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*April 14, 15.
*May 6

ROY H. STONE (PLAINTIFF) ..... APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS) ... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Company—Negligence—Contravention of statute—Protection of employees—Foreign car—Defective equipment—R.S.C. [1906] *c.* 37, *s.* 264, *ss.* 1(*c*).

The provisions of section 264, subsection 1(*c*) of The Railway Act which require every railway company "to provide and cause to be used on all trains modern and efficient apparatus" for coupling and uncoupling cars without the necessity of going between them is contravened by the use of a foreign car not provided with such "modern and efficient apparatus" in a train operated by a Canadian company, and the company using such car is responsible for any injury caused by the want of such equipment. A lever for opening and closing the knuckle of the coupler which is too short to be operated from the side ladder with safety is not "modern and efficient apparatus" under the above provision.

Where a brakeman on a car approaching another with which it was to be coupled saw that the knuckle of the coupler of the car he was on had to be opened and had only fifteen seconds in which to do it, being unable to signal the engineer to stop, took the only course open to him, which was a common one, and was injured he was not guilty of contributory negligence.

Fitzpatrick C.J. dissented on the ground that the plaintiff's negligence was the sole cause of the accident.

Judgment of the Court of Appeal (26 Ont. L.R. 121) reversed, Fitzpatrick C.J. dissenting.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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APPEAL from a decision of the Court of Appeal for Ontario(1) setting aside the verdict at the trial in favour of the plaintiff and dismissing his action.

The material facts in relation to the matter which are not in dispute may be shortly stated as follows:—

The plaintiff, a young man about 22 years of age, entered the employment of the defendants as brakesman in August, 1910, after being with the Canadian Express Company for five or six years and with the Grand Trunk Railway as brakesman. On the day of the accident, 18th March, 1911, he was engaged as brakesman on a freight train running between Toronto and Fraxa Junction, a short distance north of Orangeville, on the respondents' line and among the cars which made up this train was a foreign box or freight car belonging to the Wabash Railroad which was being returned empty to that company. This car was equipped with automatic couplers, it had the usual side ladders near the ends, but it had no ladders at either end. When the train arrived at Bolton Junction a car from near the centre of the train and attached to the Wabash car had to be uncoupled and left there. This was done and it was while the rest of the train was being coupled up again that the accident happened. The appellant went on the top of the Wabash car to signal the engineer and while there he noticed that the knuckle, *i.e.*, a portion of the automatic coupler attached to the Wabash car, was closed. For the purpose of opening the knuckle and while the car was travelling at a speed of about 7 miles an hour, he went down the side ladder in order to get hold of the lever or coupling rod by which the knuckle was opened. According to his own testimony the appellant went to the bottom of the ladder. His left foot was

(1) 26 Ont. L.R. 121.

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resting on the step below the ladder and he was holding on with his left hand to the lowest rung of the ladder, there being a space of about only 20 inches between them. While his right foot was in the air, he tried to reach round the end of the car with his right hand and attempted to raise the lever or coupling rod. While he was in this cramped or doubled up position the car passed over a crossover between the two tracks, the jar caused his foot to slip from the bottom step and he fell with his right arm beneath the wheels. The arm was badly crushed and had to be amputated at the shoulder.

The allegations in the Statement of Claim were that the side ladder from which the plaintiff fell was improperly placed and was insecure, that the car was not equipped with end ladders as required by the "Railway Act" and was not properly equipped with automatic couplers, in that the lever or coupling rod was too short, and to these defects the appellant attributes his accident.

The jury assessed the damages at $6,000 and the learned trial judge on their answers to questions submitted by him, entered judgment for that amount against the respondents, but this judgment was reversed by the Court of Appeal for Ontario, and the appellant's action dismissed on the ground that the accident was not caused by the short lever or want of end ladders, but was due to the plaintiff's own negligence.

Creswicke K.C. and *C. C. Robinson* for the appellant. Sub-sections 1(*c*) and 5 of section 264 of the "Railway Act," were passed for the protection of railway employees and should not be strictly construed if

so doing would defeat that object. See *Johnson* v. *Southern Pacific Co.*(1), at page 18; *Atcheson* v. *Grand Trunk Railway Co.*(2). Interpreting the words "of the company" in sub-section 5 as meaning "owned by the company" would defeat it.

The duty is imposed on the company of providing reasonably safe appliances for their employees. *Ainslie Mining and Ruay. Co.* v. *McDougall*(3); *Marney* v. *Scott*(4); and the jury have found that such duty was not observed in this case.

Hellmuth K.C. and *MacMurchy K.C.* for the respondents referred to *Barnes* v. *Nunnery Colliery Co.* (5); *Plumb* v. *Cobden Flour Mills Co.*(6).

