REGAL OIL & REFINING COMPANY, LIMITED, AND REGAL DISTRIBUTORS, LIMITED (DEFENDANTS).... APPELLANTS;

AND

FRED A. CAMPBELL (PLAINTIFF) ..... RESPONDENT.

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* Mar. 19, 20.
* Apr. 21.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Negligence—Master and servant—Plaintiff, operating defendants' bulk station plant for handling gasoline and oil, injured by explosion—Construction of plant—Volenti non fit injuria—Contributary negligence—Liability of both defendants, having regard to acts, position, and occupancy, of each.

Defendant R.O. Co. refined and manufactured petroleum products, and engaged plaintiff, in February, 1929, to operate a bulk station plant,

* PRESENT:—Duff C.J. and Rinfret, Cannon, Davis and Kerwin J.J.

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to be constructed at Beiseker, Alberta. R.O. Co. obtained a lease of land on April 29, 1929, on which it immediately had the plant constructed, and plaintiff, in April or early in May, 1929, began operating it. It contained platform scales and pumps for the handling of gasoline and oil, and, in a small room adjoining the main room and entered by a door from the platform and with no window, a gasoline engine to provide power to operate the pumps, and connected with them by a shaft running through a hole in the wall between the engine room and the warehouse proper, the hole having an unobstructed space of about 60 square inches through which fumes from the warehouse could pass into the engine room. The exhaust pipe of the engine was not extended out of the engine room. There were two storage tanks. On June 1, 1929, the defendant R.D. Co. took over the marketing facilities of R.O. Co. and later wrote to plaintiff that the refining and marketing were operated under different company names, that operations with which plaintiff was connected were to be under the name of R.D. Co., and that he should in future communications use that name. The said lease to R.O. Co. was never assigned to R.D. Co. prior to the accident in question. On Aug. 22, 1932, while tractor fuel was being pumped from a truck into a storage tank, plaintiff, as the pump seemed not working satisfactorily, placed a drum on the scales and made adjustments so that the rest of the fuel in the truck should go into drums. When a number of drums had been filled, and the fuel was coming irregularly and slowly, plaintiff left his position beside the drum to go to a point where he could exchange signals with a man on the truck and, receiving what appeared to be a signal that the truck was empty, he returned to close off the valves, but before that was done fuel overflowed from the drum. Plaintiff then went to the engine room to shut off the engine and while attending to this he saw a flame come from the exhaust, an explosion occurred, and he was injured. He sued for damages. The trial judge charged the jury that the determining factors were three issues of fact: (1) the charge against defendants of negligence in construction; (2) defendants' reply that in any case plaintiff accepted any hazards that were incident to the operation of the plant; and (3) defendants' contention that the accident was chargeable to plaintiff's own negligence in regard to the operation of filling the last drum immediately prior to the accident. The jury found a verdict for plaintiff for damages and judgment was given accordingly, which was affirmed on appeal. Defendants appealed to this Court.

Held: The appeal should be dismissed.

Per Duff C.J. and Davis and Kerwin JJ.: The doctrine of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, could have no application to this case (*Toronto Power Co.* v. *Raynor*, 51 Can. S.C.R. 490, at 503, 505). An employer, though he does not warrant the safety of the plant and property used in the business in which the servant is employed, is under an obligation, arising out of the relation of master and servant, to take reasonable care to see that such plant and property is safe. (The question whether or not, by the common law, he can fulfil his obligation by delegating the performance of it to employees whose competence he has taken reasonable care to ensure, discussed, and *Toronto Power Co.* v. *Paskwan*, [1915] A.C. 734, *Ainslie Mining & Ry. Co.* v. *McDougall*, 42 Can. S.C.R. 420, *Brooks, etc., Co.* v. *Fakkema*, 44 Can. S.C.R. 412, *Bergklint* v. *Western Canada Power Co.*, 50 Can. S.C.R. 39,

