THE CANADA ATLANTIC RAILWAY COMPANY (DEFENDANT).. } APPELLANT;

AND

GEORGE HURDMAN, ADMINISTRATOR, &C. (PLAINTIFF)..... } RESPONDENT.

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*Oct. 16, 17.
*Dec. 9.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway company—Loan of cars—Reasonable care—Breach of duty—Negligence—Risk voluntarily incurred—"Volenti non fit injuria."

A lumber company had railway sidings laid in their yard for convenience in shipping lumber, over the line of railway with which the switches connected, and followed the practice of pointing out to the railway company the loaded cars to be removed, the railway company thereupon sending their locomotive and crew to the respective sidings in the lumber yard and bringing away the cars to be despatched from their depot as directed by the bills of lading.

Held, that in the absence of any special agreement to such effect, the railway company's servants while so engaged were not the employees of the lumber company, and that the railway company remained liable for the conduct of the persons in charge of the locomotive used in the moving of the cars; and that where the lumber company's employees remained in a car lawfully pursuing their occupation there, the persons in charge of the locomotive owed them the duty of using reasonable skill and care in moving the car with them in it, so as to avoid all risk of injury to them.

On the trial of an action for damages in consequence of an employee of the lumber company being killed in a loaded car which was being shunted the jury had found that "the deceased voluntarily accepted the risks of shunting" and that the death of the deceased was caused by defendant's negligence in the shunting, in giving the car too strong a push.

Held, that the verdict meant only that deceased had voluntarily incurred the risks attending the shunting of the cars in a careful and skilful manner, and that the maxim "*volenti non fit injuria*" had no application. *Smith* v. *Baker* ([1891], A.C., 325), applied.

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment of the Queen's Bench Divisional Court (2), in favour of the plaintiff.

The plaintiff sued as administrator of the estate of Thomas F. Hurdman, who was killed on the 30th December, 1892, under the following circumstances:

The deceased was employed by the Shepard & Morse Lumber Co., proprietors of a yard for piling and sorting lumber, about two miles from the Canada Atlantic Station at Ottawa.

The railway company had lent rails to the lumber company, which had constructed switches and sidings upon their own property, separated from the defendants right-of-way by a fence, and closed by a gate under the control of the lumber company.

The mode of doing business between the companies was that the lumber company made out and presented the bills of lading from their Ottawa office to the railway company at the station in Ottawa, and freight was paid by the lumber company from Ottawa to the point of destination, but, as a matter of convenience to the lumber company, the railway company gratuitously hauled empty cars from Ottawa to the yard to be loaded, and brought them away when loaded. At the outset, the lumber company sorted the cars and collected them for the railway company by means of horses, as they objected to allow locomotives inside their yard, but afterwards, without any special arrangement, the practice changed, and the railway company, at the request of the lumber company, sent their engine and force of yardmen into the lumber company's yard, to do the sorting and moving of cars.

On the 30th December, 1892, the railway company, at the request of the lumber company, sent an engine

(1) 22 Ont. App. R. 292. (2) 25 O.R. 209.

and a working force of four men, to leave empty cars and bring away the cars shipped, and also to bring away any other cars pointed out by the lumber company, even though not billed or shipped, and to do the shunting in the yard required for the purpose of sorting and arranging the cars. The car in which the deceased was killed was not yet shipped or billed, but the yard-master of the railway company was requested to shunt and bring it away to Ottawa, to be subsequently billed. This was a closed or box car filled to the roof with lumber, and when coupled for the purpose of placing it on another siding was still in the possession and under the control of the lumber company. The counting of the lumber was not completed, and the deceased and another employee of the lumber company were in the car counting the lumber, in a narrow space across the middle of the car from one door to the other. The yard-master waited for them to finish and get out of the car, but they told him not to wait, saying that it was all right; that they would soon finish counting and look out for themselves.

This car was then coupled to the train, shunted several times, and finally dropped or allowed to run down into another siding, when it collided with cars standing on that siding with sufficient force to cause the lumber in the car to be moved, and deceased was fatally injured.

It appeared that this mode of shunting was in common use on railways.

