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*Mar. 25.

*May 6.

THE CANADIAN RAILWAY ACCIDENT INSURANCE COMPANY (DEFENDANT)..... .... } APPELLANT;

AND

LOUISA McNEVIN (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Amount in controversy—Interest before action—60 & 61 V. c. 34, s. 1 (c)—Accident insurance—Baggageman on railway—Conditions in policy—Hazardous occupation—Voluntary exposure to unnecessary danger.

A judgment for $1,000 damages with interest from a date before action brought is appealable under 60 & 61 Vict. ch. 34, sec. 1 (*c*).

An accident policy issued to M., who was insured as a baggageman on the C. P. Ry., contained the following conditions: "If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, his insurance shall only be for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard." (There was no classification of "exposure" by the company). "This insurance does not cover * * * death resulting from * * voluntary exposure to unnecessary danger." M. was killed while coupling cars, a duty generally performed by a brakesman, whose occupation was classed by the company as more hazardous than that of a baggageman.

Held, (Davies J. dissenting) affirming the judgment of the Court of Appeal (2 Ont. L. R. 521) which sustained the verdict for plaintiff at the trial (32 O. R. 284) that as he was only performing an isolated act of coupling cars, the insured was not injured in an occupation classed as more hazardous under the first of the above conditions.

Held also, that as the evidence showed that insured was in the habit of coupling cars frequently, and therefore would not consider the operation dangerous there was no "voluntary exposure to unnecessary danger" within the meaning of the second condition.

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* PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgments at the trial in favour of the plaintiff (2).

The material facts are sufficiently stated in the above head-note and in the judgments given on this appeal.

Nesbitt K.C. and *Fripp* for the appellant.

Aylesworth K.C. and *McGarry* for the respondent.

Aylesworth K.C. for the respondent, moved to quash the appeal for want of jurisdiction. The damages were $1,000 with interest from the date of insured's death. Under 60 & 61 Vict. ch. 34 sec. 1 (*c*) the amount necessary to give the court jurisdiction is over $1,000 and interest cannot be added to make the damages sufficient.

The court held that the judgment showed jurisdiction on its face. It was claimed, also, that $159 paid into court reduced the amount in dispute below $1000. As the court had decided on dismissing the appeal they did not deal with this contention.

Nesbitt K.C. and *Fripp* for the appellant. Insured was killed while performing a brakesman's duty. If he had been insured as a brakesman the limit of his policy would have been $500 and the premium $29 per $1,000. It is inequitable that he should recover $3,000 for which he paid at a much lower rate. See *Aldrich* v. *Mercantile Mutual Accident Association* (3).

Insured volunteered to do the coupling and it was therefore a voluntary exposure to danger. *Tuttle* v. *Travellers Ins. Co* (4); *Neill* v. *Travellers Ins. Co.* (5).

Aylesworth K.C. and *McGarry* for the respondent referred to May on Insurance, (3 ed.) p. 1228, par. 532; *Stone's Administrators* v. *United States Casualty Co.* (6).

TASCHEREAU J.—An objection to our jurisdiction in this cause has been taken by Mr. Aylesworth on the

(1) 2 Ont. L.R. 521.
(2) 32 O.R. 284.
(3) 149 Mass. 457.
(4) 134 Mass. 175.
(5) 12 Can. S.C.R. 55.
(6) 34 N.J. (L.R.) 371.

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ground that the amount in controversy before us does not exceed the sum of one thousand dollars; *City of Ottawa* v. *Hunter* (1). The judgment appealed from is for one thousand dollars with interest from a date anterior to the issue of the writ, so that on its face the appeal from it involves an amount sufficient to give us jurisdiction.

It is however contended for the respondent that as the appellant company offered by their pleas and deposited in court a sum of $159 in satisfaction of the plaintiff's claim, the pecuniary amount in contestation before us is reduced to a sum less than one thousand dollars. This is so, it is conceded, as a matter of figures, if, as the respondent contends, that sum of $159 is to be considered as deducted from the amount of the judgment. The case of *Tintsman* v. *The National Bank* (2), (see also, *Hilton* v. *Dickinson* (3), in the United States Supreme Court,) seems in point, and would, perhaps support the respondent's contention, though it might be possible to distinguish it. The question is not free from difficulty. However, as we have come to the conclusion that the appeal should be dismissed upon the merits, it need not be solved here.