54 Can. S.C.R. 285, and *Fanton* v. *Denville,* [1932] 2 K.B. 309, referred to. Where defendant relies upon delegation, the onus is upon him to establish it: *Canadian Northern Ry. Co.* v. *Anderson,* 45 Can. S.C.R. 355). There is no longer an independent rule that, for an employee to recover for injuries sustained from defects in the plant, there must be ignorance in himself and knowledge in the master of those defects (*Jury* v. *Commissioner for Railways,* 53 Comm. L.R. 273, at 282). As to the defence of *volenti non fit injuria,* the question is, did the employee agree that if injury befell him the risk would be his and not his master's? (*Smith* v. *Baker,* [1891] A.C. 325; *McPhee* v. *Esquimalt & Nanaimo Ry. Co.,* 49 Can. S.C.R. 43). The issue of *volens* in this case was one for the jury. As to contributory negligence—plaintiff was obviously much concerned about the manner in which the apparatus emptying the truck was working; the overflowing of the drum was not the consequence of any want of zeal on his part; and the jury might, without acting arbitrarily and unreasonably, have thought any slip, any miscalculation or error of judgment excusable, and not incompatible with the absence of negligence. In the view taken as aforesaid, the responsibility of R.D. Co. was not disputed; there would also appear to be a *prima facie* case against R.O. Co.

Per Rinfret, Cannon and Kerwin JJ.: On the evidence the jury could reasonably find in plaintiff's favour on the said three issues of fact submitted to them. For a defence on the ground of *volenti non fit injuria,* it must be found as a fact that plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, expressly or impliedly agreed to incur it (*Letang* v. *Ottawa Electric Ry Co.,* [1926] A.C. 725); it was not sufficient in this case that plaintiff knew it was a common thing for the engine to backfire, that any fault in construction of the building existed from the time he took over the plant, that he knew that the tractor fuel was a highly inflammable product and the vapour from it highly inflammable and dangerous, that he apprehended the danger of a spark exploding such vapour, that he would not light a match there, and that he never complained; the jury had to be satisfied that, not only did plaintiff know, but he accepted voluntarily to run, the risk (*Baade* v. *Hill,* [1934] 4 D.L.R. 385, referred to). Both defendants were liable—R.O. Co., which made the agreement with plaintiff, brought into the plant the dangerous substance for storage; it was, under its lease, the occupant of the land; R.D. Co., which in fact was only a continuing incorporated department of R.O. Co., also occupied the land either as tenant or employee of R.O. Co.; it was in charge of the premises at the time of the accident and had control over plaintiff; (*Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co. Ltd.,* [1921] 2 A.C. 465).

APPEAL by the defendants from the judgment of the Appellate Division of the Supreme Court of Alberta, affirming the judgment of Simmons C.J., on the verdict of a jury, in favour of the plaintiff against the defendants for $24,585, for damages for injuries suffered by the plaintiff in an explosion which occurred in a bulk station plant for the handling of gasoline and oil, which the plaintiff was oper-

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ating. The plaintiff alleged that the plant was supplied by the defendant Regal Oil & Refining Co. Ltd., on land in its possession under a lease, that plaintiff was in its employment as an agent to handle, expose and offer for sale its gasoline products in the district of Beiseker, in the province of Alberta; and that the defendant Regal Distributors Ltd. had (subsequent to the plaintiff's contract of employment) assumed the management and control of the plant. The plaintiff alleged that the explosion occurred by reason of negligence of the defendants. The material facts of the case and the questions involved are sufficiently stated in the judgment of Cannon J. now reported. The appeal to this Court was dismissed with costs.

O. M. Biggar K.C. for the appellants.

A. Macleod Sinclair K.C. and *L. A. Walsh K.C.* for the respondent.

DUFF C.J. (Davis and Kerwin JJ. concurring)—This appeal should be dismissed.

First, a word as to the law. By the common law, an employer is under an obligation arising out of the relation of master and servant to take reasonable care to see that the plant and property used in the business in which the servant is employed is safe. That is well settled and well known law. It is equally well settled that he does not warrant the safety of such plant and property. (*Wilson* v. *Merry* (1); *Young* v. *Hoffman* (2); *Fanton* v. *Denville* (3)). The question whether or not he can fulfil his obligation by delegating the performance of it to employees, whose competence he has taken reasonable care to ensure, is a question upon which it is not clear that the authorities are harmonious. The judgment of the Privy Council in *Toronto Power Co.* v. *Paskwan* (4), as interpreted in the head-note, would seem to say that he cannot discharge this duty by employing competent delegates for that purpose; that, in other words, he is responsible for the safe condition of the plant and premises so far as reasonable care can make them so.