THE CHIEF JUSTICE (dissenting).—I agree entirely with Mr. Justice Meredith. The appellant lost his balance and fell from the car after deliberately getting himself into an impossible position, and his own negligence in that regard was, in my opinion, the determining cause of the accident.

The appeal should be dismissed with costs.

DAVIES J.—In the final analysis of the evidence as to the facts and conditions under which the accident occurred, the question whether the appeal should be allowed seems to resolve itself into two, first, whether the plaintiff was guilty of contributory negligence in his attempt to work the lever attached to the coupler of the Wabash car so as to enable the couplers to connect, and, secondly, whether the find-

(1) 196 U.S.R. 1.
(2) 1 Ont. L.R. 168.
(3) 42 Can. S.C.R. 420.
(4) [1899] 1 Q.B. 986.
(5) [1912] A.C. 44.
(6) 29 Times L.R. 232.

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ings of the jury negative this contributory negligence on the one hand, and can be fairly construed as imputing negligence to the defendants which caused the accident, on the other.

To find the plaintiff guilty of contributory negligence under the circumstances, it is not sufficient to find that he erred in judgment at the supreme moment when action was promptly required from him. He may have acted unwisely and imprudently in attempting to hang on to the ladder with one hand, clinging to the rung of the ladder immediately above the lower step on which one only of his feet was placed, and with crouching, bent body, reaching round the end of the car to get hold of and work the lever. The result places it beyond doubt that his judgment was faulty and his action dangerous. But I take it the question is not whether his judgment in the moment calling for instant action was prudent or otherwise, but whether it constituted gross carelessness.

It seems beyond reasonable doubt that if the lever had been long enough to reach the side of the car or nearly so, the method he adopted of going down the side ladder and operating the lever from it would have been quite safe. It was the shortness of the lever which compelled him to crouch and bend himself so as to give his arm a long reach and thus make up for the shortness of the lever. He had 15 seconds within which to stop the car. If the lever had been of the same length as those on the ordinary C.P.R. cars, it does not seem doubtful that he would have safely worked it. The extra reach to get hold of the short handle made his position perilous and the jar of the car in passing over the crossing of two tracks caused his foot to slip from the lower rung of the ladder and he fell with his arm under the car wheels.

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The plaintiff's evidence is that the lever was only about 16 inches long, bringing its length to about 2½ feet from the side of the car. The defendants' witnesses, who inspected the car, but did not measure the lever, say it was about 2½ feet long, which would bring its end to about 16 inches from the side of the car. No witness on either side suggested it came within 15 inches of the side of the car. The jury, in answer to questions 5 and 6, say the plaintiff was injured in consequence of defects in the make up of the car, and that the car lacked the ladder on the end and the *long lever equipment* used by the defendants on their cars. They do not find specifically the actual length of the lever, but they find its shortness, or want of normal length, was one of the defects which caused plaintiff's injuries. I do not attach importance to the absence of the end ladder because under the circumstances with the rapidly approaching cars it seems obvious that it would have been dangerous and against good practice for him to have used an end ladder and so placed his body between the approaching cars.

It does seem to me that it was at least open to the jury to accept plaintiff's evidence on the length of this lever, and that at any rate they could find it was not the *long lever equipment* used on the Canadian Pacific Railway cars, and which doubtless experience had shewn was necessary in order to comply with the requirements of the statute.

They further find in answer to question 3, that as plaintiff had not received circular No. 4, he acted as he did to the best of his knowledge, and in answer to question 7, that he could not, under the circumstances, by the exercise of reasonable care, have provided for the coupling of the cars with safety to himself.

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It is true that they do not give any answer to the specific question No. 8, whether they found negligence as to the matters in dispute, (*a*) in the Canadian Pacific Railway Co., or (*b*) in the plaintiff. But finding generally that the car and its fittings were not reasonably safe in the respects they mention for the employees in the usual operations of the road; that the plaintiff acted, not having received circular No. 4, to the best of his knowledge; that he was injured in consequence of defects in the make up of the car, and that what they found to be wrong was the absence of end ladder and "the long lever equipment used by the Canadian Pacific Railway," and that plaintiff could not, by the exercise of reasonable care, have provided for the coupling of the cars with safety to himself; they may have concluded that further specification of negligence in either party was unnecessary, and would only involve repetition of their previous answers.

It seems to me that these findings, read in connection with the charge of the Chancellor, negative contributory negligence of the plaintiff on the one hand, and find negligence in the defendants which caused the accident on the other.

I may remark that the alternative course which was open to the plaintiff when he discovered that the knuckle of the coupler of the Wabash car was closed, was, from his place on the top of the car, to signal the engineer to *stop the train.* He says he did not do so because the engineer was not looking. The engineer was not examined, and there is no conflict of evidence on that point. The course he took in going down the side ladder and attempting to operate the lever from it was a perfectly safe one had the lever been the ordin-

ary length of those in use on the Canadian Pacific Railway cars, that is, a length which would enable the brakesman to operate it without being under the necessity of placing at least a part of his body between the cars.