Now, as to the merits. The appeal is from the judgment of the Court of Appeal for Ontario (4), affirming, by an equal division of opinion, among the learned judges the judgment of the trial judge in favour of the respondent, reported at 32 O. R. 284.

The respondent brought this action as beneficiary named in a policy of accident insurance issued by the appellant to her son, Alexander McNevin, deceased, to recover the sum of $1,000, amount of the said policy, with interest thereon from the twenty-seventh day of August, 1900.

(1) 31 Can. S. C. R. 7.
(2) 100 U. S. R. 6.
(3) 108 U. S. R. 165.
(4) 2 Ont. L. R. 521.

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The defence to the action was based entirely upon the two following conditions of the policy within which it was sought by the appellant to bring the facts connected with the death of the insured as disclosed by the evidence; and, it is conceded on their part that if they fail to bring the case under one of these clauses, their appeal fails.

Condition number one indorsed on the policy is as follows:—

1. If the insured is injured in any *occupation or exposure* classed by this company as more hazardous than that stated in the application, his insurance shall be only for such sums as the premiums paid by him will purchase at the rates fixed for such increased hazard.

The second clause of condition, number three, is as follows:—

This insurance does not cover disappearance or suicide, sane or insane, nor injuries of which there is no visible mark on the body (the body itself, in case of death, not being deemed such mark); nor accident, nor death, nor loss of limb or sight, nor disability resulting, wholly or partly, directly or indirectly from any of the following causes, or while so engaged or effected; disease or bodily infirmity, hernia, fits, vertigo, sleep-walking, medical or surgical treatment (except amputation necessitated solely by injuries and made within ninety days after accident), intoxication or narcotics, voluntary or involuntary taking of poison or contact with poisonous substances (except in cases where it occurs to insured whilst necessarily exposed in the discharge of the duties pertaining to the occupation under which he is insured) duelling or fighting, war or riot, intentional injuries, (inflicted by insured or any other person), voluntary overexertion, violating law or violating the rule of any corporation, *voluntary exposure to unnecessary danger*, expeditions into wild or uncivilised countries.

The appellant pleaded first, that the accident in question happened to the deceased while he was engaged in an occupation or exposure more hazardous than that stated in his application for insurance, namely, that of brakesman, or failing this, secondly, that the accident resulted in consequence of voluntary exposure to unnecessary danger.

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The accident being proved, upon the appellant, I think, rested the burthen of proving the facts which they rely upon to be relieved from the liability which, *primâ facie*, the policy imposes upon them. *Badenfield* v. *Massachusetts Mutual Accident Association* (1); *Williams* v. *United States Mutual Accident Association* (2). The Ontario Insurance Act, R. S. O. (1897) ch. 203 sec. 153, expressly decrees that where the event has happened on the occurrence of which the insurance is payable, but the amount payable is a matter of dispute, the amount payable by the insurer shall *primâ facie* be the maximum amount indicated in the policy, and it shall lie on the insurer to prove the contrary. This enactment would seem to have its application here, though there is room for doubt on this point. However, the course followed at the trial renders the question of the *onus probandi* immaterial here.

Another rule that must not be lost sight of in the consideration of this appeal is that in case of a real doubt arising in the construction of a policy, the construction most favourable to the insured must prevail. I am free to say, however, that, as I read this policy, there is, in my opinion, no room for doubt in the construction of it in relation to the facts of the case.

As to condition No. 1, thereof;—

> If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in the application, his insurance shall only be for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard.

All the judges in the Court of Appeal have been of the opinion, with the trial judge, that the defence to the action *quoad hoc* could not prevail. And the appellant has not been able to show any error in the rejection of the said ground of defence. The deceased did not give up his occupation or employment as bag-

(1) 154 Mass. 77.