There are two decisions of this court (*Ainslie Mining & Railway Co.* v. *McDougall* (5); and *Brooks, Scanlon, O'Brien Co.* v. *Fakkema* (6)) which would appear to

(1) (1868) L.R., 1 Sc. App. 326.
(2) [1907] 2 K.B. 646.
(3) [1932] 2 K.B. 309.
(4) [1915] A.C. 734.
(5) (1909) 42 Can. S.C.R. 420.
(6) (1911) 44 Can. S.C.R. 412.

sanction the rule as stated in the head-note in *Toronto Power Co.* v. *Paskwan* (1). In the subsequent case of *Bergklint* v. *Western Canada Power Co.* (2), the distinction is drawn between the original installation of the plant and the maintenance of it. As to original installation, the duty to take reasonable care for the safety of the employee is, under the decisions of this Court, as finally interpreted in *Bergklint's* case (2), one of which the employer cannot divest himself by appointing competent delegates, while, under the common law, the opposite is the case in respect of subsequent maintenance. These decisions are, perhaps, in conflict with the decision of the Court of Appeal in *Fanton* v. *Denville* (3), and, possibly, with other decisions of that Court.

In the present case, we are really not concerned with this conflict (if such there be) for two reasons. First, no evidence was offered to show that the employers had exercised care in entrusting the duty of making the plant safe for the employees to competent delegates; and, where the defendant relies upon delegation, the onus is upon him to establish it (*Canadian Northern Ry. Co.* v. *Anderson* (4)). Second, the doctrine of common employment has been abrogated in Alberta (R.S.A. 1922, c. 178, s. 2).

I cannot endorse the argument that the employee can only succeed by establishing ignorance in himself and knowledge in the master. I agree with the following passage in the judgment of Rich and Dixon JJ. in *Jury* v. *Commissioner for Railways* (5):

> There is no longer an independent rule demanding ignorance in the servant and knowledge in the master. But negligence in the master, or those for whom he is responsible, if any there be, must be proved, and knowledge is one way but not the only way of proving it. The servant must not have consented to the consequences of the master's negligence, but his mere knowledge does not prove consent. He must not have been guilty of contributory negligence, but still less does his mere knowledge prove that he was.

(1) [1915] A.C. 734.
(2) Reported first in (1914) 50 Can. S.C.R. 39, and afterwards (as *Western Canada Power Co* v. *Bergklint*) in (1916) 54 Can. S.C.R. 285.
(3) [1932] 2 K.B. 309.
(4) (1911) 45 Can. S.C.R. 355.
(5) (1935) 53 Commonwealth L.R. 273, at 282.

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Such being the state of the law, I have only to add that the doctrine in *Rylands* v. *Fletcher* (1) can have no application. This was expressly held by the majority of this Court in *Toronto Power Co.* v. *Raynor* (2). In my judgment in that case I said:

> The judgment of Mr. Justice Clute in the Court of Appeal proceeds, as far as I can gather, on the application of the doctrine of *Rylands* v. *Fletcher* (1).
>
> This doctrine has never been applied and could not, without bringing the direst confusion into the law on the subject, be applied in cases of this description between master and servant, where apart from statute the question must always be (the master being charged with responsibility for harm coming to the servant in the course of his employment): Was the harm caused by the failure of the master in any duty to the servant arising out of the relation subsisting between them? The duty of protecting or compensating the servant for harm arising from the perils incidental to the service which cannot be avoided by any reasonable degree of care on the part of the master, is not one of the duties which the law casts upon the master.

On the contrary,

> The doctrine of *Rylands* v. *Fletcher* (1) imposes a responsibility which in the first place is, speaking generally, absolute for the consequences of the escape of the noxious agent (excepting where the escape is due to the act of God or the mischievous intervention of a third party) and in the second place cannot be discharged by employing independent contractors or servants never so competent and never so well equipped as to skill and means.

