1932
Sept. 14.
1933
Jan. 10.

BETWEEN:

HIS MAJESTY THE KING, on the information of the Attorney-General of Canada ..... PLAINTIFF;

AND

CANADIAN TUG BOAT CO. LTD..... DEFENDANT.

Negligence—Evidence—Res ipsa loquitur—Damages

Defendant's servants having sole control of certain boom sticks, made them fast to the shore of Kirkland's Island in the Fraser River, in an improper and insecure manner, and then left them unattended. The sticks escaped and caused damage to plaintiff's property.

Held, that defendant not having rebutted the presumption of negligence raised against it by the pleadings, the evidence and the admissions made at the trial, by showing the cause of the accident and that it was inevitable, the doctrine of *res ipsa loquitur* was applicable and defendant must be held liable in damages to the plaintiff.

INFORMATION exhibited by the Attorney-General of Canada to recover from the defendant damages for negligently causing injury to plaintiff's property.

The action was tried before the Honourable Mr. Justice Angers at Vancouver.

W. G. McQuarrie, K.C., for plaintiff.

E. A. Lucas for defendant.

The facts are fully stated in the reasons for judgment.

ANGERS J., now (January 10, 1933), delivered the following judgment:

By the information herein the plaintiff claims from the defendant the sum of $469.30 as damages, with interest at 5 per cent on $419.30 from October 26, 1929, and his costs of action.

The information sets forth that the defendant is and was at the time the cause of action arose the owner of the

tug *John Davidson;* this fact is admitted in the statement in defence.

The information goes on to say that the plaintiff suffered damage from the negligence of defendant's servants in leaving in the course of their employment certain boom sticks at or near Kirkland's Island on the Fraser River, a navigable stream, on or about October 11, 1929, unattended and inadequately secured whereby the said boom sticks escaped and came into contact with certain aids to navigation the property of the plaintiff then and there being lawfully in place in the channel of the river, thereby damaging and displacing them in the following manner to wit:

(*a*) the King Edward Cut buoy was moved down river about one thousand feet;
(*b*) No. 26 buoy was dragged down to No. 12 buoy;
(*c*) No. 24 buoy had lantern torn off and lost and buoy was moved about 200 feet;
(*d*) No. 22 buoy was taken down stream to No. 12 buoy.

The damages are particularized as follows:

Cost of 200 m/m Aga lantern.....	$401 60
Tubing, etc.	8 00
Lantern table	9 70
Steamer's time replacing buoys.....	50 00
	$469 30

In its statement of defence, the defendant denies responsibility and says that the boom sticks were adequately secured as follows:

The said boom sticks were made fast to a dolphin at the bank of Kirkland's Island by a new three-quarter inch wire rope; the spliced eyes at both ends of the wire rope were shackled by seven-eighth inch shackles to the boom chain bolted to the head ends of the foremost boom sticks; the pins of the shackles were properly screwed home with a spike.

The defendant adds that the escape of the boom sticks from their mooring was caused by the action of some person or persons unknown to the defendant, who unshackled the wire rope from the boom chain and placed one of the unpinned shackles upon the foremost boom stick and cast away the other shackle and the wire rope.

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Admissions were made on behalf of the defendant in a letter from the latter's solicitors to the plaintiff's solicitors, dated the 8th of September, 1932, filed as exhibit 1; it reads as follows:

> We hereby give you notice under Rule 145 of the Exchequer Court Rules that we admit on behalf of the Defendants, that the Defendants' servants moored certain boomsticks to the shore of Kirkland Island as described in Paragraph 4 of the Statement of Defence; that the said boomsticks came adrift and went down the Fraser River, a navigable stream in British Columbia, and did the damage set out in Paragraphs 3*a*, 3*b*, 3*c* and 3*d* of the Information.
>
> We further admit on behalf of the Defendants that the quantum of damages as set out in the particulars of the Information is correct and that such damages were caused by the said boomsticks carrying away the buoys referred to in the Information.
>
> This should obviate the necessity of calling witnesses to prove that our boomsticks went down the river and carried away these buoys and witnesses to prove the costs, etc., of the lanterns, etc., and of the expenses gone to in replacing the buoys.