The statutory requirement as to trains is found in section 264 of the "Railway Act," which reads:—

> Every company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means:—
>
> * * * * *
>
> (*c*) to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars.

This sub-section evidently requires such apparatus and appliances as will enable the couplers to be efficiently operated without the necessity of men going between the cars.

It was argued that this lever of the Wabash car was sufficiently long to enable such purpose to be accomplished when the cars were not moving, in other words, that the brakesman could have opened the knuckle of the coupler which was closed, and so enabled the cars automatically to be coupled without going between the ends of the cars, and that no doubt is so. But the question comes back to the one I started with: Was the plaintiff, when he found he could not convey to the engineer a signal to stop the train because that officer was not looking, guilty of gross negligence or "inviting disaster," as one of the judges in the Court of Appeal pointedly puts it, by attempting to reach the lever in the manner and at the time and under the circumstances he did? Was he guilty of gross negligence in his attempt or only of an error

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of judgment at a moment requiring prompt and instant decision and action ?

The answers of the jury taken as a whole placed the blame for the accident on the inefficiency of the lever on account of its shortness, and must be taken to have absolved the plaintiff from contributory negligence.

I have not reached my conclusions without much doubt, founded in part on the absence of specific answers to question 8, and in part on the reasonings of the learned judges of the Court of Appeal which were ably supported at bar. But I feel myself bound by the construction I place upon the findings of the jury as I interpret them, and upon the conclusion I have reached that sub-section (*c*), of section 264, is applicable to the Wabash car which formed part of the defendants' train and which was found inefficiently equipped in not having the long lever equipment used by the Canadian Pacific Railway Co. on its own cars.

I, therefore, concur in allowing the appeal and restoring the judgment of the trial court, with costs.

IDINGTON J.—The appellant was a brakesman on one of the respondents' trains engaged in shunting cars at one of their stations. He was on top of a self-coupling car being moved backward to be connected with another car standing on the track. He descended the side ladder of the car on which he was, in order to reach the lever by which the knuckle might be opened or pin raised of the coupler or part thereof attached to his car so as to prepare it to receive and connect with the part of the coupler on the other car towards which his train was moving at a rate of about seven miles an hour.

He put his left foot in the step which projected

below the bottom of the car, seized a rung of the ladder with his left hand and attempted with his right hand to reach the lever which was unusually short, but failed to reach it, and whilst in this attitude the car crossed a part of the crossing of the tracks which gave a jolt or jar and he fell and then his arm was run over. The arm had to be amputated near the shoulder. This action was brought for the resultant damages. It was tried before the Chancellor, who refused to nonsuit and submitted to the jury a number of questions; and upon their answers thereto he entered judgment for appellant.

The Court of Appeal dismissed the action. Some difficulty is experienced in trying to harmonize the several reasons assigned therefor, and I shall not attempt to analyze same. Broadly speaking they may, I think, be properly described as attributing the accident to the alleged unjustifiable conduct of appellant in attempting to do what he did.

Incidentally to the determination thus reached the interpretation and construction of sections 264 and 317 of the "Railway Act" are dealt with in such a way as to render it more easy to reach a conclusion that the appellant is solely blameworthy for the accident. It is important for that reason to settle, if possible, the questions thus raised.

Under the caption in said Act of "Operation—Equipment and Appliances for Cars and Locomotives," appears, first, section 264, intended to be chief part of an efficient code for the purposes indicated.

This section enacts:—

264. Every company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means:—

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(*c*) to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars.

And then, after sub-sections 2, 3, and 4, follows sub-section 5, as follows:—

5. All box freight cars of the company shall, for the security of railway employees, be equipped with:—

(*a*) outside ladders, on two of the diagonally opposite ends and sides of each car, projecting below the frame of the car, with one step or rung of each ladder below the frame, the ladders being placed close to the ends and sides to which they are attached; and

(*b*) hand grips placed anglewise over the ladders of each box car and so arranged as to assist persons in climbing on the roof by means of the ladders;

Provided that, if there is at any time any other improved side attachment which, in the opinion of the Board, is better calculated to promote the safety of the train hands, the Board may require any of such cars not already fitted with the side attachments by this section required, to be fitted with the said improved attachment.

Sub-section 6 enables the Board to deal with draw-bars, and sub-section 7 provides as follows:—

7. The Board may upon good cause shewn, by general regulation, or in any particular case, from time to time, grant delay for complying with the provisions of this section.