The appellants can only succeed, then, on one of two grounds: contributory negligence or *volenti non fit injuria*. As regards the defence of *volens*, the question, as Lord Watson said in *Smith* v. *Baker* (3), is, did the employee agree that if injury befell him the risk would be his and not his master's? This defence was very fully discussed in *McPhee* v. *Esquimalt & Nanaimo Ry. Co.* (4) where *Smith* v. *Baker (supra)* and *Williams* v. *Birmingham Battery & Metal Co.* (5) were applied.

I do not think it is seriously open to question that the issue of *volens* was in this case one for the jury.

There is much more to be said in favour of the appeal under the contention that the finding of the jury negativing contributory negligence cannot be supported. After, however, carefully considering and reconsidering the evidence in its bearing upon this issue, my conclusion is that the judgment of the Court of Appeal ought not to be reversed.

(1) (1868) L.R. 3 H.L. 330.
(2) (1915) 51 Can. S.C.R. 490, at 503, 505.
(3) [1891] A.C. 325.
(4) (1913) 49 Can. S.C.R. 43.
(5) [1899] 2 Q.B. 338.

The respondent was obviously much concerned about the manner in which the apparatus emptying the truck was working. The overflowing of the drum was not the consequence of any want of zeal on his part. In the result, I am not satisfied that the jury might not, without exposing themselves to a charge of acting arbitrarily and unreasonably, have thought any slip, any miscalculation or error of judgment excusable; and not incompatible with the absence of negligence either as commonly understood by laymen or in the sense of the law.

In the view just expressed, the responsibility of the Regal Distributors, Ltd., is not disputed; there would also appear to be a *prima facie* case against the other company.

The appeal should be dismissed with costs.

CANNON J. (Rinfret and Kerwin JJ. concurring)—The appellants appealed before this Court from a judgment of the Appellate Division of the Supreme Court of Alberta, dismissing their appeal from the judgment of the trial Court based upon the verdict of a jury which awarded the plaintiff damages to the sum of $24,585. The appellant, the Regal Oil and Refining Co. Ltd. (hereinafter called the Refining Co.), is engaged in the refining and manufacture of petroleum products, and the appellant, Regal Distributors Ltd. (hereinafter called the Distributing Co.), in the distribution of such products. The Refining Company engaged the respondent by an agreement in writing dated February 15, 1929, to operate for it a bulk station plant at Beiseker. The Refining Co. was granted a lease of land on the 29th of April, 1929, on which immediately thereafter was erected the plant in question by a contractor engaged by the Refining Co. The building and equipment were turned over to the respondent late in April or early in May, 1929. It consisted of a building constructed of corrugated iron on a wooden frame and contained platform scales and Blackmore twin pumps for the handling of gasoline and oil. In addition to the main room of the plant there was an adjoining room about 6 feet square in which was housed a Fairbanks-Morse gasoline engine. This engine room contained no window and was entered by a door from the platform. The power to operate the pumps was provided by the engine which was connected with the pumps by a shaft $1\frac{1}{2}$ inches in diameter which ran

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from the engine through the wall between the engine room and the warehouse proper. This shaft passed through a hole in the wall which was about 10 inches from the floor and about 10 inches in diameter. Notwithstanding the presence of a gear box, there would be left, after taking this obstruction into account, approximately an area of 60 square inches, through which fumes from the warehouse could pass into the engine room. The exhaust pipe of the gasoline engine was not extended out of the engine room and any fumes or sparks from the engine were projected into the room. The equipment in addition included two storage tanks. No. 1 was used for gasoline and No. 2 for tractor fuel.