The evidence discloses the following facts:

On the 9th of October, 1929, the tug *John Davidson* belonging to the defendant, in charge of Captain Hagen, was towing some 395 boom sticks down the Fraser River, bound for Comox. The voyage was interrupted at Woodward's Landing, shown on the map of the Fraser River filed as exhibit 3, the reason of such interruption being that the dynamo had burned out. According to Hagen's testimony, the dynamo was required to operate the searchlight, without which it was impossible to tow a string of boom sticks during the night (dep. Hagen, p. 11). The string of boom sticks was approximately 900 feet long. The log, produced as exhibit 2, shows that the tug tied up at Woodward's Landing around 7 o'clock on the night of the 9th of October and that the next morning, at half-past five o'clock, the tug towed the sticks across the river and fastened them to the shore of Kirkland's Island. According to Hagen's version, the tide was ebbing and it was about low water. Hagen says that he tied the boom sticks to a three-pile dolphin; he describes this so-called dolphin as follows (dep. Hagen, p. 11, in fine, and p. 12): . . .

Asked as to who made the head end of the boom sticks fast to the dolphin, Hagen replies that it was the mate, Elmer Stewart, at the time of the trial in Prince Edward Island. Stewart was not heard as a witness, but Hagen says that he saw him do the work. He explains what Stewart did as follows (dep. Hagen, pp. 12 *et seq.*): . . .

The tug then left light for the mill at Comox. Hagen says that on the night of the 9th of October, whilst at Woodward's Landing, he telephoned to one Simpson, Commodore of the defendant, and reported the trouble he had with the dynamo.

After he left Kirkland's Island on the morning of the 10th of October, Hagen never saw the boom sticks again.

No one was left in charge of the string of boom sticks at Kirkland's Island. Hagen and other witnesses heard on behalf of the defendant contend that it would have been useless, nay even dangerous. I shall deal with this point more at length in a moment.

Hagen, who has been a tug captain on the Fraser River since 1914, states that he could not have done anything more than what was done to make the boom sticks reasonably secure and fast to the shore. He adds that he would fasten a boom of logs in exactly the same way as the mate tied up the boom sticks on the morning of the 10th of October. That is what he has always done and, during his experience on the Fraser River, no booms of logs ever went adrift.

An undisputed fact is that the string of boom sticks left their mooring and caused the damage whereof the plaintiff is now complaining. There is no definite evidence as to when the boom sticks escaped but it seems as if it were sometime during the night of the 10th to the 11th of October. Worsfold, district engineer for the lower part of the mainland of British Columbia, examined as witness on behalf of plaintiff, tells us that he first noticed the damage to the buoys on the 12th of October.

The question I have to determine is whether the escape of the boom sticks is imputable to the negligence of the defendant's servants.

As I have already stated, the defence is that the boom sticks were adequately secured and that their escape from their mooring was caused by the action of some person unknown to the defendant. Even assuming that the boom sticks were sent adrift by the intervention of a third party, am I to conclude that this relieves the defendant of all responsibility? This is a question which I shall examine later.

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As previously noted, Captain Hagen pretends that the boom sticks were tied up to a dolphin on the shore of Kirkland's Island, in such a manner that they could not possibly escape. His evidence is uncorroborated; the mate of the tug who tied up the string of boom sticks was not called as witness; he was alleged to be in Prince Edward Island at the time of the trial. Nothing was said as to why he was not examined on a commission; perhaps the defendant was not aware of his whereabouts; in any event nothing was said about it at the hearing. His evidence might possibly have shed some light on the subject.

In his examination in chief Hagen said that the string of boom sticks was made fast to a dolphin. When asked to describe what this so-called dolphin was, Hagen is not very positive; he says that it is a long time ago and that, *as far as he can remember,* "it was good, big piles, three of them." Then he is asked how high above the water these piles were; he does not reply to the question directly but states that "*a dolphin* is anywhere between 10 or 15 feet above water." Later on he says he is positive the piles were at least 10 feet above the water (p. 24).