(2) 82 Hun. N.Y. 268.

gageman to become a brakesman. And he was not injured in any exposure classed by the company as more hazardous. Occupations are classified, according to the evidence, but not exposures. The word "exposure" in the policy is a redundancy. It means nothing else than any occupation more hazardous. I could not say more upon this first ground of the appellant's pleas without repeating what has been said in the opinions of the courts appealed from. To the cases already cited, I would add a reference to *The National Accident Society* v. *Taylor* (1); and to *The Provident Life Insurance Co* v. *Fennell* (2), in which the insured, represented in the policy as a switchman, met his death while acting as as a brakeman.

Did McNevin's death result from voluntary exposure to unnecessary danger? is the next point to be considered.

The trial judge answered that question negatively and, in my opinion, he could not but do so. It never came to this man's mind, on the occasion in question, accustomed to couple cars as the evidence shows he was, that there was any danger in the act he was going to perform. "Voluntary," in this policy, conveys the idea of an act of volition. It means "knowingly," "wilful," not that he is going knowingly to perform an act which for others might be dangerous, but "knowingly," "rashly" and conscious of danger to himself, recklessly taking the risk, wanton or grossly imprudent exposure. *Manufacturers Accident Indemnity Co.* v. *Dorgan* (3). It is the exposure that must be wilful, voluntary. *Burkhard* v. *The Travellers Insurance Company* (4). *The Providence Life Insurance Company* v. *Martin* (5). Now, how could the deceased

(1) 42 Ill. App. 97.
(2) 49 Ill. 180.
(3) 58 Fed. Rep. 945.
(4) 102 Pa. St. 262.
(5) 32 Md. 310.

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be said to have wilfully exposed himself to danger, to a danger that was for him certain, and ought to have been present to his mind; *Lovell* v. *The Accident Insurance Company* (1); if he did not know that the act was for him dangerous, or if he believed that it was not? *Miller* v *The American Mutual Accident Insurance Company* (2); *Jones* v. *The United States Mutual Accident Association* (3); *Keene* v. *The New England Mutual Accident Association* (4); *Schneider* v. *The Provident Life Insurance Company* (5).

He never thought for a moment, that he was in the least exposing himself to danger when he went to couple these cars. He did not knowingly risk his life, when he did so, no more than it could be said that the thousands of men who couple cars daily could be said to risk their lives or to act rashly. The accident was not what might have been reasonably expected to follow the act done. The act of coupling cars requires experience and carefulness. The experience the deceased had, but he must have been careless and negligent. That is what caused the accident. Carelessness and negligence, however, are no defence to an accident of this nature. Even if he could be said to have been imprudent in attempting to couple these cars, though with the experience he had it was not so, that would not constitute a voluntary and wanton exposure to danger within the meaning of the policy. The case of *Neill* v. *The Travellers Insurance Company* (6), and *Cornish The Accident Insurance Company* (7), have been relied upon by the appellant, but the facts in those cases are not such as to make them authority in the case at the bar. I would dismiss the appeal with costs.

(1) 3 Ins. L. J. 877.
(2) 21 S.W. Rep. 39.
(3) 61 N. W. Rep. 485.
(4) 161 Mass. 149.
(5) 24 Wis. 28.
(6) 12 Can. S.C.R. 55.
(7) 23 Q.B.D. 453.

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SEDGEWICK J.—I am of opinion that the judgment of the court below is right.

The principal question is as to the interpretation to be given to the words in the policy, "voluntary exposure to unnecessary danger." If the act of the deceased which occasioned his death comes within this description the appeal must succeed, otherwise not, as we all agree. The phrase was doubtless borrowed from accident policies issued by United States companies and there are, in that country, many decisions as to its intent and meaning, most of them being cited in the first volume of the American and English Encyclopædia of Law, under the title of "Accident Insurance." They are not binding on this court, but I have gone carefully over them all, and they confirm me in the view I take as to the proper meaning of the phrase in controversy.

The deceased was an employee of the Canadian Pacific Railway Company at Arnprior station. The only officers of the company there were the station agent and himself. He was insured as baggageman, but he was called the porter. His duties were not defined by any written document or instructions by the company; he was, I suppose, to do all that it was necessary to do in and about the station and yards that the agent was not to do. He was, in fact, a "man of all work" subject to the agent's directions and to his own sense of duty in the interests of his employers. On a certain Sunday there was a freight train at the station in charge of a conductor and two brakesmen, the conductor and one brakesman being at the front of the train, the other brakesman at the rear. It was necessary that the train should back down to a yard a considerable distance off, to attach it to a van. To do this a coupling-pin had to be found, none being on board the train. The deceased

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found the pin and did the coupling. In doing this, he slipped between the van and the train to which it was attached, was run over and killed. The brakesman denied asking him to do the coupling, but a witness testified that he heard a conversation between him and the deceased and he understood from the conversation that that was the request made.

