

pany's servants while so engaged were not the employes of the lumber company, and that the railway company remained liable for the conduct of the persons in charge of the locomotive used in the moving of the cars. Also, that where the lumber company's employes remained in a car lawfully pursuing their occupation there, the persons in charge of the locomotive owed them the duty of using the utmost skill and care in moving the car with them in it, so as to avoid all risk of injury to them. *Heaven v. Pender* L.R. 11 Q.B. 503 followed.

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

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

Appeal dismissed with costs.

Chrysler, Q.C., and *Nesbitt*, for appellants.

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

Quebec]

[Dec. 9, 1895.]

KERR v. ATLANTIC & NORTH WEST RY. CO.

Prescription—Action for damages—Injury to property—Continuance of damage—Art. 2261 C.C.—Railway Co.—Construction of road—Wrongful act of contractor—Liability for.

K. brought an action against a railway company for damages by reason of a right of way which he claimed having been closed up by the building of a portion of the road through the city of Montreal, and claimed that he suffered an annual loss of \$450 by being deprived of the right of way. The company pleaded, *inter alia*, that the action not having been brought within two years from the time the alleged wrong was committed, was prescribed by Art. 2261 C.C., and also that the injury was done by the contractor for building the road, and they were not liable therefor.

Held, affirming the decision of the Court of Queen's Bench, that the injury complained of having been committed by one act, the consequences of which might have been foreseen and claimed for at the time, the fact that the damage continued did not prevent the prescription running against K., and his action was barred by Art. 2261 C.C.

Held also, that the company were not liable for the wrongful act of the contractor in borrowing earth for embankments from a place, and in a manner not authorized by his contract, and so committing the injury complained of.

Appeal dismissed with costs.

Taylor, for the appellant.

Abbott, Q.C., for the respondents.