The jury answered the first three questions submitted to the effect that there had been negligence in the management of the car, in giving the car too strong a push, and that they believed the accident was the result of such negligence. The fourth question and the answer of the jury thereto were as follows:

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4. Q. Did the deceased, knowing the danger, voluntarily accept the risks of shunting? A. The deceased voluntarily accepted the risks of shunting.

On the finding of the jury a verdict was entered for plaintiff which was affirmed by the Divisional Court and the Court of Appeal.

Chrysler Q.C. and *Nesbitt* for appellant: There is no evidence of negligence. The immediate cause of the death was the shifting of the lumber in the car, not the impulse given to the car. *Callender* v. *Carleton Iron Co.* (1).

Deceased was not killed by the negligence of any persons who were at the time, and under the circumstances, the servants of the company.

Murray v. *Currie* (2); *Murphy* v. *Caralli* (3); *Rourke* v. *White Moss Colliery Co.* (4); *Donovan* v. *Laing Syndicate* (5).

The conveying of deceased in the car was not assented to by the defendants and must be presumed to have been at the request and for the purposes of the lumber company, and at their risk. Deceased placed himself upon the train voluntarily, and was not lawfully there at the time of the accident. *Sheerman* v. *The Toronto &c. Railway Co.* (6); *Graham* v. *The Toronto &c. Railway Co.* (7); *Blackmore* v. *Toronto Street Railway Co.* (8).

The jury having found that deceased voluntarily incurred the risk of shunting, the plaintiff cannot recover. *Volenti non fit injuria.* *Thomas* v. *Quartermaine* (9); *Thrussell* v. *Handyside* (10).

See also *Moffat* v. *Bateman* (11); *Smith* v. *Baker* (12).

If a man rides on a freight train as a matter of convenience to himself, the railway company receiving no

(1) 9 Times L.R. 646.
(2) L.R. 6 C.P. 24.
(3) 3 H. & C. 462.
(4) 2 C.P.D. 205.
(5) [1893] 1 Q B. 629.
(6) 34 U.C.Q.B. 451.
(7) 23 U.C.C.P. 541.
(8) 38 U.C.Q.B. 172.
(9) 18 Q.B.D. 685.
(10) 20 Q.B.D. 359.
(11) L.R. 3 P.C. 115.
(12) [1891] A.C. 325.

reward, and is told there is danger, but ageees to take his chances, and the car being put in too rapid motion, he is hurt, could he recover? That is the neat question here. *Gallin* v. *London and North Western Ry. Co.* (1). The jury has found, for the purposes of this case, the very facts above stated.

McCarthy Q.C. and *Blanchet* for the respondent.

The jury found that the death of the deceased was the result of the appellants' negligence. The deceased did not voluntarily accept the risks arising from the negligence. If the deceased assumed the ordinary risk of shunting, when performed with reasonable care, his undertaking was with the lumber company in whose service he was, but appellants seek to use it to shelter themselves from the consequences of negligence established against them. There was no undertaking between the deceased and appellants. From the time the negligent act was committed deceased was physically restrained from saving himself; he was compelled to remain on the car.

The doctrine of *volenti non fit injuria* does not apply in cases where negligence has been proven and found by the jury, and the deceased was not *volens* within the legal meaning of the maxim. It was necessary for defendants to prove not only that deceased had agreed to accept the risk, but also that he agreed to waive all recourse for consequent injury. *Smith* v. *Baker* (2); *Osborne* v. *London and North-Western Railway Co.* (3); *Brown* v. *Leclerc* (4); *Thrussell* v. *Handyside* (5); *Town of Prescott* v. *Connell* (6); *Heaven* v. *Pender* (7); Pollock on Torts (8).

There was no loan of the engine by the appellants to the lumber company, and the appellants did not

(1) L.R. 10 Q.B. 212.
(2) [1891] A. C. 325.
(3) 21 Q. B. D. 220.
(4) 22 Can. S. C. R. 53.
(5) 20 Q. B. D. 359.
(6) 22 Can. S. C. R. 147.
(7) 11 Q. B. D. 503.
(8) 4 ed. p. 155.