It is attempted to distinguish the effect of sub-section 5 from the rest of the section by reason of the use of the expression therein "of the company." It is pointed out that the word "trains" is used in some of the earlier sub-sections and that, therefore, this expression "of the company" must mean something else, though the entire sub-section is, as if to emphasize the very contrary, being enacted expressly "for the security of railway employees."

I can hardly appreciate how "the security of railway employees" is to be obtained in relation to cars that do not form part of a train and that in motion. When cars stand still there would not seem to be much

need for securing employees or any one else against their defects.

It does not appear in the reasons given exactly how such security is to be attained anywhere else than where the cars are in motion and forming part of a train. It is said, however, that cars are exchanged with foreign roads which may not be so equipped, and we are referred to section 317 providing for a foreign traffic.

There is not a word therein or elsewhere in the Act shewing any discrimination is to be made between such foreign and the domestic cars in relation to the security of the employees in this regard. Indeed, section 317 is entirely devoted to another object and purpose.

The sub-section 7, of section 264, may or may not enable such discrimination, but if it does not there is none possible. And there is no pretence made that the said power has ever been exercised in the premises. There is no possibility of pretending that by section 317 or otherwise than by said sub-section 7 has the Board or any one else authority to suspend in favour of such foreign cars or use thereof, the provisions of this statute for the security of the employees.

The more the extent of the use of foreign cars is magnified, as it is impliedly in the argument put forward, the less justification is there for importing such an invasion of this security the statute was designed to provide.

If exception had been attempted in the case of other Canadian railways whose cars had failed to obey the statute, then it might have been argued with a degree of plausibility that the penalties of the Act imposed by section 386 must be held to be the only

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mode of relief, inasmuch as interchange of cars and traffic are made obligatory. I do not think that would be tenable, and no one has been bold enough to so argue.

But why exemption should be made in favour of foreign cars of which the owners could not be subjected to such penalties, is something I cannot understand if employees are needing and are to get protection.

The distinction, I respectively submit, is quite unwarranted. When one reflects upon the rapidity of judgment needed to be exercised by these employees in a variety of ways their situation so often calls for in discharge of their duties, it is not to be supposed in face of such legislation that it was ever intended that judgment was to be needlessly confused by considerations of the different rules to be applied to the nationality or kind of cars in relation to which it has to be exercised.

I think the statute applies and must be held to apply to all cars in all trains, including such combinations of locomotives and cars as the statute constitutes a train in a yard or elsewhere.

Now, what did this statute require, which, according to the interpretation I have given it, related to the cars and train in question ?

It required modern appliances and these must, it is conceded, be progressively so modern as to keep pace with modern invention and known utility.

This Wabash car in question herein had the semblance of an automatic coupler, but it failed so lamentably in placing the lever which was to open or close it that it did not come up to the standard which the respondent and others had adopted before this accident.

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On any view one may take of the matter the antiquated appearance of the appliances on this Wabash car as compared with those in use by their own company, before the eyes of the inspectors of respondent, ought to have arrested their attention.

Instead of their inspection being, as the reasons assigned by the Court of Appeal suggest, a means of shielding the respondent, the neglect of these inspectors and of those who permitted them to act, on their own responsibility in such matter, instead of directing their attention to the statute and its requirements furnishes the condemnation of the respondent in this regard so far as it bears on the issues raised herein.

Then it is said that the provision of the section relative to the coupling or uncoupling of cars had only a bearing upon an operation to take place by the hands of some employee standing upon the ground, and not on the car or a ladder or platform of any kind attached to a car.

No one has been able to say so as a witness. Some of them seemed adroit in way of answering carefully framed questions to indicate that in certain emergencies this or that mode of doing something in relation to such a proceeding as coupling or uncoupling of cars, might be bad practice. But no one pretends that the raising of the lever in itself by a man standing on a ladder of a moving car, would in every case and of itself be bad practice.

These couplers may, it seems, so get out of order or be so misplaced as to require adjustment, and that the employees are warned against (though this man was not) doing when the cars are in motion.

But what the appellant attempted is nothing of that kind. It might be that the coupler in question

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needed such adjustment, but no one pretends such ever was discovered to be the fact. If it had been, no doubt, it would have been proven herein as giving some semblance of excuse or means of blaming the appellant.