In cross-examination, the witness repeats that it was a three-pile dolphin (dep. Hagen, p. 22), but when asked if it could not have been the remains of an old tower of the B.C. Electric Company, he says that he cannot deny it. The memory of the witness was obviously not very retentive; this is easily conceivable when one considers that the accident occurred approximately three years ago and that the witness had no particular reason to notice the nature, the size, the solidity or the condition of the object to which the string of boom sticks was made fast.

This is an important feature of the case and I think it is only fair to the witness that I should quote verbatim what he said (pp. 22 and 23):

Q. You call it a dolphin. Was it in fact a dolphin at all, or was it the remains of an old British Columbia Electric tower which was put in the river there?—A. It was a dolphin.

Q. Not a Government dolphin?—A. Well, of course, I can't tell you who put it there.

Q. No, but not a Government dolphin. You heard Mr. Worsfold's evidence. It was not a Government dolphin. Whose dolphin do you suggest it was?—A. I couldn't tell you that.

Q. You don't know anything about it?—A. Not a thing.

Q. Is that dolphin still there?—A. I don't know.

Q. You don't know. Well, then I will tell you that that dolphin is not there. They are not going to produce it as evidence. The dolphin isn't there at all; it has completely disappeared now. What do you say about that? You don't say anything? All right. Now, that dolphin was not kept there for the purpose of anybody, for the purpose of tying up logs to, was it?—A. It was put there for tying up to, I suppose.

Q. You suppose that. I will put this to you, that it was not put there for that purpose at all; that it was put there years ago by the B.C. Electric Railway Company, when they were putting their high-tension wires across the river, and that these piles that you speak of were only the remains of that old tower. What do you say about that?—A. I don't know where you got that information.

Q. You can't contradict me either, can you?—A. No, I can't.

The witness concludes his deposition on this point by saying that he found the dolphin in a very first class condition. I must say that this answer appears to me very categorical and explicit as compared with the previous answers of the witness relating to the so-called dolphin.

Worsfold, on the other hand, called as witness by the plaintiff, made the following statements concerning the alleged dolphin on Kirkland's Island (dep. Worsfold, p. 6):

Mr. MCQUARRIE: Q. Now, do you know anything about a dolphin there on Kirkland's Island?—A. No.

Q. Do you remember a dolphin put in by your Department, or any department?—A. No, I never remember any department putting in a dolphin there. At one time, somewhere possibly just below Woodward's, the B.C. Electric had two high towers to carry the wires, and there might have been something left from that.

Q. Some of the remains of those towers?—A. Yes, but I have no idea of whether they were there at the time.

Q. In 1929?—A. No.

Q. And there was no proper dolphin for tying logs?

Mr. LUCAS: I wish my friend would not lead. That is rather a leading question.

Mr. MCQUARRIE: Q. Were there any proper dolphins there used for the purpose of tying logs or boomsticks, or anything of that kind, so far as you are aware?

Mr. LUCAS: I object. Mr. Worsfold says he doesn't know.

The WITNESS: I don't know whether there is any. I don't know whether there was any there at that time.

Mr. MCQUARRIE: Q. You don't know?—A. No. There was certainly none put in by the Government, anyway. There may have been some old dolphin there that somebody else had driven, but there certainly was none driven by the Government.

Q. You are referring to the B.C. Electric?—A. That is the only thing for certain that was there, but I don't know if it was there then.

Powys, a master mariner of some 45 years' experience on the Fraser river, says that he does not remember having seen any dolphin at the place where the boom sticks were left by Hagen, for at least the last twelve years. Accord-

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ing to him there was a tower built by the B.C. Electric Company of sawn timber to carry its high tension wires. The witness says that he did not take any particular notice of whether there remained anything of this tower in October, 1929, but adds that there was bound to be left a few piles. He declares however that there were no piles left at the time of the trial, i.e., in September, 1932. But a delay of three years had elapsed since the date of the accident.

Summing up, the witness says, notwithstanding Captain Hagen's testimony to the contrary, that he does not remember the existence of any dolphin in October, 1929, at the spot where the boom sticks were tied up (p. 58). . . .