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cease to have control over the conductor, engine driver, fireman and brakeman employed by them while shunting. They continued to remain their servants handling their own engine and cars. The appellants could have dismissed or withdrawn from the work the men controlling the engine at any time, which the lumber company could not have done, and this is the test for the purpose of determining whose servants they were at the time the accident occurred. See *Cameron* v. *Nystrom* (1); *Johnson* v. *Lindsay* (2); *Jones* v. *Liverpool* (3); *Oldfield* v. *Furness* (4).

TASCHEREAU, SEDGEWICK and GIROUARD JJ. were of opinion that the appeal should be dismissed with costs.

GWYNNE J.—This action was brought by the administrator of a deceased person against the defendants to recover damages from them for the death of the deceased, caused, as is alleged, by the negligence of the defendants and their servants.

In the statement of claim it is alleged that the deceased was a clerk in the employment of a company called the Shepherd & Morse Lumber Company, at their lumber yard adjoining the line of the defendants' railway near the city of Ottawa, his duty being to count the lumber placed by the Shepherd & Morse Co. in the care of the defendants for carriage on their railway; that in the lumber yard there were a number of switches connected with the defendants' line of railway, and that upon the day in question certain cars, the property of the defendants, were upon the said switches for the purpose of being loaded with lumber; that while the deceased was lawfully in one of

(1) [1893] A. C. 308.
(2) [1891] A. C. 371.
(3) 14 Q. B. D. 890.
(4) 9 Times L. R. 515.

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the said cars, counting the lumber therein for his employers, certain servants of the defendants who were in charge of and operating a locomotive of the defendants for the purpose of moving the cars in the said lumber yard when loaded with lumber, proceeded to move the car in which the deceased was so lawfully employed as aforesaid from the switch or siding upon which it was and to place it upon another switch or siding where other cars were, and that the defendants' servants in charge of the said locomotive so carelessly and negligently shunted and removed the car in which the deceased so was, that by reason of such negligence of the defendants' servants the said car was made to collide with such force and violence with other cars upon the switch into which the car in which the deceased was so as aforesaid was shunted, that the deceased was thereby killed; and that the collision so causing his death was caused by the careless and negligent handling by the defendants and their servants of the said cars, and the careless and negligent coupling of the same and by the negligent and wrongful acts of the defendants and their servants in having shunted or kicked the said car in which the deceased was with greater force and violence than was necessary and in not having applied the breaks of the said car in time to prevent the said collision. To this statement of claim the defendants pleaded in substance that they were not liable. The learned judge before whom the case was tried with a jury submitted certain questions to the jury which they answered as follows:

1. That there was negligence in the management of the car in question.

2. In giving the car too strong a push.

3. We believe the accident was the result of the negligence aforesaid.

The fourth question put to them was —

Did the deceased knowing the danger voluntarily accept the risk of shunting?

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To which they replied—

The deceased voluntarily accepted the risk of shunting.

The parties came to an agreement that if the plaintiff was entitled to judgment upon these findings the damages for which such judgment should be entered should be $750. The learned judge who tried the case thereupon entered judgment for the plaintiff which judgment has been maintained by the Court of Appeal for Ontario.

In this appeal from that judgment the learned counsel for the appellants contended that judgment of non-suit should have been entered as had been moved upon the part of the defendants in the courts below, or that judgment should be entered for the defendants upon the above answer of the jury to the fourth question submitted to them. His contention in support of the non-suit was:

1. That the deceased was not killed by the negligence of any persons who were at the time and under the circumstances the servants of the defendants.

2. That there was no evidence to go to the jury establishing negligence conducive to the accident.

3. That under the circumstances in evidence it did not appear that the defendants or the persons in charge of the locomotive owed any duty to the deceased and so that the defendants could not be guilty of negligence in the performance of any duty owed to him.