On the 1st June, 1929, the Distributing Company took over the marketing facilities of the Refining Company. On the 16th of September, 1929, the Distributing Company wrote a letter on the notepaper of the Refining Company to the respondent, informing him of the change in "the organization of the different branches of our Company," and that his operations were to be carried on under the name of the Regal Distributors Limited. After some changes in the mechanical equipment to permit the shipping of the petroleum products to this station in automobile tank trucks, the first such shipment was received at about 3.30 p.m. on the 22nd of August, 1932. The respondent had received instructions pointing out to him the importance of emptying such trucks as speedily as possible. The trucks had been hired by the Refining Company and contained tractor fuel, which is admitted to be of a highly inflammable nature. During the operation of pumping the contents of the truck into the storage tank No. 2, the pump was not working to the respondent's satisfaction and he decided that the remainder of the tractor fuel, about 500 gallons, should be placed into drums. To do so he placed the drum on scales; and by an adjustment of valves, the destination of the flow from the truck was changed from the storage tank to the drum. After filling seven or eight drums in this manner, he found that the fuel was coming very irregularly and very slowly. One Schultz was on top of the truck watching the progress of the pumping and exchanged signals with the respondent, who would move from his position to a point on the platform from which he

could see Schultz to determine if the truck was about empty. Having received from Schultz a signal which he understood as meaning that the tank was empty, the respondent turned to go in and turn off the quick closing valve located immediately above the scales, and at that moment he saw the tractor fuel overflow from the drum and Russel, the truck driver, run and close the valve. The respondent then went into the engine room and shut off the engine by closing the fuel valve and turning down the oil cup. As he was leaning over the engine to close the latter, he saw a bunch of flame come from the exhaust. There were one or two explosions which blew the respondent through the wall of the engine room and deposited him on the ground at the rear of the truck with his clothing in flames. As a result of the accident, the respondent has lost completely the use of both hands, after undergoing great pain and suffering and actual out of pocket expense of $584.90.

In his charge, the learned trial judge stated that the determining factors in the case were three issues of fact: first, the claim by the respondent that the appellants were negligent in the construction and maintenance of this plant for the storage and delivery of dangerous explosives; second, the reply by the defendants that in any case the respondent accepted any hazards that were incident to the operation of that plant; and third, that the accident was chargeable in whole or in part to the respondent's own negligence in regard to the operation of filling the last drum immediately prior to the accident.

Respecting the first point, complaints in regard to the structure were: (*a*) the exhaust pipe was not carried out from the smaller enclosure in which the gasoline engine was placed; (*b*) there was an opening in the wall near the floor of that structure that would allow vapour fumes to get into the engine room. The learned trial judge pointed out, and my reading of the record confirms his view, that the evidence of Mr. Robb, the expert, which was not contradicted, is to the effect that if these features had not existed, it would have been a safer structure for the purpose for which it was intended; he added that it was the duty of the appellants to construct the building and plant in a way that would not expose employees or anyone who had occasion

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to come around it, to unnecessary danger. Referring to the first ground of defence, that the respondent had accepted the hazard which would naturally be incident to a plant of this kind, knowing that naphtha and gasoline are very volatile and would evaporate in warm weather and the vapour spread around, and also to the fact that the respondent knew from long experience how to run the engine, the jury were asked to decide whether or not the respondent could be reasonably justified in assuming that the appellants' construction engineer should be capable of determining what would be a reasonably safe arrangement, and whether or not the respondent would be chargeable with a technical examination of all the plant to satisfy himself it was absolutely safe before he entered on his employment. It was also pointed out that the plant was not there at all when he entered this employment.

As to the third issue, the learned trial judge also put the question to the jury, whether or not the respondent was negligent when he left his position at the scales when he thought that the drum was only about one-half full.

> Was it necessary for him to go away from that drum, go to the point on the platform where he could not readily turn off that quick acting valve. If there is an explanation which you think is proper and reasonable, having regard to his duties, I suppose you would be justified in saying he was not negligent; but then on the other hand, if it was not necessary for him to investigate this condition of the tank, then it would seem that he might better have stayed at his own point of duty. Secondly, I would say that if it could be reasonably contemplated that what happened might happen as a result of him leaving that point of duty, it would be a very serious question for you to consider whether he is chargeable with negligence.

The learned trial judge then said that independently of the overflow of gasoline which the jury might or might not attribute to the negligence of the respondent, it was the uncontradicted evidence of Mr. Robb, the expert, to the effect that there would be a certain amount of gasoline vapour expelled from the drums and that if that vapour from the drums got into the engine room, it must have contributed to the accident.