Having read the entire evidence in the case I agree with the following extract from the judgment of Mr. Justice Magee in the Court of Appeal:—

> It is, I think, clear from the evidence, that it was customary for brakesmen to operate the levers from the ladders while the cars were moving. It had been done only a few moments before by the other brakesman opening the coupler of the adjoining car to make a flying shunt. The conductor says it was quite customary, and he would not think of reporting a brakesman for doing it, and had never told any one not to do it. The general yard-master, called for the defendants, states that the lever can be operated from the side-ladder.
>
> It is sought to draw a distinction between operating the lever on a moving car in order to uncouple, and doing so in order to couple. But the plaintiff states, and he is not contradicted, but indeed borne out by other evidence, that he had plenty of time to do what he was going to do and get around to the side out of the way before the cars would couple. Really all he proposed doing was operating the lever on a moving car. Nowhere do I find that to be forbidden. It was argued that this was contrary to the defendants' circular No. 4 of 15th February, 1911, which, however, the jury find the plaintiff not to have notice of. That circular forbids "all acts familiarly known as taking chances," and it calls attention to accidents which had occurred "solely by carelessness on the part of some employee, such as," *inter alia*, "adjusting coupler * * * when cars are in motion." But Mr. Hawkes, the defendants' yard-master, expressly states, as one might expect, that opening the knuckle by the operating lever is not "adjusting the coupler." That circular naturally enough puts "adjusting coupler" in the same category with "turning angle-cock or uncoupling hosebags"—all which would have to be done by going between the cars on the ground. But the circular is luminous in respect of several operations. Thus it refers to "accidents from holding on side of car," but only "when passing platform, building or other obstruction, known to be close to track;" "kicking cars into sidings," but only where other cars are standing; and "detaching moving cars" without first seeing to the brakes being in order. This last instance impliedly recognises the practice of detaching moving cars if only

the brakes are in order. The plaintiff was injured in an operation not a whit more dangerous than those which are here impliedly recognised, and not at all one which involved the danger of going between cars.

The appellant was attempting to do just what this practice so referred to justifies. In hopes of averting a mishap likely by reason of both parts of the coupler, that on the Wabash car and that on the car to be connected with it, being closed, he tried to reach and raise the lever to open the one on the Wabash car on which he was. He swears that this, if done, would have enabled successful connection, and he is not contradicted in regard thereto, or the possibility of its accomplishment by the means he tried.

What Mr. Justice Magee condemns, and the sole reason for his judgment being adverse to appellant, is that appellant took such a position in his attempt that the overbalancing of his body, which he thinks was the direct result thereof, disentitled him to succeed.

It seems he, standing with one foot on the stirrup part (if I may so call it) of the ladder, holding on by a rung of the ladder twenty inches or more above that, had to bend down and thus be placed in an insecure position and be liable to be jerked off, as he was.

There was nothing impossible in such a feat. It was necessary to so bend down to reach the lever, or try to reach it.

And if he failed, whose fault was it ? The utmost that is said is that his doing so was bad judgment. That is the evidence of the respondent's own man called to testify as an expert. I respectfully submit he and appellant, as well as some of the jury, evidently knew a great deal more of the nature of the feat attempted, than some others possessed of higher gifts of another sort.

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When was error of judgment converted in law into either recklessness or negligence ?

Who invited him to so act ? Who imposed upon him the duty of exercising a judgment determining how far he should venture ? Who placed before him the necessity for his attempting such a thing and made for him the trap into which his misjudgment led him ?

If the practice of the men and the masters placed in charge by respondent did not shew that they felt it was no more than a question of judgment, then surely the use by respondent of such a defective and illegal lever as this one in question did invite him, and as result of its use impose upon him the duty of determining how far he ought to venture to avert the damage likely to happen to respondent's property.

The respondent violated the statute in carrying such a car so equipped that the lever could not be reached without this undue straining of appellant to serve his master. There is not a word in the statute requiring the operation, needed to work such couplers, to be done when standing on the ground, or to indicate the protection was solely intended for such cases. Invention might well reach the point of making it with greater safety on a car than on the ground.

If the longer kind of lever used on other cars built and run by respondent had been placed on this Wabash car then there would have been no necessity for appellant running any risk. If even one of a shorter description than those of this latest pattern had been on said car, there would have been little risk.

And if there had been a ladder on its end as required by said sub-section 5, of section 264, the operation needed could have been executed with the short

lever. Of course, the operator in such case would have had to act with such promptness that the act of drawing it would be over and the operator straightened up or back to the top before the two cars being connected had met.

The respondent had equally violated the statute in carrying as part of its equipment on this train a car which had no ladder properly placed on the end of the car as required by the statute. That violation is perhaps not so clearly as the other a possible basis for this action. If there had been, however, no such violation of the law, the means of averting the consequence of the other violation of law would have had to be considered if the facts had presented such a case. The appellant, or any one so situated as he, would be bound to use that ladder so far as practicable as a means of mitigating the risks to be run in handling a car so defectively equipped in regard to the lever.

The point made by Mr. Robinson in his brief argument so admirable for its precision and direct bearing on the issue raised by a consideration of these subsections in their relation to each other, was well taken, and the authority of the case of *The "Arklow"* (1), at page 139, which he cited, is as undoubted as the principle of law involved therein. The violating of a statute bearing on the duty of a railway company may well have *primâ facie* the like results as attendant upon the violation of a statutory rule of navigation though the consequences as to measurement or apportionment of damages may not apply.