The trial judge found that the deceased understood that the request was made and did the coupling in pursuance of it. He had several times done the same thing before. It was part of his duty to seal cars, involving the same danger as coupling cars, but the agent gave evidence that it was no part of his duty to couple cars, simply meaning, as I think, that as a general thing he had nothing to do with the management or operation of a train, whether at a stand-still or in motion, that duty being imposed upon the engineman, conductors and brakesmen, and that, as porter, his work was "on-shore."

Was there then, on this occasion, and under these circumstances, "a voluntary exposure to unnecessary danger?" Let me critically examine this phrase. To bring the company within the exception, they must be able to answer affirmatively, four independent questions of fact:—

1. Was there *danger?*
2. Was there *unnecessary* danger?
3. Was there an *exposure* to danger? and
4. Was there a *voluntary* exposure to danger?

I am inclined to the belief that the original design of the stipulation was to prevent an act on the part of the assured exhibiting a conscious, reckless, wanton and wicked disregard of personal safety, whether of life or of limb,—the doing of a thing that would, according to the view of a "reasonable man," be madness, except upon the hypothesis of voluntary suicide or self-mutilation.

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But, let me deal with the questions just suggested. Was the doing of the deed in question a danger—a dangerous deed? The evidence discloses that the act complained of was in ordinary circumstances done by a person on board a train, known as a brakesman, and that his occupation was more hazardous and more liable to accident than that of the deceased, just as probably the occupation of a seaman is more subject to risk than that of a landsman. But, in the exercise of a brakesman's duty, he has many things to do other than the coupling of cars—what these duties are, I have not knowledge to specify. He lives and moves and has his being on a moving machine. Accidents may befall him from innumerable causes. He may fall from the car's roof on which he has to travel. There may be a defective track, or a miscreant may obstruct or derail it, or a collision with another train or engine before or behind may occur and misfortune may come to him, but there is no evidence that, as far as he is concerned, the coupling of a car alone is any more dangerous than many acts the deceased was accustomed to do. It may be easy enough to decide whether or not one occupation is more dangerous than another, but it is not easy to determine whether or not the coupling of two cars by one who knows how to do it (as the deceased did) is more dangerous than the act of sealing from the platform of a moving car, or say the harnessing of a horse to a carriage. Danger lurks everywhere. The word (danger), however, is not used in that broad sense in the policy. The act in question must be an act which, as regards the person doing it, a jury would find was dangerous. I have great doubt as to whether the coupling of cars here was dangerous within the meaning of the policy, and I therefore do not answer the first question, yes or no.

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In dealing with the second question, I assume there was danger, but was the doing of the act a necessary or an unnecessary danger? If necessary, the appellants are out of court. The act of coupling must be done. It is an inseparable incident to the operation of a railway, and, in fact, the doing of it, if a danger at all, is a necessary danger.

My admission as to the first question applies to the third, and I come to the fourth question: Was there a voluntary exposure? These are the only words in the phrase I am commenting on, that have reference to conscious personal agency or the exercise of human volition or free will. I think that the adjective "voluntary" here, is not used as the opposite of "involuntary," but to describe an act which the deceased thought he had the liberty to do or not to do as he might think best. To convey the intended idea the word "unnecessary" might have been here used as a proper equivalent or synonym. As before suggested the two words "voluntary exposure" mean exposure not called for—officious exposure. They do not include an exposure or act done under a sense of duty, under a feeling of obligation, to either a fellow-servant or to the company, whose man he is, to an act behind which there is an insistent voice, a human or divine imperative impelling it. The evidence, I think, shows that it was in obedience to this call of duty that the deceased acted as he did, and the question now being considered must, therefore, be answered in the negative.

Upon these grounds, which I might elaborate, at much greater length, I am of opinion that the appeal should be dismissed with costs.

