assuming it to be the recognized construction put upon the words since the judgment in the *Franconia* case was delivered.

James Nelson, the third mate of the *Inchmaree* was in charge of the bridge on that vessel from 8 o'clock a.m. till 12 o'clock noon on the day of the collision. The course of his ship was then W., or two points S. of W., and she was making seven knots an hour when he went on deck at 8 a.m. He describes the weather as "fine, a light swell and a light breeze." Nelson says that about 9 o'clock he saw the smoke of a steamer, and with the glasses made out the two

1898

THE  
INCHMAREE  
STEAMSHIP  
COMPANY

v.  
THE  
STEAMSHIP  
ASTRID.

Reasons  
for  
Judgment.

1898  
 ~~~~~  
 THE  
 INCHMAREE  
 STEAMSHIP  
 COMPANY  
 v.  
 THE  
 STEAMSHIP  
 ASTRID.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

masts and funnel of a ship which afterwards turned out to be the *Astrid*. The *Astrid*, he says, then bore about a point before the beam of the *Inchmaree*, and was ten or eleven miles distant from her. He went to his breakfast and returned to the bridge about 9.40, when he found they had got closer to the *Astrid*. About 10.15 the master of the *Inchmaree* came on deck and the position of the *Astrid* was pointed out to him by Nelson, which was then as Nelson says, "about a point or so before the beam, perhaps a little more, about eight miles distant, and apparently steering W. by N". The master of the *Inchmaree*, who appears to have seen the *Astrid* for the first time at or about 10.20 a.m., says that she was a little "before the port beam at six or seven miles distant," and being asked for his definition of the word "little," answered "probably a point." The *Inchmaree* was then making seven knots an hour. The master of the *Inchmaree* did not again see the *Astrid* till twenty to twenty-five minutes before 12 o'clock noon. He says the *Astrid* was then a little further forward of the beam, perhaps a couple of points, about a mile and a quarter distant, and appeared to him to be steering northward of W. true, while the *Inchmaree* was steering two points S. of W. true. He then left the deck and did not appear there again till at or near 12 o'clock, on being called by the officer of the bridge, when he found the ships within one hundred yards of each other with the *Astrid* about three points on his port beam. The master and first officers of the *Astrid* who were examined on the part of the defence did not materially differ from the evidence of the third officer of the *Inchmaree*, who is in reality the only witness called on behalf of the plaintiffs who appeared to know much concerning the facts pertinent to the decision of the contest between the parties. The master of the *Astrid*

says he first saw the *Inchmaree* between 8 and 9 o'clock a.m. He was on and off the bridge occasionally from that time till 11 a.m., but remained on the bridge continuously from the latter hour till the collision took place, and the second officer who was in charge of the bridge had never left his post from 8 o'clock till the collision occurred. The master says he first sighted the *Inchmaree* between 8.30 and 9 o'clock, that his ship was then heading W.  $\frac{3}{4}$  N. true, and going  $6\frac{1}{2}$  knots. That the *Inchmaree* bore then two to three points on his starboard beam, abaft the beam, and the *Inchmaree* appeared to be steering a W. S. W. course, true, and to be about twelve miles distant. That he came on the bridge again at 11 o'clock when he took the bearings by compass and found the *Inchmaree* to be bearing from two to three points abaft the beam of the *Astrid*, and distant five or six miles. The *Astrid*, according to these witnesses, continued on her course without deviation up to and until the collision occurred. The second officer, who was in charge of the bridge all the morning, corroborates the evidence of the master as to the bearings and distances of the two ships relative to each other and the courses steered, but he puts the speed of the *Astrid* at six knots instead of six and a half as computed by the master. The third officer of the *Inchmaree* was asked on his examination whether on the course he was steering that morning, he could, if it were night, have seen the lights of the *Astrid*, and he answered yes. The question was not put to any of the other witnesses; and I am advised by the gentleman who assists me with his advice, that serious weight should not be attached to that statement considering the differences of opinion as to the actual bearings of the vessels in relation to each other, and the uncertainty necessarily attending such opinion under the circumstances in evidence. On the whole

1898  
 THE  
 INCHMAREE  
 STEAMSHIP  
 COMPANY  
 v.  
 THE  
 STEAMSHIP  
 ASTRID.  
 —  
 Reasons  
 for  
 Judgment.  
 —

1898  
 THE  
 INCHMAREE  
 STEAMSHIP  
 COMPANY  
 v.  
 THE  
 STEAMSHIP  
 ASTRID.  
 —  
 Reasons  
 for  
 Judgment.  
 —

evidence, I have come to the conclusion that the *Astrid* has established the contention that the *Inchmaree* was an overtaking ship, and was therefore bound to give way and keep clear of the overtaken ship—while the *Astrid* had a right to keep her course. The great weight of evidence is, I think, in favour of the contention that the *Inchmaree* was, from the time when her position could be first correctly ascertained on board the *Astrid* till immediately before the collision, between two and three points abaft the starboard beam of the *Astrid*, and that she was a following ship. This I understand to be also the opinion of Captain Smith, R.N.R., whose advice I am glad to have as assessor. Did the matter rest here, the *Inchmaree* would in my opinion be held in the wrong. But the owners of the *Inchmaree* say that at the last moment, but in time to save a collision between the two ships, the helm of the *Inchmaree* was put hard to port—that as a result of this she changed her course northward eight or ten points, and, had the *Astrid* kept her course, no collision could have occurred; but that the *Astrid*, instead of keeping her course, put her helm to port, thereby crossing the bow of the *Inchmaree* and causing the collision. If it be established by the evidence that this allegation of the *Inchmaree* is true, I have no hesitation in saying that it would be my opinion that the *Astrid* ought to be held liable. The evidence on this point is absolutely contradictory, and this is to be the more regretted, inasmuch as on other questions where differences or discrepancies appeared in the evidence, they could be reconciled on considerations arising from the difficulty of forming absolutely correct conclusions under the circumstances. But, on the point I am now considering, I fear I must come to a conclusion as to which of the two sets of witnesses I ought to believe.

The master of the *Inchmaree* was called to the bridge by the officer on the bridge after the latter had ordered the helm of the *Inchmaree* hard to port, and when he arrived on the bridge he had barely time to give the order to stop and reverse before the collision occurred. A man in that position, unless of exceptionally strong nerve and great presence of mind, would likely be somewhat disturbed by the difficulties in which he suddenly found himself involved, and his judgment of events then passing may reasonably be supposed to be less clear and correct than on ordinary occasions.

Captain Simpson as to the point of dispute says: "Our vessel was heading north at the time of the collision, when I was called I saw the *Astrid*; she was then on our bow and apparently trying to cross from port to starboard—about one hundred yards off—possibly inside of that. Her midships would be about three points on our bow and appearing to be crossing from port. When I ran full speed astern, the *Astrid* seemed to be coming flying round on our bow as we were going off to starboard under the port helm and then the vessels came together, our port bow with her starboard side just abaft the bridge." The second mate and the man at the wheel of the *Inchmaree* also say that the latter vessel appeared to follow the *Inchmaree* round from west to north, and then both headed north when the collision took place. On the other hand the master, second mate and steersman of the *Astrid* swear distinctly and positively that the *Astrid* continued under full speed till after she got clear of the other ship. That her course was not altered in the slightest degree from west to three-quarters north till she stopped after getting rid of the other vessel. The statements of the witnesses are absolutely irreconcilable. The evidence was all taken under commission and I have no means of determining the merits

1898  
 THE  
 INCHMAREE  
 STEAMSHIP  
 COMPANY  
 v.  
 THE  
 STEAMSHIP  
 ASTRID.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———



1898  
 ~~~~~  
 THE  
 INCHMAREE  
 STEAMSHIP  
 COMPANY  
 v.  
 THE  
 STEAMSHIP  
 ASTRID.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