The evidence on this point is not very convincing and the existence of the so-called dolphin is, I must say, rather problematical and uncertain.

Hopkins, a tug captain, called as witness on behalf of the defendant, said that on the 10th of October he was in Vancouver and he received instructions from Simpson of the Canadian Western Lumber Co. to pick up the string of boom sticks. He proceeded up the Fraser River and found the boom sticks entangled around buoy 17 with other buoys. I may note here incidentally that he is the only one to speak of buoy 17, which, besides, is not indicated on the plan exhibit 3; furthermore his version is not in accord with the admission by defendant of sub-paragraphs (*a*), (*b*), (*c*) and (*d*) of paragraph 3 of the information, which do not mention buoy 17. Hopkins adds that he then went to Woodward's Landing and telephoned Simpson to ask him to send a small shallow draught tug. He then returned to the boom sticks and he says that he—with others apparently as he uses the pronoun " we "—got them straightened and carried on to Comox.

There is evidently an error in the date. The tug *John Davidson* tied up at Woodward's Landing during the evening of the 9th; she towed the boom sticks across the river on the following morning and Captain Hagen and his men fastened them to the shore of Kirkland's Island. The tug then left light for the mill at 7.15 a.m. All this appears from the log (exhibit 2). Now the boom sticks went adrift sometime during the night of the 10th to the 11th, most likely on the morning of the 11th. It was therefore impossible for Hopkins to disentangle the sticks on the 10th.

According to Worsfold's evidence, it was on Saturday the 12th that he first knew of the damage done to the buoys and that the boom sticks were cleared and the buoys put back in position (dep. Worsfold, p. 8) . . .

The discrepancy between the versions of Hopkins and Worsfold as to the time when the boom sticks were cleared from the buoys may not be very material, save that, if credit is given to Worsfold's testimony, we must draw one of two conclusions: either that the sticks went adrift later than the morning of the 11th or else that the Canadian Western Lumber Company, advised by Hopkins that the sticks had gone adrift and displaced some of the buoys, did not deem it advisable to notify the Department of Marine of this fact, notwithstanding the danger to navigation arising from such displacement.

Another point on which Hopkins and Worsfold disagree is in connection with the clearing of the sticks: as I have already said, Hopkins swears (p. 34) that "we"—meaning apparently he and his men—"got them straightened and carried on to Comox."

Worsfold, on the other hand, declares that he called up the mill of the Canadian Western Lumber Company and notified them about the boom sticks going down the river and removing certain buoys, and told them (p. 8) that "we had been down there and cleared the sticks of the buoys and put the buoys back."

Perhaps the only way to reconcile the two versions is to conclude that Hopkins straightened out the boom sticks on the 11th—not on the 10th as he says—and that Worsfold and his men replaced the buoys on the 12th. There is no doubt that Hopkins had nothing to do with the replacement of the buoys; in fact he does not mention it. If such is the case, the least I can say is that neither Hopkins nor Simpson were very diligent in notifying the Department of Marine that its buoys had been removed. This, however, is immaterial: the negligence or carelessness of the defendant's servants in that respect cannot have any bearing on the issues herein.

I do not wish to attach too much importance to these differences, but they may indicate that Hopkins' memory was not as good as it could be and, to some extent, they may affect the reliability that one can place on the witness'

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testimony. I wish to add that, in saying this, my remarks must not be interpreted as casting any doubt on the good faith of the witness.

Hopkins was examined regarding the condition in which he found the head end of the strings; we have his version on this point at pp. 34 and 35 of his deposition: . . .

Continuing his deposition, the witness says that the shackle could only become unpinned through someone unscrewing the pin and pulling it out (dep. p. 36).

Further on however the witness is not quite so positive (p. 37): . . .

Hopkins and two other tug captains, namely Cosulich and Carlson, declared that the manner in which Hagen had made his string of boom sticks fast to the shore was the proper manner and that nothing else could be done (dep. Hopkins, p. 35; dep. Cosulich, p. 44 and dep. Carlson, p. 49).

All this evidence of course is essentially hypothetical and based on the assumption that the dolphin was solid and that the string of boom sticks was made fast to it in the manner described by Hagen.

