

1899  
 Jan. 16.

ON APPEAL FROM THE NOVA SCOTIA ADMIRALTY  
 DISTRICT.

THE INCHMAREE STEAMSHIP } PLAINTIFFS ;  
 COMPANY, LIMITED, (APPELLANTS) }

AND

THE STEAMSHIP "ASTRID," (RE- } DEFENDANT.  
 SPONDENT) .....

*Maritime law—Collision—Burden of proof—Findings of Trial Judge—  
 Appeal.*

In this case there was a conflict of testimony on two questions of fact material to the decision of the case, both of which were found by the Local Judge in Admiralty in favour of the defendants ; the burden of proof being in each case upon the plaintiffs, and there being evidence to support the findings, the court on appeal declined to interfere with the same.

APPEAL from a judgment of the Local Judge of the Nova Scotia Admiralty District (1).

November 25th, 1898.

*R. C. Weldon*, for the appellants, cited *Marsden on Collisions* (2); *The Franconia* (3); *The Main* (4); *Cuba v. McMillan* (5); *The Ceto* (6); *The Jesmond* (7).

*A. Drysdale, Q.C.*, for the respondent, relied on *Bland v. Ross* (8); *The Picton* (9); *The Sisters* (10); *The Assyrian* (11); *The Seton* (12); *The Molière* (13); *The Imbro* (14); *The City of London* (15).

(1) Reported, ante, p. 178.

(2) P. 506.

(3) 2 P. D. 12.

(4) 11 P. D. at p. 139.

(5) 26 Can. S. C. R. 656.

(6) 14 App. Cas. 696.

(7) L. R. 4 P. C. 1.

(8) 14 Moo. P. C. 210.

(9) 4 Can. S. C. R. 648.

(10) 3 Asp. M. L. C. N. S. 122.

(11) 6 Asp. M. L. C. 525.

(12) 9 P. D. 1.

(13) [1893] P. D. 217.

(14) 14 P. D. 73.

(15) Swab. at pp. 248, 302.

*Mr. Weldon*, in reply, cited: *The Jesmond* (1); *Wilson v. Currie* (2); *The Khedive* (3); *The Ceto* (4).

THE JUDGE OF THE EXCHEQUER COURT now (January 16th, 1899) delivered judgment.

This is an appeal from a decree pronounced, on the 3rd day of November last, by the learned Judge for the Admiralty District of Nova Scotia dismissing the action of the plaintiff company for damages sustained by the steamship *Inchmaree*, in a collision with the steamship *Astrid*, and condemning the plaintiff company in costs. The learned Judge was assisted by Captain W. H. Smith, R.N.R., as nautical assessor.

The case presents two principal questions of fact, both of which have been found in favour of the defendants :

First, whether at the time when the two ships came into such relation to each other that each could ascertain the position and course of the other, the *Inchmaree* was in the position of an overtaking ship or not ; and, secondly, whether, when the collision was imminent, the *Astrid*, as stated by her master, second officer and helmsman, kept her course at full speed, or whether, as stated by the master and third officer, corroborated by the helmsman of the *Inchmaree*, the *Astrid* altered her course by porting her helm so that she crossed the bow of the *Inchmaree*, thereby defeating an attempt which, by porting her helm and reversing her engines, the *Inchmaree* had made to keep clear of the *Astrid*.

The learned Judge had to decide the case upon evidence taken under commission, none of the witnesses having been examined before him.

With reference to the second of the two questions mentioned, he rested his finding upon the absence of preponderating evidence in favour of the plaintiff.

(1) L. R. 4 P. C. 1.

(2) [1894] A. C. 116.

(3) 5 App. Cas. 876.

(4) 14 App. Cas. at p. 679.

1899  
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 THE  
 INCHMAREE  
 STEAMSHIP  
 COMPANY  
 v.  
 THE  
 STEAMSHIP  
 ASTRID.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

The conflict of testimony was irreconcilable, the manœuvre attributed to the *Astrid* by the officers of the *Inchmaree* was so extraordinary that it could only be accounted for by supposing that some mistake had been made in giving the order, or in understanding the purport of an order given, and the burden of proof of making out that such a manœuvre was adopted was on the plaintiffs. Under the circumstances the learned Judge thought he ought to find for the defendants, and it seemed to me that he was right.

Then in regard to the question as to whether or not the *Inchmaree* was an overtaking vessel, the definition of what constitutes an overtaking vessel as given by the learned judge on the authority of Lord Esher in the *Franconia* case (1) is admitted to be correct; and the only question is one of fact as to what the courses and bearings of the two ships were at the time when they each could make out the position of the other. Now, in regard to this I am asked by Dr. Weldon, the learned counsel for the plaintiff company, to assume that from nine o'clock of the morning of the collision to twelve o'clock, the two ships being then in sight of each other, the *Inchmaree* steered continuously and uniformly a course of south sixty-eight degrees west true, and that the *Astrid* steered uniformly and without variation a course of west eight degrees north true, making the angle of their converging courses thirty degrees, that the speed of each was such that a collision would take place at twelve noon if there was no alteration in the course or speed of either ship and that the same rate of speed was uniformly maintained by each vessel, and that on these hypotheses I should test the statements made by the witnesses of the respective parties and

(1) L. R. 2 P. D. 8.

Say whether the bearing of the *Astrid* as given by the officers of the *Inchmaree* or that given by the officers of the *Astrid* as to the bearing of the *Inchmaree* from the *Astrid* is more consistent with such hypotheses. Now I have been at some pains to do that with the result that I have not been able to harmonize the evidence of either of the parties with the hypotheses upon which I am asked to act, and that I am afraid to rely with any confidence upon the proposed test. To take an instance from the evidence of each of the parties; the third officer of the *Inchmaree* says that about nine o'clock, the *Astrid* was one point before the *Inchmaree's* port beam. The master of the *Inchmaree* gives the same bearing for the *Astrid* at ten o'clock. If that were true, and the angle of their converging courses was thirty degrees, the *Astrid* would have the greater distance to travel to come into collision with the *Inchmaree* and her rate of speed would have to be greater, which seems to be contrary to the admitted facts. Taking, on the other hand, the bearing of the *Inchmaree* from the *Astrid* at nine o'clock as given by the master and second officer of the *Astrid* to be between two and three points abaft the starboard beam of the *Astrid* and taking that to mean, say, two and a half points, and testing the matter by the hypotheses suggested, the rate of speed of the *Astrid* being six and a half knots an hour, we would find that the *Inchmaree* would at nine o'clock have nearly thirty-two miles to make to the point of collision, and that she would then be distant from the *Astrid* about eighteen miles, and these are conclusions that cannot be easily reconciled with all the evidence. So after all it seems to me that the question must be settled by reference to what the witnesses say as to the bearing of the two vessels from each other. The learned judge has, with the concurrence of the nautical assessor, found that the *Inchmaree* was an

1899

THE  
INCHMAREE  
STEAMSHIP  
COMPANY

v.  
THE  
STEAMSHIP  
ASTRID.

Reasons  
for  
Judgment.

1899  
 THE  
 INCHMAREE  
 STEAMSHIP  
 COMPANY  
 v.  
 THE  
 STEAMSHIP  
 ASTRID.

Reasons  
 for  
 Judgment.

overtaking vessel, and in consequence bound, under the rule, to keep out of the *Astrid's* way. There is ample evidence, if it is believed, to support that view, and his finding ought, it seems to me, to be sustained on this appeal.

The appeal will be dismissed, and with costs.

*Judgment accordingly.*

Solicitor for appellant: *W. A. Henry.*

Solicitor for respondent: *Drysdale & McInnes.*

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