And as to the judgment for the defendants upon the answer of the jury to the fourth question it was contended that this finding of the jury entitled the defendants to the benefit of the principle *volenti non fit injuria.*

Now as to the contention that the persons whose negligence is alleged to have caused the death of the deceased were not, at the time

of the occurrence of the accident which caused the death, the servants of the defendants and in their employment, but were then in the employment of, and the servants of, and under the control of, the Shepherd & Morse Lumber Company, the facts are these: This lumber company have a lumber yard alongside of the main track of the defendants' railway, from which latter into the lumber yard there are several switches or sidings for the convenience of the shipping of lumber by the defendants' railway. Formerly the practice had been for the lumber company to draw the lumber from their yard by horses on to the railway of the defendants, to be by them conveyed to the destination indicated by the lumber company. A different practice was introduced as being doubtless more convenient for both the lumber company and the defendants; no agreement as to the matter was proved to have been entered into, but the practice was as follows: The defendants supplied cars as required to the lumber company to be loaded; when loaded the lumber company sent a list to the defendants of cars which they had loaded and ready for removal, whereupon the defendants sent their servants to the lumber yard with a locomotive for the removal of the loaded cars from the respective sidings in the lumber yard upon which they were and to bring them into the defendants' station at Ottawa, whence they were despatched as directed by bills of lading signed by and on behalf of the lumber company. Upon the evening preceding the day on which the fatal accident occurred the lumber company sent to the defendants a list of cars which they had in the yard loaded and ready for removal. The car in which the deceased was when killed was not one of the cars upon that list, but on the following day the defendants' servants in charge of a locomotive sent for the purpose of removing the cars on the list took

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this car also, as it was loaded while they were in the yard upon such employment. There was not a particle of evidence that there was any agreement between the defendants and the lumber company that the defendants' servants while employed with the locomotive in removing the cars from the lumber yard should be the servants of the lumber company, and under their control, nor was there anything in the evidence from which it could reasonably be inferred that the defendants' servants so employed were in truth the servants of the lumber company and under their control; or that the lumber company ever assumed to exercise any control whatever over the defendants' servants in the use of the locomotive and the removal of the cars; all that was suggested was that the servants of the lumber company pointed out to the defendants where the cars stood which were to be removed. In short, there was nothing whatever in the evidence to indicate that the defendants' servants in removing the loaded cars on to the track of the defendants were acting otherwise than in the employment of, and as the servants of, and for the benefit of, the defendants; and so the contention before us that the servants of the defendants when in charge of the locomotive moving the loaded cars from the yard of the lumber company to the railway of the defendants, were while so engaged the servants of the lumber company and in their employment and under their sole control, and were not the servants of the defendants, or in their employment, cannot be maintained; none of the cases cited support that contention. Then as to the contentions that there was no evidence to go to the jury of negligence, assuming the deceased to have been a person to whom under the circumstances in evidence any duty was due, and that the defendants did not owe to him any duty even though the persons in charge of the

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locomotive should be regarded as the servants of the defendants and in their employment and under their control. The circumstances upon which this question as to owing a duty to the deceased depends are these: One Clarke, who was in charge of the locomotive, and of the engineer, fireman and brakesman employed in working it, says that after he had coupled the car in which the deceased was to the locomotive he stood for the space of about half a minute by the car in which the deceased and another young man, servants of the lumber company, were employed in counting the lumber, and that the young man, whose name is Ashler

looked out and wanted to know if I was waiting for them and I says, yes, and then he said go on with your work we are all right.

Young Ashler gave similar evidence. He says "Clarke wanted to know if we wanted him to wait," and being asked if he told him not to wait he answered "yes," and being asked if the deceased told him to say not to wait he answered "yes." Thereupon Clarke, without giving any notice to the engineer that the young men were on the car, gave to him a signal to proceed which he accordingly did, and after shunting about, moving loaded cars from one switch in the yard to another, collecting the cars to be removed, finally shunted the car in which the young men were upon a down grade with such force that the car in which the young men were came into violent collision with another car, and by such collision and the displacement of the lumber in the car in which the young were the deceased was killed. Now assuming the defendants to be answerable for the conduct of the persons in charge of the locomotive used in moving the car, and that the deceased was in the position of a person to whom the defendants owed the duty of moving the car with all due care and skill, there cannot be a doubt that upon the evidence given the case could not

