

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
the Owners of the steamship "Flamsteed"
v. Wellesley and Wells, and the Owners of
the cargo on board the steamship "Flam-
steed" v. Wellesley and Wells (H.M.S.
"Bellerophon"), from the High Court of
Admiralty of England; delivered Saturday,
June 19th, 1875.*

Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

SIR HENRY S. KEATING.

IN this Appeal the Appellants were the Owners of a Steamship called the "Flamsteed," and brought their suit in the Admiralty Court in consequence of the loss of that vessel from injuries received by a collision with Her Majesty's ship "Bellerophon." The "Flamsteed" was a screw Steamship of 935 tons register, with engines of 80 horse-power, and on the 24th November 1873, the time when this collision took place, was on a voyage from Liverpool to Lisbon and other places. When at sea, about 500 miles from the Cape de Verde Islands, at 6 or 7 a.m., she sighted Her Majesty's ship "Bellerophon." The "Bellerophon" is an armour-plated iron ship of 4,220 tons register, with engines of a thousand horse-power. She had the usual crew of such a ship—indeed one rather in excess of the usual number, for she had as many as 630 hands on board. She was commanded by Captain Wells, one of the Respondents in

this case, and was flying the flag of Vice-Admiral Wellesley, who is another Respondent, her destination being Bermuda. It appears that the "Bellerophon," whose course was lying to the north-west, that of the "Flamsteed" being south-west-by-south, signalled to the "Flamsteed" to ask if she could lend a newspaper. The "Flamsteed" gave an affirmative answer, and accordingly the "Bellerophon" lowered a boat manned with 12 able seamen, to send for the newspapers. Before the boat pulled off to the "Flamsteed," that steamship held on her course; then starboarding her helm she passed the stern of the "Bellerophon," and, still under a starboard helm, came off the starboard quarter of the ship of war at a distance of about three quarters of a mile. Being in that position the boat pulled up to her, the officer who was with the boat received the newspapers, and then the captain of the "Flamsteed" appears to have offered to take the boat in tow, and bring her nearer to the "Bellerophon." There was no request upon the part of the officer that this should be done, nor any necessity for doing so. The weather was fine; there was at the time a moderate breeze, with no sea on, but only the usual swell of the Atlantic—indeed it is said less than that usual swell. There was nothing whatever to prevent the boat from getting back from the "Flamsteed" to the "Bellerophon" in the same way that it had reached the "Flamsteed." The officer, however, accepted the offer of the captain of the "Flamsteed," and the "Flamsteed" accordingly, with the boat in tow upon her port side, starboarded her helm and proceeded towards the "Bellerophon." The evidence here certainly discloses a most remarkable and ill-judged course adopted by the "Flamsteed" in approaching a ship of war such as the "Belle-

rophon." The "Bellerophon," of this great size, was hove to under sail; and, it appears from the evidence, that although iron vessels of that class have masting and rigging, this is not for the purpose of rendering them sailing vessels properly so called, because they are made primarily for the purpose of being moved by steam; and that thus the masting of the "Bellerophon," as in similar cases, is of a lighter description than that put in sailing vessels which do not move by steam; indeed, Captain Wells in a portion of his evidence describes the masting as being rather in the nature of jury-masting than ordinary masting. At the time in question the fires of the "Bellerophon" were banked up; she had no assistance from steam-power, as her screw was disconnected; she was under sail, but close to the wind, hove to; and yet the "Flamsteed," having full sea room before her, instead of taking the course which their Lordships are advised would have been proper and natural to have been adopted under such circumstances; namely, to have gone under the stern of the "Bellerophon," to have dropped the boat, and proceeded on her course, seems to have steered directly for the "Bellerophon" amidships, and to have continued on up to within about 100 yards of that enormous vessel, floating in what was described by the captain to be "a helpless state" upon the water, and unable to make any active exertion whatever to escape a collision. The "Flamsteed," steering in that way, when thus close to the "Bellerophon" ported her helm, apparently with the idea of performing what at that distance would have been the very nice and perilous manœuvre of passing along her starboard side, and running ahead of her. That manœuvre, it would appear by the evidence, might perhaps have been successfully performed, assuming the "Flam-

