ROBERT BAILEY (PLAINTIFF).....APPELLANT; 1904

*Oct. 26, 27.

AND *Nov. 21.

JOHN ANDREW CATES (DEFENDANT)..RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Negligence—Careless mooring of vessels—Vis major.

The plaintiff's tug, "Vigilant," was moored at a wharf in Vancouver Harbour with another tug, the "Lois," belonging to the defendant, lying outside and moored there by a line attached to the "Vigilant." The "Lois" was left in that position all night with no one in charge and no fenders out on the side next the "Vigilant." During the night a heavy gale came up and the "Lois" pounded the "Vigilant" causing her considerable damage.

Held, affirming the judgment appealed from, that, as the defendant was not a trespasser, he was not guilty of negligenee, under the circumstances, in leaving his tug as he did and that he was not obliged to observe extreme and unusual precautions to avoid injury by a storm of exceptional violence.

APPEAL from the judgment of the Supreme Court of British Columbia, reversing the judgment of the trial court and dismissing the plaintiff's action with costs.

The case is sufficiently stated in the above head-note.

R. G. Code for the appellant.

Davis K.C. for the respondent.

SEDGEWICK and GIROUARD JJ. concurred in the judgment dismissing the appeal with costs.

DAVIES J. concurred with Killam J.

NESBITT J.—I do not feel strongly enough to reverse in this case but I confess it is very near the line. I

* PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

1904

BAILEY v. CATES.

Nesbitt J.

cannot but feel that the trial judge was affected in his view that negligence had been made out by reading the trial judgment in *McDowall* v. *The Great Western Railway Co.* (1), reversed in 1903 (2), and this case, like that, seems to me to fail for lack of proof that the negligence complained of was itself the affecting cause of the accident, and on the further ground that, granted negligence existed, the result was not what would reasonably be apprehended. See *Sharp* v. *Powell* (3); *Wood* v. *The Canadian Pacific Railway Co.* (4).

I should have felt great doubt in holding the storm described came within the doctrine of *vis major*. See *Garfield* v. *The City of Toronto* (5), where Hagarty C.J. summarizes all the authorities to date as determining the *vis major* rule to be satisfied when what has occurred "is extraordinary and that it could not reasonably be expected."

The evidence here would not have satisfied me as coming up to that standard. I do not feel, as I have said, confident enough to reverse and restore the trial judge and, so, when in doubt, affirm.

The appeal should be dismissed with costs.

KILLAM J.—In my opinion this appeal should be dismissed.

As I look upon the case it is one of fact only. The defendant committed no trespass or other actionable wrong in mooring his tug beside the plaintiff's. Whether any or how many or what class of men should have been kept on board, whether there should have been a watch, whether steam should have been kept up or other precautions taken, depended wholly

(1) [1902] 1 K. B. 618.
(2) [1903] 2 K. B. 331.
(3) L. R. 7 C. P. 253.
(4) 30 Can. S. C. R. 110.
(5) 22 Ont. App. R. 128.

1904

BAILEY v. CATES.

Killam J.

upon the circumstances. The cases which have been cited to show that the absence of certain precautions was regarded as constituting negligence depended upon the particular facts and the respective situations of the vessels.

Viewing the evidence as a whole, I cannot find that the defendant was negligent, under the circumstances, in leaving the tug as he did. The storm that came up was one of exceptional violence and it is by no means certain that, without the observance of extreme and very unusual precautions, the injury could have been avoided.

Appeal dismissed with costs.

Solicitors for the appellant: *Taylor, Bradburn & Innes.*

Solicitors for the respondent: *Bowser & Wallbridge.*