The appellants, realizing that they have to contend against the verdict of the jury and the concurrent judgments of both courts below on these three questions of fact, submit:

1st. There is no negligence proven against either of the appellants;

2nd. There is certainly no justification for a judgment against both defendants;

3rd. The plaintiff respondent's contributory negligence disentitles him to any verdict;

4th. The maxim: *Volenti non fit injuria,* affords a complete defence.

5th. The learned trial judge failed to instruct the jury properly or at all for the failure of the appellants to instal an automatic barrel filler and the liability of the appellants with respect thereto. This point was not insisted upon at the argument before us. The jury came back to court and asked for the reading of the evidence on that point. Appellants never asked for a special direction, and, in any case, the absence of instructions would seem to have favoured the appellants more than the respondent, because the latter suggested to the appellants' inspector the desirability of such an addition to the plant which would have prevented any overflow.

6th. The damages awarded were excessive and unreasonable.

The position of the respondent in regard to all these points is that the jury has found in his favour on competent evidence, and he quotes the definition of the function of this Court by My Lord, the Chief Justice, in *C.N.R.* v. *Muller* (1), where he said:

> We premise that it is not the function of this Court, as it was not the duty of the Court of Appeal to review the findings of fact at which the jury arrived. Those findings are conclusive unless they are so wholly unreasonable as to show that the jury could not have been acting judicially. * * * In construing the findings, moreover, one must not apply a too rigorous critical method; if, on a fair interpretation of them, they can be supported upon a reasonable view of the evidence adduced, effect should be given to them.

The jury had before them the opinion of Mr. Charles A. Robb, Professor of Mechanical Engineering in the University of Alberta, who, the appellants readily admitted, was duly qualified as an expert, who said:

> Q. Will you tell His Lordship and the jury what in your opinion was the cause of that fire?
>
> A. In my judgment the fire resulted in the bringing together of a mixture of gasoline fumes with air in proportions suitable for combustion.
>
> Q. Now just to deal with that while we are at it. Would you tell us what that mixture is that you speak of?

(1) [1934] 1 D.L.R. 768 at 769.

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A. We describe a mixture of gasoline or naphtha fumes and air as being inflammable when these are present in the proportion of one and a half per cent of gasoline fumes up to six per cent, the remainder being air.

* * *

Q. Mr. WALSH: When you have this mixture of from one point five per cent to six per cent by volume of gasoline fumes with air what else is needed to cause trouble?

A. The introduction of a spark or flame is sufficient.

The professor also told the jury that in this case the naphtha was simply a mechanical mixture with the distillate and, as such, is as dangerous to handle for all practical purposes as if it were pure gasoline and he ends his direct examination as follows:

Q. Mr. WALSH: It was as inflammable as gasoline? What we laymen speak of as gasoline that we use in our cars?

A. The answer is in the affirmative, yes.

Q. Here is another question, in your opinion would this plant have been capable of safer operation with the engine house in a building entirely separate from the warehouse?

A. Yes.

Q. So then to recapitulate you say that the first safety measure that might have been taken was some form of separation of the engine room from the warehouse?

A. Yes.

Q. Having in view the object of preventing fumes of gasoline and tractor fuel from the warehouse entering the engine room?

A. Yes.

Q. And you say second, that you would have piped the exhaust from that engine to a place of safety outside the building?

A. Yes.

Q. You agree with me that the automatic drum filler would have been of some assistance as a safety measure?

A. I do.

Q. And finally you say that it would have been better if they had had them in a separate building?

A. Yes.

In view of the facts proven and of this competent evidence, the jury could reasonably find, as they did, and return a verdict in favour of plaintiff on the three issues of fact submitted to their consideration, as shown above.