The witnesses agree on one point, viz., that the string of boom sticks left their mooring because the pin was removed from the shackle. The question is whether it was removed deliberately or whether it dropped out because it had not been screwed on securely. Two master mariners of experience, Powys and Garvie, called as witnesses on behalf of the plaintiff, say that the motion of the sea may have caused the pin to fall out if not tightly screwed: See deposition Powys at p. 61 and deposition Garvie at p. 73.

It was suggested that possibly the pin was wilfully removed by a fisherman anxious to get rid of the boom sticks, either because they interfered with his fishing or because he had a grudge against Captain Hagen (p. 38): . . .

Asked as to whether it would not have been advisable to leave a man in charge of the boom sticks, Hagen, Hopkins, Cosulich and Carlson, for various reasons, say that it would not.

Captain Hagen (at p. 15) answers the question as follows:

Q. Would it have made the situation safer had you left a man in charge of the boomsticks?—A. A man could not do anything there if he was there.

Q. In case the boomsticks had come adrift, you say a man could not have done anything anyhow?—A. No.

In cross-examination, the witness emphasizes his opinion in a rather singular manner (p. 27, in fine, and page 28): . . .

If, as Hagen pretends, the boom sticks were made fast to the shore in such a manner that they could not escape without the intervention of someone deliberately sending them adrift, the object of leaving a man in charge would obviously not have been to save the boom sticks in case they left their mooring, but to prevent anyone unshackling them or otherwise interfering with them.

Hopkins (dep. p. 39) expresses the opinion that it would not have been safe to leave a man in charge of the boom sticks: . . .

Hopkins apparently takes for granted that the boom sticks could have gone adrift, notwithstanding his opinion that they were securely fastened to a dolphin.

Hagen's and Hopkins' statements on this point are preposterous.

Carlson says that it was not customary nor feasible to leave a man in charge; see his deposition, at p. 50: . . .

Cosulich says that, if the tide were ebbing, a man in charge of the boom sticks could not have prevented the boom sticks from going adrift, but that if the water were slack, he might possibly have saved them. He admits however that a man could have prevented a fisherman from letting the sticks go adrift (dep. p. 46). I have no doubt that he is right on this last point.

After hearing the witnesses, reading over the depositions carefully and weighing the evidence, I have come to the conclusion that the string of boom sticks was not made fast to the shore of Kirkland's Island in an adequate and secure manner. I doubt very much whether there were any dolphin or even suitable piles at the spot where the boom sticks were moored; and if there were, I am not at all convinced that the string of boom sticks was properly fastened.

In view of the admissions made in the statement of defence as well as at the trial (see exhibit 1), there exists a presumption that the damage was caused by the negligence of defendant's servants; in the circumstances, it was incumbent upon the defendant to rebut that presumption; the

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burden of proof was shifted upon the defendant; the doctrine of *res ipsa loquitur* applies.

In Halsbury's Laws of England, vol. 21, p. 439, No. 751, the question of presumption of negligence is concisely and clearly laid down as follows:

751. An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference immediately arising from them is that the injury complained of was caused by the defendant's negligence. To these cases the maxim *res ipsa loquitur* applies. Where, therefore, there is a duty upon the defendant to exercise care, and the circumstances in which the injury complained of happened are such that with the exercise of the requisite care no risk would in the ordinary course of events ensue, the burden is in the first instance upon the defendant to disprove his liability. In such a case, if the injurious agency itself and the surrounding circumstances are all entirely within the defendant's control, the inference is that the defendant is liable, and this inference is strengthened if the injurious agency is inanimate.

The injurious agency was within the defendant's control and it could and should have remained within its control, had the defendant's servants acted prudently and taken the necessary precautions.

Beven, on Negligence, 4th Ed., at p. 126, says:

There must be *reasonable evidence* of negligence; and the mere occurrence of an injury is sufficient to raise a *prima facie* case;

(*a*) When the injurious agency is under the management of the defendant;

(*b*) When the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care.

Over inanimate things this duty of care is absolute; over animate beings it only goes to guard against injury from their customary habits.