GIROUARD J.—Concurred in the judgment dismissing the appeal with costs.

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DAVIES J. (dissenting).—With respect to the contention of the insurance company that, as the death of the assured resulted from injuries received in "an occupation or exposure classed by the company as more hazardous than that of baggageman at station," which insured was described as being in his application, he was not entitled to recover at all or, if entitled at all, could only recover under clause thirteen of the policy such sum as the premium paid would purchase at the rate fixed for such increased hazard, I understand we are all of the opinion, in common with the judges of the Court of Appeal and the trial judge, that such contention cannot be upheld, because the "occupation or exposure" classed by the company as more hazardous than that stated in the application of insured does not cover the case of a mere transient or isolated act of the insured done by him outside of his regular occupation. This clause in the policy was only intended to cover an entire change of occupation or employment and, if the company intended that it could cover isolated or transient acts done or committed by the insured and not part of his duties as baggageman at the station or fairly arising therefrom, language much more clear and definite must be used to express the intention.

With regard, however, to the company's contention that the plaintiff cannot recover because of the stipulation in the second paragraph of clause three, I am of opinion that it is sound and fatal to the right of the plaintiff to recover.

The clause is one common to many accident policies and reads as follows:

> This insurance does not cover * * * voluntary exposure to unnecessary danger.

I agree with the learned Justices Osler and Moss, in the Court of Appeal, that the injuries the deceased received, when engaged in coupling the cars of the train were within the clause.

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Many decisions have been given in different states of the Union, as to the meaning of the provision in question, but none of them appear to be directly in point. They will be found collected in the first volume of the American and English Encyclopædia of Law, at page 306.

The learned editors say that the words "voluntary exposure" imply conscious intentional exposure to something which one is willing to take the risk of, and "one which reasonable and ordinary prudence would pronounce dangerous." I agree in these definitions as far as they go, but they do not cover all the ground. If the danger is unknown and hidden an injury would be accidental.

There is a clear distinction between a voluntary act and a voluntary exposure to danger. A hidden danger may exist, yet exposure thereto, but without knowledge of the danger, would not constitute a voluntary exposure to it. The act may be voluntary and the exposure involuntary. It must also be an unnecessary danger. A voluntary exposure to a necessary danger is not forbidden nor an involuntary exposure to unnecessary danger.

The policy recognises the existence of dangers which it may become necessary for the insured to meet in the daily walks of life, and even out of the ordinary walks. For instance, the attempt to rescue persons in deadly peril, where such an attempt is not absolutely foolhardy. I think the words imply a conscious intentional exposure to a danger which neither his contractual duty to his employers nor the duties of our common manhood call upon him to face. For instance, voluntarily assisting in the rescue of a ship's crew in a stormy sea, or in an attempt to save the lives of passengers on a burning car, would not be a voluntary exposure to unnecessary danger because it would be a man's duty as such so to assist.

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Mr. May, in his treatise on insurance, section 2624, formulates the rule thus:

> If the insured voluntarily places himself in a position where, from the surrounding circumstances a person of ordinary prudence would reasonably hesitate to place himself for fear of danger to life or body, then there can be no recovery for injuries or death in consequence of such an act.

Read in the light of the limitations I have already suggested, I think this fairly states the law, and that the words, "unnecessary danger" mean when the whole policy and its object is studied, danger which it is unnecessary for the insured to incur.

The cases of *Neill* v. *The Travellers Insurance Co.* (1), and *Cornish* v. *The Accident Insurance Co.* (2) are both pertinent and instructive as to the proper construction of the clause.

In the case at bar, it does seem to me that the insured, by entering as he did between the cars and coupling them together, brought himself directly within the clause. As the learned judge has found this act was clearly not part of his duty as baggage-man at station, nor was it part of his duty in any way to couple cars or to have anything whatever to do with the management of trains. The learned judge, however, decided that the deceased understood Carroll, the brakesman, to ask him to make the coupling and that, therefore, his exposure would not be voluntary. With every respect to the learned judge, I do not think the evidence warranted any such finding. Carroll himself expressly swore that he did not ask him and the "understanding" of a by-stander ought not to countervail the positive testimony of the man Carroll himself. But, whether Carroll did or did not ask him, makes no difference to my mind. The deceased man was in no way connected with or under the control of or working with Carroll. The latter as he says had

(1) 12 Can. S C. R. 55. (2) 23 Q. B. D. 453.