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have been withdrawn from the jury, and they have found that the death of the deceased was caused by negligence in the car having been given too great a push. There was evidence to the effect that the push given to it was too strong and altogether unnecessary for the purpose of attaining the object in view; and indeed there was besides evidence of negligence in other respects, namely, in not notifying the engineer that the young men were in the car and in not having brakesmen upon it

Now, Clarke having taken the car and removed it with the young men in it lawfully pursuing their business in the service of their employers counting the lumber, there cannot, I think, be entertained a doubt that under such circumstances Clarke owed to the young men the duty of taking care that the car should be moved with the utmost skill and care so as to avoid all risk of any injury occurring to them. This proposition appears to me so free from doubt that I cannot think it necessary to seek for an authority to maintain it. In *Heaven* v. *Pender* (1), a question arose as to whether a dock owner who had received into his dock a vessel to be repaired and painted by its owner owed any duty to a painter employed by the owner of the vessel to paint so as to be subject to an action at suit of the painter for negligence in a staging, upon which the painter had to stand when painting the vessel, not being sufficiently secure, whereby the painter fell and sustained injuries, and it was held by the Court of Appeal, reversing the judgment of the Queen's Division, that the dock owner did owe a duty to the painter, and the action was sustained.

Lord Esher, Master of the Rolls, giving his judgment n that case, says:

(1) 11 Q.B.D. 503.

The questions we have to solve in this case are: What is the proper definition of the relation between two persons, other than the relation established by contract or fraud, which imposes on the one of them a duty towards the other to observe with regard to the person or property of each other such ordinary care or skill as may be necessary to prevent injury to his person or property, and whether the present case falls within such definition?

He then proceeds to discuss several cases in illustration of the proposition he enunciates, and then adds:

The proposition which these recognized cases suggest, and which is therefore to be deduced from them is, that whenever one person is by circumstances placed in such a position with regard to another, that every one of ordinary sense who did think, would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

Then he adds:

Without displacing the other propositions to which allusion has been made as applicable to the particular circumstances in respect of which they have been enunciated, this proposition includes, I think, all the recognized cases of liability. It is the only proposition which covers them all.

He then proceeds to criticise *Langridge* v. *Levy* (1); *George* v. *Skivington* (2); *Corby* v. *Hill* (3); *Smith* v. *London and St. Katharine Docks Co.* (4); *Indermaur* v. *Dames* (5); *Winterbottom* v. *Wright* (6); the judgment of Cleasby B. in *Francis* v. *Cockrell* (7); and he concludes that the true principle upon which every one of these cases can be rested is that embodied in the above proposition as enunciated by him.

Now although Lords Justices Cotton and Bowen declined to concur in the applicability of the rule as enunciated by him to the several cases which he had criticised and to which he had applied it they do not

(1) 2 M. & W. 519; 4 M. & W. 337.
(2) L. R. 5 Ex. 1, 5.
(3) 4 C.B.N.S. 556.
(4) L.R. 3 C.P. 326.
(5) L.R. 1 C.P. 274; 2 C.P. 311.
(6) 10 M. & W. 109.
(7) L.R. 5 Q. B. 501.

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dissent from its applicability to the circumstances of that case of *Heaven* v. *Pender* (1); and this appears from the judgment of the court in *LeLievre* v. *Gould* (2). There the judgment in *Heaven* v. *Pender* (1) was attempted to be applied by counsel to a case to which it never was intended to apply and to which it had no application. There mortgagees of the interest of a builder under a building agreement advanced money to him from time to time on the faith of certificates given by a surveyor that certain specified stages had been reached; certain untrue statements had been made but without any fraud; in some of the certificates the mortgagees advanced monies to their prejudice; and it was sought to make the surveyor responsible to the mortgagees for negligence in the giving of the certificates which was contended to be in breach of a duty the surveyor owed to them; but Lord Esher, Master of the Rolls, there says:

> The case of *Heaven* v. *Pender* (1) has no bearing upon the present question. That case established that under certain circumstances one man may owe a duty to another even though there is no contract between them. If one man is near to another or is near to the property of another a duty lies upon him not to do that which may cause a personal injury to that other or may injure his property.

