The work upon which the deceased was employed at the time of his death was that of constructing a tunnel under the Detroit river, and, being a civil engineer, his position was that of superintendent of shaft No. 2.

On the night of the 14th September, 1908, a fire occurred in shaft No. 4, which, it was supposed, was caused by the use of candles in the hands of some of the defendants' workmen engaged in making repairs to a bulkhead containing compressed air, which was leaking. The place where the fire occurred was about 2,000 feet distant from shaft No. 2, where the deceased was employed, and was territorially quite beyond any place in the tunnel where his duty to the defendants required him to be.

At the time of the fire there were workmen in the tunnel, and the deceased, attracted to shaft No. 2 by the fire, went, with others, down that shaft for the purpose of assisting to extinguish the fire and in the rescue of the workmen in the tunnel; and, while in the tunnel, was suffocated by the smoke, which was very dense, although the fire itself was not otherwise of a serious nature.

Negligence was charged by the statement of claim in not providing and maintaining proper supervision of the work, in leaving timber or paper exposed, in permitting the improper use of fire, and otherwise conducting the work in a negligent manner, negligence in the person having superintendence, absence of proper appliances to put out fires, and insufficient modes of egress from the shaft in which the fire occurred.

The appeal was heard by Moss, C.J.O., Osler, Garrow, Maclaren, and Meredith, JJ.A.

J. H. Coburn, for the plaintiff.

J. H. Rodd and E. C. Kenning, for the defendants.

Garrow, J.A. (after setting out the facts as above):—It is perfectly plain . . . that in doing as he did the unfortunate deceased was acting not at all as the servant of the defendants, or under any orders or commands, directly or indirectly, from them, but solely as a volunteer. And it is also equally beyond question that in venturing into the shaft for the second time as he did, he did so with a full comprehension of the danger of so doing, and indeed after a warning not to do so from Mr. Wheeler, who was acting as the defendants' first aid physician. In such circumstances, and in view of the reservation made by consent at the trial that the Court might deal with the issue of contributory negligence upon the evidence, the case for the plaintiff, notwith-