As to the application of the maxim "*volenti non fit injuria*," as it was clearly set out in *Letang* v. *Ottawa Electric Railway Co.* (1), it must be found as a fact, in order to afford a defence to an action for damages for personal injuries due to the dangerous condition of the premises to which the plaintiff has been invited on an errand of business, that he freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, expressly

(1) [1926] A.C. 725.

or impliedly agreed to incur it. Lord Shaw, at page 730, quoting Bowen L.J., in *Thomas* v. *Quartermaine* (1), says:

> "The maxim, be it observed, is not '*scienti*' *non fit injuria*—but '*volenti*.' It is plain that mere knowledge may not be a conclusive defence. * * * The defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of a danger. * * * Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open but one, namely, that the risk has been voluntarily encountered, the defence seems to me complete."

The evidence adduced by the defendants was fully put to the jury by the learned trial judge to show that the respondent knew that it was a common thing for the engine to backfire from time to time; that if any fault existed in the construction of the building it existed from the time the respondent took over the plant; that he knew that the tractor fuel was a highly inflammable product and the vapour from it highly inflammable and dangerous; that he apprehended the danger of a spark exploding this kind of vapour; that he would not light a match there, and that he never complained. According to the rule above quoted, this would not be sufficient; the jury had to be satisfied that, not only did the plaintiff know, but that he accepted voluntarily to run the risk. See *Baade* v. *Hill* (2), and the authorities therein collected in the able judgment of Hughes J.

The appellant failed to show to the satisfaction of the Court that the damages awarded were excessive and unreasonable, and indeed did not insist before us for a reduction of the amount. The respondent proved that he was now totally incapacitated so far as manual labour was concerned, that he earned before the accident about $2,500 a year; according to the insurance statistics, his natural earning period would be about 32 years.

Even taking into account the natural vicissitudes, including accidents, diseases and possible death, we cannot say that the amount awarded under those circumstances is unreasonable.

Despite the able argument of Mr. Biggar, we must reach the conclusion that he has not successfully established that the findings of the jury or the courts below were clearly wrong on the facts of the case.

(1) (1887) 18 Q.B.D. 685, 696, 697.

(2) (1934) 4 D.L.R. 385.

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There remains the point of the joint liability of both appellants. Are they both liable if the verdict stands? The Refining Co. made the agreement, also secured the lease from the C.P.R. of the site where they built the plant and gathered the dangerous explosives. Both companies have the same general manager and the following notice was sent to the respondent:

REGAL OIL & REFINING COMPANY, LIMITED.

CALGARY, ALTA., Sept. 16, 1929.

The Agent,
Regal Distributors Ltd.

DEAR SIR,—For some time past there has been a change in effect with regard to the organization at the different branches of our Company. Each department such as Refining and Marketing are operated under different Company names.

All operations with which you are connected are to be operated under the name, of the REGAL DISTRIBUTORS LIMITED and we would ask, in future, that all communications or any other matters in which you may be called upon to use the name of the Company to use "Regal Distributors Limited" exclusively.

Yours very truly,

REGAL DISTRIBUTORS LTD.
H. E. McDONALD,
Sales Manager.

The Distributing Company is the one who was in charge of the premises at the time of the accident and had control over the respondent. Under the principle laid down in *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co. Ltd.* (1), both these companies would be liable towards the plaintiff. The Refining Company by the hands of its employees brought into the plant the dangerous substance for storage on the site which it had leased from the C.P.R. The lease provided that "the lessee will not during the said term, assign or sublet the said premises or any part thereof unto any person or persons, without first obtaining the written consent of the lessor." The lease was never assigned to the Distributing Company prior to the date when the plaintiff sustained his injuries. The Refining Company, therefore, was the occupant of the lands at all times prior to this action. As far as the Distributing Company is concerned, which in fact is only a continuing incorporated department of the Refining Company, it also occu-

(1) [1921] 2 A.C. 465.

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REGAL OIL & REFINING CO. LTD. ET AL. v. CAMPBELL.

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pied the land either as tenant or employee of the Refining Company. "They cannot escape any liability which otherwise attaches to them on storing it (the explosive) there merely because they have no tenancy or independent occupation of the land but use it thus by permission of the tenants or occupiers," quoting the words of Lord Sumner, in the above case, at page 479.

The appeal fails and must be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants: *Eric L. Harvie.*

Solicitors for the respondent: *A. Macleod Sinclair & Walsh.*