In *Britannia Hygienic Laundry Co.* v. *Thornycroft & Co.* (1), Scrutton, L.J., at p. 241, explained the doctrine of *res ipsa loquitur* as follows:

The doctrine of *res ipsa loquitur,* as I understand it, is this: where you have a subject-matter entirely under the control of one party and something happens while it is under the control of that party, which would not in the ordinary course of things happen without negligence you may presume negligence from the mere fact that it happens, because such a thing could not happen without negligence. There is the case where a cask tumbled out of the door of a warehouse on to a passer-by, and it was said against the defendant: you are in sole control of this warehouse, and in the ordinary course of things casks do not tumble out of warehouses on to the heads of passers-by unless somebody has been careless. If nothing else is proved about how this cask tumbled out, *res ipsa loquitur,* the jury are entitled to find that it tumbled out by negligence, that being the more probable way in which it happened.

(1) (1926) 95 L.J.K.B. 237.

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In *Scott* v. *London & St. Katherine Docks Co.* (1), Erle, C.J., says (p. 601):

There must be reasonable evidence of negligence.

But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

The same principle was adopted in *Byrne* v. *Boadle* (2); Pollock, C.B., at page 727, says:

The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford primâ facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *primâ facie* evidence of negligence. Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are *primâ facie* responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them.

See also *Kearney* v. *London & Brighton Railway Co.* (3), particularly the notes of Kelly, C.B., at pp. 761 and 762; *The Merchant Prince* (4); *Rylands* v. *Fletcher* (5).

In the case of *The Merchant Prince (ubi supra)* Fry, L.J., speaking of the burden which rests on the defendant to show that the accident was inevitable, says (p. 189):

It is a case in which a ship in motion has run into a ship at anchor. The law appertaining to that class of case appears to be clear. In the case of *The Annot Lyle* (11 P.D. 114), it was laid down by Lord Herschell that in such a case the cause of the collision might be an inevitable accident, but unless the defendants proved this they are liable for damages. The burden rests on the defendants to shew inevitable accident. To sustain that the defendants must do one or other of two things. They must either shew what was the cause of the accident, and shew that the result of that cause was inevitable; or they must shew all the possible causes, one or other of which produced the effect, and must further

(1) (1865) Ex. Rep., 3 H. & C. 596.
(2) (1863) Ex. Rep., 2 H. & C. 722.
(3) (1871) L.R., 6 Q.B. 759.
(4) (1892) L.R. Pr. Div. 179 at pp. 189 and 190.
(5) (1868) L.R., 3 E. & I. App. 330.

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shew with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shewn inevitable accident.

I may further cite the following decisions dealing with the burden of proof: *The Indus* (1); *The Annot Lyle* (2); *The Schwan* (3); *Tarry* v. *Ashton* (4); *Briggs* v. *Oliver* (5), particularly the notes of Bramwell, B., at p. 164; *The Marpesia* (6); Pollock on Torts, pp. 467 and 540 *et seq.*; Salmond on the Law of Torts, pp. 33 and 34.

I do not think that the defendant has succeeded in showing what was the cause of the accident. The defendant has suggested that it was likely that the boom sticks were sent adrift by a fisherman or someone having a grudge against Captain Hagen. It was submitted however that the pin in the shackle, if there was one, might have fallen out by the movement of the sea, if it had not been properly screwed in. The evidence leaves us in a field of hypotheses and conjectures. It was the duty of the defendant to show what had been the cause of the accident and that such cause was inevitable. As Fry, L.J., said in *The Merchant Prince (ubi supra),* "the burden rests on the defendants to shew inevitable accident. . . . They must either shew what was the cause of the accident, and shew that the result of that cause was inevitable; or they must shew all the possible causes, one or other of which produced the effect, and must further shew with regard to every one of these possible causes that the result could not have been avoided."

This the defendant has not done.

But there is more. I believe that the evidence discloses negligence on the part of the defendant's servants; it arises from the following acts or omissions; tying up the string of boom sticks at a place where the current was very swift and dangerous; leaving the boomsticks unattended; not sending another tug at once to take charge of these boom sticks.

