

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Owners of the "Agra" v. Stoneman and others, from the High Court of Admiralty, ships "Agra" and "Elizabeth Jenkins;" delivered the 20th day of July, 1867.

Present :

LORD CAIRNS.

SIR WILLIAM ERLE.

SIR JAMES W. COLVILLE.

SIR EDWARD VAUGHAN WILLIAMS.

SIR RICHARD TORIN KINDERSLEY.

THE collision between the barque "Elizabeth Jenkins" and the ship "Agra" took place about 8 o'clock P.M. on the 10th of November, 1866, off the Ower's Light-ship, in the English Channel. The night was cloudy, but not thick. The "Elizabeth Jenkins" was heading south-east, under plain sail, close hauled on the starboard tack, making six knots an hour. The "Agra" was steering west, close hauled on the port tack, making about six and a-half knots an hour. The wind was south-south-west.

Under the 12th and 18th of the Regulations of 1863, it was, in these circumstances, the duty of the "Agra," having the wind on the port side, to keep out of the way of the "Elizabeth Jenkins;" the "Elizabeth Jenkins," on the other hand, ought to have kept her course, unless a departure from her course was warranted under the 19th rule, by the necessity of avoiding immediate danger.

As the ships were nearing, and about to cross, the "Agra" gave way, porting her helm, squaring her after-yards, and letting go her spanker. The "Elizabeth Jenkins" did not keep her course, but

starboarded her helm and hauled in her spanker ; and the result was a collision, the starboard bow of the "Agra," near the stem, striking, or being struck, by the stem of the "Elizabeth Jenkins;" the "Elizabeth Jenkins" foundering, and the master and several seamen being drowned.

It is contended for the owners of the "Elizabeth Jenkins" that the "Agra" so long delayed porting her helm and giving way that those on board the "Elizabeth Jenkins" were led to think she was trying, and intended, to cross the bows of the "Elizabeth Jenkins," and that a collision must, if the "Elizabeth Jenkins" kept her course, take place; and that the change in the course of the "Elizabeth Jenkins" was thus necessary in order to avoid immediate danger.

For the "Agra," on the other hand, it is said that she ported and gave way as soon as she saw the red light (the only light that she admits she did see) of the "Elizabeth Jenkins." That she observed the loom of the "Elizabeth Jenkins" when about a mile or three-quarters of a mile distant. That at that time the "Elizabeth Jenkins" had no lights visible; for the master and pilot of the "Agra" seeing the loom of the "Elizabeth Jenkins" before them, endeavoured to make out her lights, first with the naked eye, and then with glasses, and could not do so; and therefore concluded she was on the same tack, with her stern towards the "Agra." That they continued watching, and after some little time saw the red light of the "Elizabeth Jenkins," and immediately ported their helm; and that it was thus the want of proper lights on board the "Elizabeth Jenkins" which made the "Agra" delay porting so long, and that the "Agra" is free of all blame. It is further said for the "Agra," that when the "Elizabeth Jenkins" did depart from her course, she ought to have put down her helm and luffed up to the wind, in order to deaden her way, in place of starboarding, and thereby accelerating her speed, and increasing the violence of a collision.

Their Lordships do not see any reason to disbelieve the very precise and consistent evidence of the master of the "Agra," and of Albert the pilot, corroborated as it is by that of Jones the mate, and rendered probable by the statements of Tracey the Trinity pilot, as to the dimness of the lights of the

"Elizabeth Jenkins," on the 2nd of November previous; and they are disposed to think that when the loom of the "Elizabeth Jenkins" was first seen by the master of the "Agra," and examined through the night glasses, her lights could not, for some reason or other, be made out. They think, however, that between that time and the moment when the red light of the "Elizabeth Jenkins" was actually seen, an interval longer than these witnesses represent must have elapsed, and that during this interval a more careful and continuous look-out on board the "Agra" would have enabled them to discover the red light sooner, and would have shown, even irrespective of the light, that the "Elizabeth Jenkins" was nearing them, and the course she was pursuing. Their Lordships, therefore, cannot acquit the "Agra" of blame. They think she might and ought to have ported sooner.