And Bowen L. J. says:

> Is there any duty known to the law in such a case as the present? It is said that *Heaven* v. *Pender* (1) and cases of that class show that the defendant had a duty to the plaintiff. It is idle to refer to cases which were decided under totally different aspects and upon totally different considerations of the law.

And A. L. Smith L.J. says (3):

> The decision in *Heaven* v. *Pender* (1) was founded upon the principle that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another, that if due care was not taken damage might be done by the one to the other.

(1) 11 Q. B. D. 503. (2) [1893] 1 Q. B. 491.
(3) P. 504.

The judgment of the Court of Appeal in *Hearen* v. *Pender* (1) and the principle upon which it proceeded as enunciated by the Master of the Rolls, affirmed as that principle has been in *Lelièvre* v. *Gould* (2), is a conclusive authority that in the present case, that principle is conclusive in favour of the plaintiff, if authority were necessary, that the servants of the defendants in taking the car in which the deceased, as appears in evidence, was, owed a duty to him to take care that the car should be moved with all necessary care and skill, the breach of which duty would constitute actionable negligence, from responsibility for which in the present case the defendants cannot escape unless their last contention can be adjudged in their favour, namely, that upon the answer of the jury to the fourth question submitted to them they are entitled to have judgment entered for them. The law, as now settled by the judgment of the House of Lords in *Smith* v. *Baker* (3), is that the maxim *volenti non fit injuria* has no application in the case of injuries occasioned by the negligent conduct of the defendants. It is unnecessary to inquire whether the very trifling evidence of consent, as extracted above, justified the finding of the jury that "the deceased voluntarily accepted the risks of shunting," but in view of the nature of that evidence, coupled with the finding of the jury that the death of the deceased was caused by negligence in the shunting, namely, in giving too strong a push to the car in which the deceased was, it is impossible to construe the finding of the jury in answer to the fourth question in any other way than that the deceased voluntarily incurred the risks attending the shunting of the cars in a careful and skilful manner. To construe the finding as that the deceased voluntarily incurred the risks of shunting however improperly, carelessly and negligently conducted would

(1) 11 Q. B. D. 503. (2) [1893] 1 Q. B. 491.
(3) [1891] A.C. 325.

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be utterly at variance with the evidence, with the plainest principles of common sense and with the principle as now firmly established by the judgment of the House of Lords as to the application of the maxim *volenti non fit injuria*; and as the jury have found that the death of the deceased was due to the negligence of the defendants in shunting the car in which the deceased was in a careless and negligent manner by giving to the car in which the deceased was a stronger push than was necessary, the verdict and judgment for the plaintiff must stand and the appeal must be dismissed with costs.

KING J.—It seems very clear that the operation of shunting the cars which occasioned the injury was directly under the control of the railway company's servants. For their own, as well as for the lumber company's purposes, in order to facilitate the carrying on of mutually advantageous business, the railway company sent their engines under the control of their own servants upon the lumber company's premises to take out such cars as the latter company might indicate, in order to their being put in course of transportation by the railway company. There is no reason at all for concluding that there was a loan by the railway company of its servants to the lumber company.

It seems also clear that the deceased was rightfully in the car. He was doing the work of his employers, the lumber company, counting and tallying the lumber which they had put in the car. It is said that the work of counting was finished before the accident took place. Asher, the fellow servant with deceased in the car, says that he himself had finished his count. Of the deceased, he does not seem sure: "I guess he had finished it; but he had not finished his work on the

tallies." This latter was incidental to the work of counting, and even although it might have been done afterwards the remaining in the car to finish it can not render his being there wrongful.

Then it is said that (apart from any question as to deceased being *volens*) the defendants owed to the deceased no duty or care, or at most only that of abstaining from reckless or wanton conduct. But when, for their own purposes, they chose to move the loaded car with the lumber company's servants in it, they owed to them a duty to exercise reasonable care to prevent injury to them. Such a duty is independent of contract. *Foulkes* v. *Metropolitan District Railway Co.* (1); *Sewell* v. *British Columbia Towing Co.* (2); *Meux* v. *Great Eastern Railway Co.* (3).