Regarding the danger of leaving the boom sticks on the shore of Kirkland's Island, we have the evidence of Powys,

(1) (1887) L.R., 12 Pr. Div. 46.
(2) (1886) L.R., 11 Pr. Div. 114.
(3) (1892) L.R., Pr. Div., 419, at 431.
(4) (1876) 1 Q.B.D. 314.
(5) (1866) L.J. Ex. 163.
(6) (1872) L.R., 4 P.C. 212.

who is a disinterested witness; his testimony on this point is as follows (p. 59):

Q. You say on that side of the river it was unsafe?—A. Unsafe in my idea.

Q. To leave it. What about the other side of the river?—A. The other side of the river there is slacker water and there is quite a number of piles there that he could have tied it up to.

Q. You are suggesting that he should have left that boom on the other side of the river at Woodwards'?—A. Decidedly.

Q. Where it was first?—A. Yes.

Q. And in that view it would be much safer than leaving it where he did leave it?—A. Oh, decidedly.

Q. On account of the current?—A. Certainly.

Captain Hagen was negligent in leaving the boom sticks unattended. The majority of the witnesses heard on behalf of the defendant, particularly Hagen and Hopkins, stated that a man, left in charge of the boom sticks, could not have prevented them from going adrift. I doubt very much whether that contention is at all founded; I am inclined to believe the contrary. But the object of leaving a man in charge was not so much to prevent the boom sticks from escaping as to preclude a stranger from unfastening them and sending them adrift. Indeed, if really the boom sticks were tied up securely, as Captain Hagen pretends they were, they could not leave their mooring and there was no reason to leave a guardian in attendance to prevent their escape.

As already stated, the main purpose of leaving a man in charge—on the shore or in a boat—would have been to prevent a stranger interfering with the boom sticks. And this, in my opinion, was quite feasible.

Captain Hagen tied up at Woodward's Landing at 7 o'clock on the night of the 9th; the boom sticks left their mooring at Kirkland's Island during the night of the 10th to the 11th, most likely on the morning of the 11th and even perhaps later. The sticks were left unattended for a period of more than a day, possibly 36 hours and more. The defendant could and should in my opinion have sent another tug to take charge of the boom sticks. There was obviously extreme heedlessness and lack of foresight on the part of Hagen and Simpson in leaving these boom sticks unattended and a danger to navigation in the channel of the river.

Counsel for defendant submitted that the defendant cannot be held responsible for the act of a stranger in unfast-

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ening the boom sticks and letting them escape and that the emission of leaving a guardian in charge of the sticks to prevent such an occurrence does not constitute negligence. I must say that this contention is, in my mind, unsound. In support of this opinion, I may cite the following authorities: Halsbury's Laws of England, vol. 21, p. 380, No. 649, where it is said:

> 649. So long as there is a direct chain of causation between a negligent act and an injury, *primâ facie* he who is guilty of the negligent act is responsible, and he cannot shelter himself behind the negligence of a third party; but such an intervention may in some circumstances remove from an act of negligence its responsibility for a consequent injury. What has been called the conscious act of another volition may remove liability from one who has been previously negligent if it is proved that in fact that conscious act was the real cause which brought the injury about, but not if it is left in doubt whether such conscious act was the real cause or not, nor if such a conscious act was one of the possible events which there was a duty on the part of the negligent person to guard against. The intervention of another does not avoid the liability for a negligent act when the negligent act has placed that other in such a position that he could only reasonably have acted in the way in which he did act; and, so long as the consequence complained of is the natural and direct outcome of the original negligence, the interference of another, however wrongfully, or even criminally, the latter may have acted, does not affect the liability.

Martin v. *Stanborough* (1); *Illidge* v. *Goodwin* (2); *Evans* v. *Manchester, Sheffield and Lincolnshire Ry.* (3); *Zeidel* v. *Winnipeg Electric Co.* (4); *Collins* v. *Middle Level Commissioners* (5); *Paterson* v. *The Mayor, etc., of Blackburn* (6); *Clark* v. *Chambers* (7); *Marshall* v. *Caledonian Railway Co.* (8); *Harrison* v. *Great Northern Railway Co.* (9).