The reasonableness or unreasonableness of the effort made by appellant to operate with such defects has been passed upon by the jury, and I hold the Chan-

(1) 9 App. Cas. 136.

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cellor was quite right in submitting that question to the jury, and the Court of Appeal wrong in overruling such submission and direction.

Much might be said of the failure to instruct by means of the circular No. 4. If it aimed at anything such as appellant is said to have mistakenly done, which I do not think it did, then that clearly had been brought to the notice of the respondent's authorities a month before, and the need for directing regarding it and to stop what had become recognized practice by its employees.

It was the duty of the company to have seen to it, under such circumstances, in such a case that such practices as it describes should cease, and that a copy of the circular was duly delivered, especially in the case of men comparatively new to its service.

The appeal should be allowed with costs here and in the Court of Appeal, and the judgment of the trial judge be restored.

DUFF J.—The jury found in effect that the coupling equipment did not conform to the statutory requirements and that the accident was due to this deficiency. I think there was abundant evidence to support this finding. As to contributory negligence:—I think the jury may not unreasonably have thought—assuming the appellant in the circumstances in which he found himself on descending the ladder to be chargeable with an error of judgment—that he was not fairly chargeable with the graver fault of recklessly or thoughtlessly exposing himself to unnecessary risk.

ANGLIN J.—The plaintiff appeals against the judgment of the Court of Appeal for Ontario setting aside

the judgment in his favour entered by the learned Chancellor of Ontario on the following findings of a jury:—

1. Was the car in question owned by the C.P.R. or by another company?

Owned by another company.

2. Was the car and its fittings reasonably safe for the employees of the C.P.R. in the usual operations of the road?

We think not.

3. Was the plaintiff, having regard to all the circumstances, in his method of arranging the gear for coupling the cars, acting according to good and proper practice?

Not having received circular No. 4, we think he acted to the best of his knowledge.

4. If not, wherein did he err?

5. Was the plaintiff injured in consequence of any defect in the make-up of the car?

Yes, in our opinion we think he was.

6. If he was so injured state everything which you find to be wrong.

The car in question lacked the ladder on end of car and long lever equipment used by C.P.R., in which company he was employed.

7. Could the plaintiff by the exercise of reasonable care have provided for the coupling of the cars with safety to himself?

In our opinion, not under the circumstances.

8. Do you find negligence as to the matters in dispute:

(*a*) In the C.P.R.

(*b*) In the plaintiff.

(*c*) Or, in both of them?

9. If so, state briefly what was the negligence in each case.

10. If the plaintiff is entitled to damages, state how much.

The jury have agreed on $6,000 for damages for plaintiff.

The Court of Appeal held that the evidence did not establish any negligence or breach of statutory duty on the part of the defendants, but did clearly establish that the plaintiff's injury was attributable solely to his own fault.

I concur in the opinion of the Court of Appeal that, on its proper construction, sub-section 5 of section 264, of the "Railway Act," does not apply to foreign

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cars being hauled on Canadian railways in the ordinary course of, or as a result of, interchange of through traffic with foreign railways. But, I think, the provisions of clause (*c*) of sub-section 1 of that section apply to foreign cars equally with domestic cars when they form part of a railway train subject to the jurisdiction of the Parliament of Canada. That clause reads as follows:—

> 264. Every company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means:—
>
> * * * * *
>
> (*c*) to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars.

Although the words "without the necessity of men going in between the ends of the cars" grammatically qualify only the verb "can be uncoupled," the same requirement is introduced with regard to the operation of coupling by the qualifying phrase "automatically by impact." Having regard to the means provided for preparing the coupler to operate automatically, viz., a lever extending from it towards the side of the car—and to the fact that it is necessary to use this lever to open the knuckle of the coupler on one of the cars to be coupled whenever both knuckles are closed, in order to permit of their automatic operation, the statute, on its proper construction, requires that the lever shall be of sufficient length to permit of its being effectively used—whether in coupling or uncoupling—without the necessity of men going in between the ends of the cars. The jury has found that the "make-up" of the car in question was defective in that it "lacked the * * * long lever equipment used by the Canadian Pacific Rway. Co., in which company he (the plain-

tiff) was employed." The jury further found that the plaintiff was injured in consequence of that defect.