steed" to have answered her helm quickly, for having full steam-power upon her she could of course, if she could have kept clear of the "Bellerophon," easily run ahead of her. But having adopted the perilous course of coming so close to the ironclad, although she ported her helm, and it is said put it hard-a-port, which is probable, yet she was unable to keep herself at a sufficient distance, and her rigging became entangled with the whisker, as it is termed, of the ship of war—that is, one end of the sprit-sail yard running out from the bowsprit. Having become thus entangled, she was caught by the anchor of the "Bellerophon," and her first motion appears to have been to have backed astern, whilst the captain of the "Bellerophon" threw his sails aback, which he says was the proper course to pursue, not that it produced a great effect upon his ship, for that it could not have done, but that it was the proper and ordinary course. A suggestion was made that his doing so acted as an invitation to the "Flamsteed" to go ahead and so approach the danger; but that having been suggested originally was disposed of in the course of the argument, because it was admitted by counsel and was quite clear upon the evidence that all the operations on the part of the "Flamsteed" were wholly independent of anything done by the "Bellerophon" which would appear, as stated by the captain, to have lain like "a log upon the water." In the entanglement occasioned by the fouling of the rigging, the painter which upheld the anchor of the "Bellerophon" gave way and the anchor having fallen, the "Flamsteed" then appears to have forged ahead, and endeavoured to pass in some way in front of the "Bellerophon," and in a manner not very intelligible got under her bowsprit, and so close to her stem that, probably from the effect

of the swell of the sea, she came in contact with the ram of the "Bellerophon," and received the injury in question, which took place 14 feet below the water-line, just abaft the main-mast. It was not made any question in the Court below, nor could it have been here, that the injury inflicted upon the "Flamsteed" proceeded from contact with the ram of the "Bellerophon."

Their Lordships do not entertain any doubt, nor, indeed, has it been seriously questioned by the counsel for the appellants, that the collision in the first instance arose from the rash and unseamanlike mode of proceeding on the part of the "Flamsteed" in approaching the ship of war. So much too close did she bring herself to the "Bellerophon," that the men were obliged to jump out of the boat towed at her port side, under the apprehension that she would be swamped. There can be no doubt, therefore, that the collision was caused in the first instance wholly by the fault of the "Flamsteed."

But whilst that is not seriously denied upon the part of the "Flamsteed," it is yet sought to establish a case of contributory negligence on the part of the "Bellerophon," and it is said that this contributory negligence consisted in the omission of an alleged duty on the part of the "Bellerophon" to give at some period or another of this transaction distinct notice to the "Flamsteed" that her stem was constructed in a peculiar manner, forming a ram which protruded under the water. It was contended in the Court below that there were other points of contributory negligence on the part of the "Bellerophon," that the "Bellerophon" was a ship that drifted to leeward in some unusual way, and that notice of this tendency ought to have been given to the "Flamsteed." It was also suggested that she had

hoisted her jib and that her head paid off, and that the paying off to leeward partly induced the collision that took place, and brought the "Flamsteed" more immediately under the bows of the "Bellerophon." However, those two points were ultimately abandoned upon the argument before their Lordships, and the only point for their consideration is whether the "Bellerophon" was guilty of contributory negligence, in omitting to give notice to the "Flamsteed" that her stem was so constructed, that a vessel going close under her bowsprit might sustain damage by reason of this ram. On the part of the Appellants, it was said the law requires that wherever persons control and are in possession of a dangerous instrument, which is latent and which may produce damage to others, they are bound to give notice of the existence of that latent instrument of danger, and therefore that the circumstances in the present case imposed upon the "Bellerophon" the obligation to give notice of the existence of the ram in her bow.

It appears to their Lordships important to consider exactly what the nature of this latent instrument of danger in the bow of the "Bellerophon" was. It was insisted by the learned counsel, and truly said, that it was intended for the purpose of causing danger to others, and no doubt the ram upon the "Bellerophon" was for the purpose of being used as an instrument of offence in naval warfare, and would be or might be efficacious for that purpose. But it was not an instrument in itself necessarily dangerous to persons navigating the high seas; on the contrary, except under certain extraordinary and exceptional circumstances, it could produce no danger whatever to any of Her Majesty's subjects or others so navigating. Still, if, being such as it was, and under the circumstances

which took place, the captain of the "Bellerophon," (speaking of him for convenience sake as the person responsible,) had under the circumstances reasonable ground for supposing that this ram would occasion danger to the "Flamsteed," and had reasonable means and opportunity of warning the "Flamsteed" of that danger so as to enable her to avoid it, then although the "Flamsteed" had in the first instance been guilty of negligence, and even although by her negligence she had occasioned the necessity for giving notice, still their Lordships are of opinion it would have been the duty of the captain of the "Bellerophon," or of those in charge of her, to have given that notice to the captain of the "Flamsteed." Their Lordships entirely concur in the view that if there be a latent instrument of danger, those who have the control and the possession of it are bound to take all reasonable precautions that it shall not cause danger to others. But they are of opinion that there was no obligation upon the captain of the "Bellerophon" to give notice of this ram unless there was a reasonable probability of danger to the "Flamsteed" from the want of notice; and further unless he had a reasonable opportunity of giving such a notice as might have enabled the "Flamsteed" to avoid the ram.