Counsel for defendant, at the hearing, relied on the decision *in re The Western Belle* (10) to contend that there is no negligence in leaving a string of boom sticks unattended and that the fact that if a man had been left in attendance he might have prevented them from breaking adrift is no evidence of negligence. As the President of the Court said, in that case, the question of whether it was negligent to leave a barge unattended was a question of fact. Circumstances vary with each case. In the case of the *Western*

(1) (1924) 41 T.L.R. 1.
(2) (1831) 5 C. & P. 190.
(3) (1888) L.J.R., 57 Ch., 153.
(4) (1928) 2 W.W.R., 601.
(5) (1869) L.R., 4 C.P., 279.
(6) (1892) 9 T.L.R., 55.
(7) (1878) L.R., 3 Q.B.D., 327.
(8) (1899) 36 Sc.L.R., 845.
(9) (1864) Ex. Rep., 3 H. & C., 231.
(10) (1906) 95 L.T.R., 364.

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Belle the barge *Gratitude* was lying securely moored to the barges lying in Ward's Roads, in the River Thames. It is useless for the purposes herein to relate at length the facts and it will be sufficient to state that the *Western Belle* having been cast off from a tug came down athwart the river towards the craft at Ward's Roads, fouling the mooring chains. At ebbing tide the *Western Belle* grounded upon the moorings, broke them and thus caused the *Gratitude* to break adrift. As a result, part of the cargo of the *Gratitude* was lost and part damaged. Hence the action in damages by the owners of the cargo against the owners of the *Western Belle.* The latter pleaded, *inter alia,* that the owners of the *Gratitude* had been negligent in leaving her unattended.

The notes of the President of the Court on this question of negligence resulting from the act of leaving the barge unattended are interesting; they are to be found at p. 366 of the report, at the bottom of the first column and in the second column. It will suffice to quote an extract to show the view adopted by the Court and convince oneself that the question of negligence in that case rested mainly on a question of fact. I find on page 366, 2nd column, the following remarks:

> One can hardly believe that nothing could be done if a man had been there to avert the drifting of the barges unattended up the river. Then the question comes to be whether there was in the circumstances of the case any negligence in not having a man there. Upon that there are some cases, and I think those cases depend upon pure questions of fact—namely, whether it is usual to have a man in charge—and the question whether it is so really depends upon whether there was anything that it is necessary to anticipate that you ought to have done to avert the accident. In the docks there are several cases, and it does not seem the rule to have a man in charge in the dock. One says to one's self why is that? Because there is no necessity to anticipate danger. Others are cases in which even in a dock it has been held or indicated that it might be negligence, or would be negligence, if there was no one in charge, but that has been where there has been some dangers which have been brought to their attention, and which were so obvious that they ought to have been prevented. The same principle must apply wherever the barge is situated, if it is necessary, because of the run of the river or exposure in any way, that someone should be there—it would be negligence, but then one finds it is not usual to have people in such a case as this. On the other hand, if the barges are in the roads, and are protected as these barges were and out of the track altogether, the only evidence before me is that it is not usual to have a man in charge of these barges placed in this position.

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The fact that it was not customary to leave a man in charge of a string of boom sticks or booms of logs moored to the shore of the river does not relieve the defendant of its responsibility. There are customs that are bad and unjustifiable. The proof shows that damage to buoys on the Fraser River by boom sticks and logs was not an unusual occurrence: Hagen, in cross-examination (pp. 18 and 19), very reluctantly admitted his knowledge of this fact.

See in this respect the following cases: *The Scotia* (1); *The Hornet* (2); *The Dunstanborough* (3) commented on by Counsel *in re The Western Belle.*

Taking into consideration all the circumstances of the case I have no hesitation in arriving at the conclusion that the defendant has not succeeded in rebutting the presumption of negligence and even more that the evidence discloses negligence on the part of the defendant's servants; I must therefore hold the defendant responsible for the injury caused to the property of the plaintiff.

The amount of the damages is admitted.

There will be judgment against defendant in favour of plaintiff for $469.30, with interest as prayed for, and costs.

Judgment accordingly.