According to the evidence of the plaintiff, the lever was about 16 inches in length, so that he had to reach 32 inches in from the side of the car to touch it. According to the evidence of the defendants' witnesses the lever was about 32 inches in length and came to within about 16 inches of the side of the car. Harry Bogardus, Grand Trunk Car Inspector at Allandale, said that the lever "should run from the coupler out to the side of the car." John Hood, C.P.R. Inspector at West Toronto, said, "I guess if it came to the edge of the car it would be better. * * * Yes, it should come to the edge of the car." Wm. Lillew, leading Hand-car Inspector at Toronto Junction, in answer to Mr. Creswicke's question, "And you agree with Mr. Hood that the lever should really come out to the side of the car for better safety, you agree with his evidence?" said, "I agree with his evidence all right enough." Modern Canadian Pacific Railway cars are constructed with the lever coming out to the side. On some of the older cars the position of the buffers prevents this, but according to the evidence of John Hood, "taking the Grand Trunk and the C.P.R. and the ordinary trunk lines from the other side," the usual distance of the lever from the side of the car would be 7 or 8 inches. On the Wabash car in question, according to the evidence of Wm. Lillew, the lever could have been brought without difficulty to within 8 inches of the side — *i.e.*, 8 inches farther out than it was brought according to the evidence of the defence witnesses, and 24 inches farther out than it was brought, according to the evidence of the plaintiff. All the witnesses who were

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questioned on the point admitted that "the shorter the lever the greater the danger." John Hood stated that if the lever were as short as the plaintiff said it was it would be so improper that the company would have to change it. It is not surprising, in view of this evidence, that the jury found that the equipment of the car with such a short lever was a defect; and by that finding, having regard to the facts that it is coupled with the finding as to the lack of end ladders, and that negligence proper was covered by the eighth question which the jury did not answer, I have little doubt that they meant that the lever on the car was not in conformity with the requirements of the statute, in that it did not obviate the necessity of men going between the cars for the purpose of operating the so-called automatic coupler. A finding of negligence on the part of the defendants is probably involved in the finding of such a defect; but a finding of negligence is not requisite where a breach of statutory duty causing the injury complained of has been established. Such a breach of statutory duty has been found in the present case, as I understand the answers of the jury — and, I think, upon sufficient evidence. Unless, therefore, the evidence makes it so clear that the plaintiff was himself guilty of some negligence or improper act which was the sole or a contributing cause of his injury that a finding to the contrary would be perverse, the verdict in his favour should not have been disturbed.

The defendants charge that it was improper to have attempted to work the coupling lever from the side ladder of a moving car; and that, if this were permissible under any circumstances, the crouching position which the plaintiff assumed to perform the opera-

tion — with his left hand he clutched the bottom rung of the ladder; his left foot rested on a step some 16 inches to 18 inches lower; his right foot hung in the air, and his body was strained forward and swung around the end of the car to permit of his right hand reaching the short lever to open the knuckle of the coupler — entailed very great and unnecessary danger.

On these issues the jury found in the plaintiff's favour. While the terms in which they couched their finding — that the plaintiff could not under the circumstances, by the exercise of reasonable care have provided for the coupling of the cars with safety to himself — have been made the subject of criticism because of the use of the somewhat equivocal words "under the circumstances," I incline to think that the jury made sufficiently clear its intention to acquit the plaintiff of the charge of contributory fault or negligence — and, of course, to negative the view that his injury was ascribable solely to his own fault. Notwithstanding this finding, the learned judges of the Court of Appeal have held that the plaintiff's own carelessness was the main, if not the sole, cause of his injury, and have reversed the judgment in his favour and dismissed the action. With great respect, I am of the opinion that the evidence did not warrant the appellate court in taking that course.

The faults attributed to the plaintiff are (*a*) that he attempted to make the coupling without stopping the train; (*b*) that in endeavouring to make it he assumed an unnecessarily dangerous posture.

(*a*) According to the evidence, to effect a coupling between cars equipped with automatic couplers, the knuckle in the coupler of one car should be open and that in the coupler of the other closed. With both

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knuckles closed the coupling cannot be made, and if the cars come together with the knuckles in this position, although with a momentum which might not be too great with the couplers in proper position, it was stated by counsel for the appellant that there is a probability of the couplers being broken. There is no evidence, however, on this latter point. With both knuckles open the attempt to make a coupling is only occasionally successful.

While the plaintiff admittedly knew, before he gave the engineer the signal to back the train from the freight sheds for the purpose of making the coupling, that the knuckle on the Wabash car was closed, his evidence, though not as explicit as might be desired, is open to the construction that he did not then know that the knuckle on the stationary car, with which the Wabash car was to be coupled, was also closed. It is not suggested in the evidence that he should have known or ascertained how this was before he signalled to the engineer to back up in order to make the coupling. He says he discovered the fact after he had reached the top of the Wabash car which was moving at about 7 miles per hour and was then about four car lengths from the stationary car — a distance which would be covered in about 15 seconds. Asked why he did not then give a signal to the engineer to stop, his reply was "he was not looking — that is why he did not get one." While there is no charge of negligence against the engineer, there is no contradiction of this evidence. There is evidence in the record from defence witnesses as well as from witnesses for the plaintiff, that it is usual and customary for brakesmen to open the knuckles of automatic couplers for coupling as well as for uncoupling, by operating the levers from

the ladders when cars are in motion, and that a lever coming out to the side of the car can be operated from the side ladder "without any trouble."