A duty to exercise reasonable care arises in the use of things dangerous to life, and the evidence clearly shows that the operation in question was dangerous to persons in the car.

The jury have found that there was a want of reasonable care in giving the car too strong a push. It is argued that there was no evidence of this. But a rate of speed was testified to which (although denied) was shewn to be excessive, and which, if it existed, was caused directly by the act of defendants' servants.

There was also evidence that as a result of the concussion the end of the car was bulged out by the shifting lumber. This also was some proof of excessive force

Then we come to what is really the most material point, viz: the effect of the finding of the jury that the deceased, knowing the danger, voluntarily accepted the risks of shunting. But what is meant by the "risks of shunting"? *Primâ facie*, the risks ordinarily

(1) 4 C. P. D. 267. (2) 9 Can. S. C. R. 527.
(3) [1895] 2 Q. B. 387.

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incident to the operation when performed with reasonable care and skill. The defendants, however, say that the question (as left and as passed upon) covered as well risks arising through want of reasonable care and skill in the operation. Undoubtedly they are entitled to rely upon any observations of the learned judge in his charge to the jury in explanation of the question submitted. And the learned judge said:

> Did the deceased, knowing the danger, voluntarily accept the risks of shunting? As I understand that, what are you asked to consider in regard to that is this, that the young man placed himself between these boards when he knew the car was to be put in motion, and did he apprehend, did he know, that there was danger, that he was in a position of peril from the liability of the car being put in too rapid motion, and that the result of the rapid motion would be in the concussion to cause the lumber to go together and so injure him and destroy his life? Did he, knowing nothing of the danger, having it before his mind, knowing the conditions which existed, voluntarily place himself in a position of danger and run the chances of the car being run too rapidly, of there being a concussion, of the lumber coming together and of the result which happened? Did he, knowing the danger, voluntarily accept the risk of shunting? If you think that he, knowing the danger that would arise from too rapid shunting of the car from a collision, from the moving of the lumber, knowing of that danger, voluntarily, of his own will accept the risks in staying in the car while the car was being shifted, then you will say yes. If you think he did not, then you will say no.

The learned judge himself thinks that the question did not cover the risks of negligence, and the several courts through which the case has passed are of the like opinion.

Now the operation of shunting a car, loaded as was this, was intrinsically dangerous to any one inside the car, that is to say, it was intrinsically dangerous notwithstanding the exercise of reasonable care and skill in the doing of it. Such inherent dangers were voluntarily assumed by the deceased. Is it found that he assumed further risks? The learned counsel for de-

fendants argue that it is because the learned judge pointed out, as an example of the risks, that of the car being run too rapidly, and it is argued that this implies negligence. But this is not necessarily so. A too rapid motion of the car might well happen notwithstanding the exercise of reasonable care. Where it is sought to put the deceased in the position of a consenting party to the omission of reasonable care in the doing of an act which, with reasonable care, was sufficiently dangerous, it ought to be presented clearly to the jury so that they might distinguish in their minds between the taking of risks ordinarily incident to a dangerous operation, and the taking of the added risks arising from want of reasonable care and skill.

Such a presentation was not made, and so the defendants cannot treat the finding as conclusively covering risks arising from their own want of reasonable care.

The defendants' counsel distinctly disclaimed any desire to seek a new trial (probably in view of the moderate damages assessed upon the present trial), and hence the expediency of seeking a more explicit finding upon the point was not presented.

Nor do I think that much would be gained by a new trial, for, from the simple facts of deceased's knowledge of the danger inherent in shunting, and that, in reply to an inquiry of defendants' servant having charge of the operation, as to whether the deceased wanted him to wait until the counting was finished, the deceased said to him not to wait, I think that a jury would hesitate very much before inferring that he foresaw and fully appreciated the risk of accident from the want of reasonable care, and voluntarily assumed to take such risks upon himself.

For these reasons, which do not differ from those presented by the learned judges who have heretofore

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had to deal with the matter, I think that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants: *Chrysler & Lewis.*

Solicitors for the respondent: *Kidd, Blanchet & Jones.*