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stepped off the train "to get a pin and as he could not see any pin around, gave the signal to stop the cars," and that he neither asked nor expected McNevin to make the coupling. The latter, at the time, was not on duty, had no business with the management of the train service, and the brakesman had no authority or control over him in any way whatever. The fact is the deceased, being off duty, was riding on the train for amusement or pleasure and either voluntarily or officiously, without any request, or voluntarily at the request of Carroll, but, without any duty or obligation on his part, attempted to couple the cars, by going between them, with a pin. It does seem to me to be idle to talk of such an act not being a dangerous one. To one not expert in the business it would be a most dangerous one, and to any, even the coolest and most self-reliant men, accompanied with great danger.

The conclusion I have reached, reluctantly, is that the act of coupling cars together when in motion, as this train was, towards the car to be coupled, was so far as deceased was concerned a voluntary, if not an officious exposure of himself to a danger known to him and unnecessary for him to face. There was neither moral obligation nor contractual duty impelling him to incur the risk he did, and it was outside of his ordinary duties. It was not one of the dangers which a man may meet in or about his ordinary avocation or while engaged in any pursuit, recreation, act or duty incident to his ordinary habits of life or the promptings of humanity, but was a "voluntary exposure to unnecessary danger."

MILLS J.—I concur in the judgment of Mr. Justice Taschereau and think this appeal should be dismissed with costs.

I do not think that the performance of a single hazardous act will take the policy out of the class in which the respondent's son was insured and put him in a class in which the rate of insurance is very much higher and where the amount to which he would be entitled is very much less. McNevin was used to coupling cars, and so possessed skill which, in his case, made the danger very much less, and a single act done, as would very naturally be done by an active, industrious and obliging man, would not put him in the class of one whose ordinary employment would be regarded as specially dangerous. In all cases of this sort some regard must be had to surrounding circumstances. The performance of an isolated act of this kind cannot be regarded as determining his employment, and as taking him out from the class in which he is insured and putting him in one that is more hazardous. The doing of an act such as that he was engaged in when he lost his life, is a very different thing indeed from being constantly engaged every day in work of this kind. There is no one whose life is insured, who does not at times do some act more hazardous than those which pertain to his ordinary occupation, and yet no insurance company would think it their duty to take one out of the class in which he was insured because occasionally in his lifetime he felt it his duty to perform some act which entailed greater risk than those connected with his ordinary occupation. Some regard must be had to the relations in which men situated as McNevin was, stand to others about him. The good will and occasional assistance of others make it necessary that he should sometimes perform acts which oblige them. No one can suppose that he desired to endanger his life by what he did. He simply aimed at doing for others what he would that they should, in like circumstances, do for him, and

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this, it would seem, was the thought uppermost in his mind. He was not deserting his ordinary avocation to engage in more hazardous labours. He was not seeking to become insured in one class while his ordinary avocation put him in another where his rate of insurance would be very much greater. He simply did that which almost every industrious man finds it occasionally necessary to do, in order to oblige others, and the mutual service which men do for each other in this way is as much in the interest of insurance companies as it is in the interest of the parties who perform it.

The policies of insurance companies, in this regard, must receive a reasonable construction, and it is neither to the advantage of the insurer nor the insured that the lines should be drawn with so much rigidity that to occasionally cross them is to be regarded as a violation of the conditions of the policy which they have received.

I cannot, therefore, hold that McNevin's act was a voluntary exposure to unnecessary danger. It was, in my opinion, a duty that it was his interest to perform, and his act is not within the rule of voluntary exposure to unnecessary danger, but is quite as certainly outside of the intended restriction as the more extreme acts performed by the promptings of humanity in the cases suggested. In all these cases we must have regard to the surrounding circumstances of the party, and we must not lay down rules which would operate against the individual who, in endeavouring to get on, and who, as a useful employee, is occasionally called upon to step outside of those limits within which he, for the most part, remains.

Appeal dismissed with costs.

Solicitors for the appellant: *Tripp & McGee.*

Solicitors for the respondent: *McGarry & Devine.*