Was, then, the "Elizabeth Jenkins" free from blame, or is blame to be attributed to her as well as to the "Agra?" That she departed from the 18th rule is clear, for she did not keep her course; and that this departure had not the effect of avoiding danger is also clear, for a collision of a most disastrous character occurred. Now, their Lordships are clearly of opinion that if a ship, bound to keep her course under the 18th rule, justifies her departure from that rule under the words of the 19th rule, she takes upon herself the obligation of showing both that her departure was at the time it took place necessary, in order to avoid immediate danger, and also that the course adopted by her was reasonably calculated to avoid that danger. Their Lordships find that this has been the construction put upon the 19th rule in the cases of the "George Dean" v. the "Constitution," Admiralty Court, 1 Feb., 1865; Holt, "Rule of Road," p. 101; the "Planet" v. the "Aura," Admiralty Court, 7 Dec., 1865, *Ibid.*, p. 257; and inferentially, in the case of the "Great Eastern," before this Board, 3 Moore, N. S. 31. This obligation the owners of the "Elizabeth Jenkins" have not, as their Lordships think, discharged. It is remarkable that no one of the witnesses for the "Elizabeth Jenkins" ventures to say that had she continued her course, the "Agra" porting when she did, the collision would not have been avoided. Robins, the mate of the

"Elizabeth Jenkins," in his examination in chief, states that he thinks the collision would have taken place had his ship continued her course; but he evidently speaks on the hypothesis of the "Agra" having continued her course also; and it is clear that when the order to starboard was given by the master of the "Elizabeth Jenkins" to Robins, the latter thought it an erroneous order, and remonstrated against it. Looking to all the evidence in the case, their Lordships think—and it is also the opinion of the nautical gentlemen by whom they are assisted—that the "Agra" would have passed free of the "Elizabeth Jenkins" had the latter maintained her course; and that even if the "Elizabeth Jenkins" had, from apprehension of danger, altered or interrupted her course, she should have done so by luffing up to the wind, thereby stopping her way, and mitigating, as far as possible, the effect of a collision, if a collision should take place.

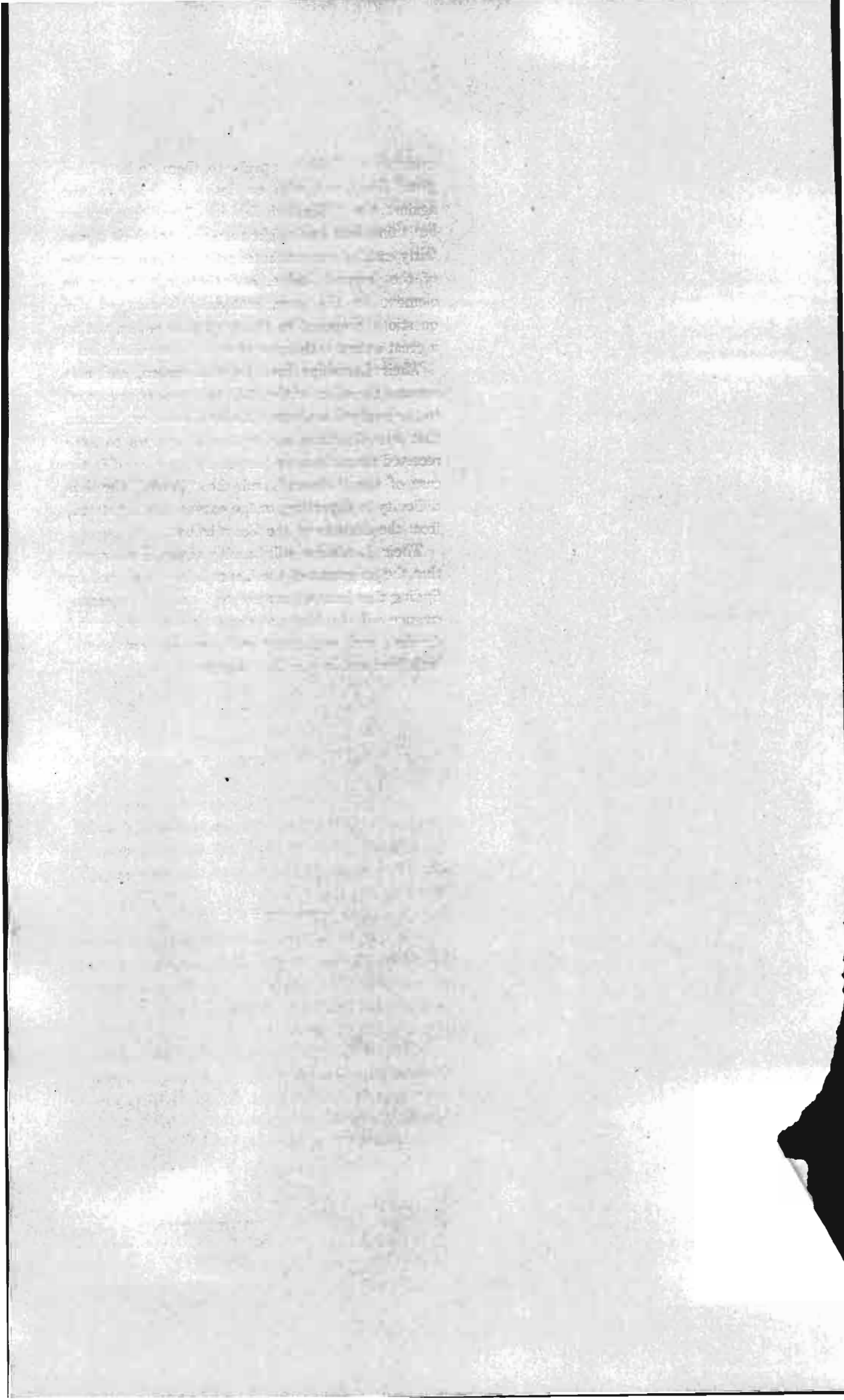
Their Lordships, therefore, have come to the conclusion that both vessels were to blame, and that the collision is attributable to both: the "Agra" for not sooner observing and getting out of the way of the "Elizabeth Jenkins;" and the "Elizabeth Jenkins" for departing from her course without sufficient necessity, and for departing from it in a manner calculated to increase, and not to diminish or avoid, danger.