of the testimony on either side. I may say, however, that I find it very difficult to reconcile some of the acts attributed to the men on board the *Astrid* with conduct we might reasonably expect from men in their profession and their condition of life. They are Norwegian sailors, a class of men who, I have reason to believe, are as a rule as competent in their profession, honest in their dealings and moral in their conduct as the same class of men in our own country, and to convict these men of untruth we must believe them to be either incompetent or dishonest or both. The question is this: It is admitted that when the *Inchmaree* ported her helm immediately before the collision, the course of that vessel was changed so that she ran on a line parallel with the *Astrid*, and that if both vessels kept that course, a collision would be impossible, yet it is said that with the knowledge of that fact patent before him, instead of keeping his course, which was rendered a safe one by the porting of the *Inchmaree*, or putting his helm to starboard and thus getting further from danger, he put his helm hard to port and chased the other vessel over a circle of eleven or twelve points of the compass from west to north, or beyond that in the effort to get out of the way. Perhaps I do not sufficiently understand the position technically, but it would appear to me that, keeping in mind the evidence that the *Astrid* continued the full speed of her engines till after she had got rid of the other vessel in collision, the fact that the vessel pointed to the north after the collision may be more reasonably explained by the effect which the force of the *Astrid* at full speed would have on the position of both vessels. The *Astrid* going west is struck well aft on the starboard side of the other vessel whose way had been stopped by her reversed engines, but still having force enough to crush in the side of the *Astrid* and *a fortiori* with

impetus enough to force her stern to the south ; and thus with the steam power of the *Astrid* full steam ahead carrying the bow around with her, the position of both vessels bearing north may be accounted for without supposing that the master wilfully sought the most dangerous position into which he could, in the emergency as it existed, possibly port his vessel. At any rate I am willing to rest my judgment on this point in the absence of preponderating evidence in favour of the plaintiffs, in the presence of the denial of all the plaintiffs' witnesses that the *Astrid* changed her course as alleged. In the result my opinion is that the *Inchmaree* was to blame for the collision, that the *Astrid* is not to blame ; that the action must be dismissed with costs ; and that a decree do pass accordingly.

1898  
 THE  
 INCHMAREE  
 STEAMSHIP  
 COMPANY,  
 v.  
 THE  
 STEAMSHIP  
 ASTRID.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

*Judgment accordingly.\**

Solicitor for the plaintiffs : *W. H. Henry.*

Solicitors for the ship : *Drysdale & McInnes.*

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\* REPORTER'S NOTE.—An appeal from the above judgment has been taken to THE JUDGE OF THE EXCHEQUER COURT.