The defendants proved the issue of a circular warning their employees against the "adjusting" of couplers while cars are in motion. Some witnesses deposed that it was the previous "unwritten law" that this should not be done. But the plaintiff, who was not a regular brakesman, had not received this circular; and the witnesses for the defendants prove that opening the knuckle of a coupler by using the lever is not "adjusting" the coupler within the meaning of that term as used in the circular. That process is resorted to only when the lever fails to work. It involves going between the cars and handling the coupler itself. Hence the prohibition. This adjusting or handling of the coupler is what two of the defence witnesses pronounced dangerous; and, when pressed on cross-examination, the defendants' witnesses constantly revert to "adjusting" as the dangerous and forbidden thing. There is no suggestion in the evidence of any specific rule of the defendant company relating to the operation which the plaintiff was performing other than that contained in circular No. 4, and the so-called "unwritten law" which preceded it, forbidding the "adjusting" of couplers on moving cars. What the plaintiff was doing was not "adjusting." The general rule against taking chances is referred to. But the evidence is that it is customary, and necessary, for certain purposes, for brakesmen to ride on the side ladders of moving cars, and that it is usual to operate the levers of automatic couplers from them. The conductor, Harcourt, called by the defendants, says he would not report a brakesman under his orders for doing so.

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There is no evidence that the plaintiff knew of the shortness of the lever until he attempted to reach it from the side ladder with his right hand. On the whole evidence, in my opinion, it is not possible to say that the plaintiff's attempting to open the knuckle of the coupler while the train was in motion was so clearly a wrong or improper thing that it is fatal to his right to recover notwithstanding that the jury has found in his favour on the charge of negligence against him. On this branch of that charge there was evidence to support the finding, and it should not have been disturbed.

(*b*). Then as to the plaintiff's position when he endeavoured to operate the lever: On reaching the foot of the ladder and realizing that the lever was short he was confronted with a situation of some difficulty. Had the lever been of normal length, the defendants' witnesses say that he could easily have accomplished what he intended to do. The car on which he was was moving at the rate of 7 miles an hour. He scarcely had time to get down and open the knuckle from the ground even if he could descend with safety, or, having got down, could reach and operate the lever while the car was moving as rapidly as it was. The defence witnesses do not say that he could not, as a result of crouching as he did, swing his free right arm farther around the end of the car. That may have been, for aught that the testimony discloses to the contrary, if not the only, the most effective means of reaching the short lever. There is no evidence that the fireman was then on the locomotive or that the plaintiff could have signalled him to stop. He was on the wrong side of the train to signal the engineer. When he had left the top of the car the engineer was not looking in his

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direction. Should he have acted on the chance that if he again mounted the ladder he might find the engineer looking and might successfully signal him in time to have the train stopped before the cars would come together? Should he have attempted that, or allowed the cars to meet at whatever risk there might be of breaking the couplers because both were closed? Was it clearly wrong for him under the circumstances to have attempted to operate the lever of the coupler with his right hand by swinging it around the end of the car? In the effort to reach that lever he assumed a position which railway men condemn. But there is no evidence that he could have reached it had he held himself more erect. The objection which the defence witnesses take to the position which he assumed is that it was so strained that it could be held "only for a short distance." But the moving of the lever would require the plaintiff to remain in that position only for a moment. He was an athlete, 22 years of age. Whether he should have realized that he was incurring risk and to what degree was eminently a question for the jury who had the advantage of seeing him. If he did err in the judgment which he formed on the spur of the moment as to what his duty required him to do, it was again for the jury to say whether that error under the circumstances amounted to negligence or fault on his part. They found that it did not. I have failed to discover in the record sufficient to justify an appellate court in setting aside that finding and holding that the evidence clearly establishes that the plaintiff was so negligent that he should be held to have been the author of his own injury notwithstanding the contrary opinion of the jury.

They are the tribunal entrusted by the law with the determination of issues of fact, and their conclusions on such matters ought

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not to be disturbed because they are not such as judges sitting in courts of appeal might themselves have arrived at. *Toronto Railway Co.* v. *King* (1), at page 270.

With great respect for the distinguished judges of the Ontario Court of Appeal, I would for these reasons allow this appeal with costs and would restore the judgment entered by the learned Chancellor upon the verdict of the jury.

BRODEUR J.—I concur with Mr. Justice Anglin.

Appeal allowed with costs.

Solicitors for the appellant: *Creswicke & Co.*

Solicitors for the respondents: *MacMurchy & Spence.*

(1) [1908] A.C. 260.