Many cases have been referred to in support of the proposition as stated by the Appellants from which their Lordships do not in any way dissent; but they are unaware of any case which establishes a rule of law which would conflict with that to which reference has been made, namely, that the obligation to give a notice or a warning of danger must arise from the existence of some reasonable probability of danger to the party to whom that notice is to be given, and an opportunity of giving it so as to enable such party to avoid the danger; and

applying that rule in the present case, their Lordships, upon the facts, think that there is no ground whatever for saying that at any period of this collision, the captain of the "Bellerophon," or those in charge of the "Bellerophon," had any reasonable ground to suppose that anyone navigating the "Flamsteed" would have placed that vessel in a position which would have rendered notice of the existence of the ram necessary to preserve them from danger. When the captain of the "Flamsteed" was asked in the Court below what ought to have been done by the "Bellerophon," and when ought the notice to have been given, it was said by the captain at first that it ought to have been given when he was approaching the ironclad, the "Flamsteed" being then directed amidships; but is it reasonable that their Lordships should suppose upon these facts that the captain of the "Bellerophon" was to assume that the "Flamsteed" had any such wild intention as that of almost scraping the starboard side of his ship, so as to become entangled, and thrown across his bows, under his bowsprit and close to his stem? The captain of the "Flamsteed" himself seems to have thought that at that time there was no danger of his getting so close. After he had said that the notice might have been given to him when he was off the quarter, because "he (the captain of "Bellerophon") saw we were going to try to pass "to leeward of him," it was observed to him, "He did not think you were coming close to him?" his answer was "No, nor I did not think so either." Therefore it appears perfectly clear that at that period there could have been no obligation arising from any reasonable anticipation of any contact between the "Flamsteed" and the ram for any notice to be given to the "Flamsteed" of the existence of that ram.

But it is suggested that at some subsequent time that notice ought to have been given. With reference to that suggestion, it is to be observed that the whole of the transaction described occupied but a very short time. The learned counsel for the Appellants observed that Captain Wells, in putting the time at something over a minute, had understated it. That is possible. The captain of the "Flamsteed" himself states it at two or three minutes. People do not look at their watches on these occasions so as to estimate accurately the time, but their Lordships think it safe to assume upon the evidence that the whole of this took place in a very short space of time, that it was a continuous act occupying it may be a minute, it may be a minute and a half, or two, or even three minutes, and yet it is suggested that it was to be expected from the captain of the "Bellerophon," and that he ought, in the midst of the confusion occasioned by the mismanagement of the "Flamsteed," to have anticipated that the "Flamsteed" would go close across his bows, and that he could and ought then to have given notice. This seems to their Lordships to be a proposition that cannot possibly be maintained. Admitting fully the obligation to give the notice, if there were reasonable ground for apprehending danger, and if a notice could be given so as to be productive of the effect of averting that danger, yet on the facts of this case their Lordships come to the conclusion that there was no reasonable ground for anticipating any danger to the "Flamsteed" from the ram, and they are further advised that in a nautical point of view there was no period after the first collision when any notice to the "Flamsteed" would or could have averted the unfortunate accident, and therefore that there was no omission upon the part of the captain of the "Belle-

rophon" which would constitute the contributory negligence sought to be established in this case.

In one of the cases cited of *Vaughan v. The Taff Vale Railway Company*, 29th Law Journal, Exchequer 247, the late Mr. Justice Willes seems to have laid it down very clearly, "Negligence is the absence of care more or less according to the circumstances." It is the circumstances that must regulate the obligation to give notice, or to do any other act which would have the effect of averting danger from those who might otherwise be exposed to it. Their Lordships, therefore, come to the conclusion that this collision in the first place was produced wholly and entirely by the fault of the "Flamsteed," and that there was no negligence on the part of those in charge of the "Bellerophon," at any period of that collision. Under these circumstances their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court of Admiralty, and also that this Appeal be dismissed with costs to be paid by the Appellant.