Their Lordships have referred to the testimony of Robins, the mate of the "Elizabeth Jenkins," and to the opinion which he appears to have expressed at the time to the master as to the course the latter was taking. They see no reason for looking at this evidence as otherwise than trustworthy, and they cannot but consider it, if trustworthy, as having an important bearing on the facts of the case. They agree with the very learned and experienced Judge from whose decision this Appeal is brought, and who has so long, and with such advantage to the public, presided over the Admiralty Court, as to the jealousy with which any attempt to warp the evidence of a witness by communications between him and either of the litigating parties should be watched and reprobated; but they cannot think that the evidence should, merely on the ground of such communications, be entirely thrown aside. The

evidence of Robins appears to them to have been given fairly, and with no desire or design to bear against the "Elizabeth Jenkins;" and they cannot but think that less weight than that to which it was fairly entitled was attributed to it in the observations of the learned Judge, and that in this way an element in the case, materially bearing on the questions proposed to the nautical assessors, was to a great extent withdrawn from their consideration.

Their Lordships have for this reason, and also because the effect of the 19th rule was not presented to the nautical assessors with the distinct explanation that was desirable, and which it appears to have received from the same learned Judge himself in the case of the "Planet" and the "Aura," the less difficulty in departing, to the extent already stated, from the decision of the Court below.

Their Lordships will humbly advise Her Majesty that the judgment of the Court below be altered by finding that both ships were to blame. The consequence will be, that the damages must be equally divided, and each party will bear his own costs, both here and in the Court below.



Opinions of the Nautical Assessors.

Case of "Agra" and "Elizabeth Jenkins."

I AM of opinion both vessels are to blame for this collision.

1st. The "Agra" for not giving way, or porting her helm, in proper time to avoid the vessel approaching on the starboard tack.

2nd. The "Elizabeth Jenkins" was not justified in starboarding, thereby increasing her speed and contributing to the collision; her proper and safe measure to avoid immediate danger was to keep her course, or luff up to the wind to deaden, or stop her way to ease the blow, and avoid doing serious injury.

JNO. M. DONALD,
Captain Royal Navy.

Council Chamber,
 July 8, 1867.

"Agra" should have taken better precautions to ascertain the course of "Elizabeth Jenkins" as the ships approached each other, and, in consequence of this neglect, an improper delay and action taken too late.

"Elizabeth Jenkins" had lights so dim or so obscured (by some slack rope or sail or otherwise), as not clearly to indicate, at a sufficient distance, the direction in which she was steering.

"Elizabeth Jenkins" should have continued her course, and, upon the collision appearing probable, should have put her helm down (*i.e.* to port) in order to throw herself to windward (or in stays) of the "Agra."

Both in fault.

A. Y.

MEMORANDUM FOR THE RECORD

DATE: 10/15/54

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