be difficult to see what other could be adopted. I assume, therefore, for the purposes of this case, that the "engineering work" in which the appellant must have been engaged if he is to recover must be work confined to some physical area, and that he must when injured have been working "on or in or about" that area. It is obvious, however, that there is a difficulty in ascertaining what is the extent and what are the limits of an "engineering work" which does not occur in the case of factories, docks, &c. In these latter causes the walls or fences built round the factory or dock, as the case may be, fix the boundaries and determine the area. In the case of an "engineering work" there is no structural boundary. The area cannot, I think, be confined to the soil on which the rails are actually laid, nor, in all cases, to the street through which the tramway runs, nor even to places immediately abutting on that street. The area must, I think, in the case of a railroad or tramway, or other undertakings of that sort, be fixed by user —that is to say, by the carrying on of some portion of the general operation of construction, alteration, or repair which the employer is engaged in carrying out. In the construction of such a huge undertaking as the Tay Bridge, for instance, various difficult and dangerous operations, all in character "engineering work," and each leading up to the accomplishment of the ultimate object, the construction of the bridge, must be carried on over a widely extended area. It would, in my opinion, be irrational to hold that the entire area so occupied, whether it be continuous or composed of several separated smaller areas, was not an area of "engineering work," and if I could come to the conclusion that the stacking of the rails in the railway yard in this case could in any sense be regarded as part or portion of the general engineering operation which the respondents were employed to carry out, I should be inclined to hold that the appellant was at the time of the accident employed "on or in or about" an "engineering work," and that the yard of the railway company was an area of "engineering work." But in my opinion the stacking of the rails in the yard was only a mode of accepting delivery of them, and was no more a part or portion of the engineering operations than was the dispatch of the rails from the place at which they were loaded. I think, therefore, that the appellant was not engaged in an "engineering work," and that the railway yard was not the area of an "engineering work," or a portion of that area, or about or in close proximity to such an area. I think, therefore, that the decision of the Court of Appeal was right and that the appeal should be dismissed.

Appeal dismissed.

Counsel for the Appellant—Gutteridge—Hemmant. Agents—Baylis, Pearce, & Company, Solicitors.

Counsel for the Respondents—Ruegg, K.C.—W. Shakespeare. Agents—William Hurd & Son, Solicitors.

HOUSE OF LORDS.

Wednesday, May 17.

(Before the Lord Chancellor (Loreburn), Lords James of Hereford, Robertson, and Atkinson.)

JOHNSON *v.* MARSHALL, SONS, & COMPANY.

(On Appeal from the Court of Appeal in England.)

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37)—"*Serious and Wilful Misconduct*"—*Workman Using Hoist in Violation of Rules—Sec.* 1 (2) (*c*).

The rules of a workshop provided that workmen were only to use a certain hoist when they were in charge of a load. There was nothing particularly mysterious or dangerous about the working of the hoist, and, unknown to their employers, the workmen often used it when not in charge of any load. A workman was injured while thus using it. *Held* that he had not been guilty of "serious and wilful misconduct" in the sense of the Act.

Opinions that "wilful" imports that the misconduct was deliberate and not merely thoughtless, and that "serious" applies to the misconduct itself and not to its consequences.

On the morning of the 20th August 1904 Johnson was working as a joiner in the gallery of the erecting shop in the respondents' works. The gallery ran round all four sides of the erecting shop, and a large number of men were employed there. Access to the gallery from the floor below was gained by two wide and convenient staircases in the south and east sides thereof. At or about the centre of the east side of the gallery there was a lift and two steep and narrow spiral staircases communicating with the floor above. On the lift was a notice as follows:—"No one is allowed to use this hoist except in charge of a load." The breakfast hour was eight o'clock, and shortly before eight o'clock Johnson was seen at work with his coat off. At a minute or two before eight o'clock Johnson was found in the lift with his coat on and without a load. The lift had descended below the floor of the gallery, and Johnson was crushed between the floor of the lift and the top of the doorway by which the lift was reached from the floor below. He died from his injuries on the 23rd August 1904. His widow claimed compensation under the Workmen's Compensation Act 1897. This was refused by the County Court Judge of Lincolnshire and by the Court of Appeal, who ordered a new trial.

Johnson's widow appealed to the House of Lords.

At delivering judgment—

Lord Chancellor (Loreburn)—I agree with the Court of Appeal that the result

of the hearing in the County Court was unsatisfactory. Mathew, L.J., went further and held that judgment ought to be entered for the appellant. That is also my own opinion. The facts, so far as they are material, have not been disputed. A workman was found fatally injured in a lift in the respondents' (his employers) workshop without a load, and no one was allowed to use the lift unless he was in charge of a load. That is all we know. It was an accident, and the widow, now appellant, must have compensation under the Act of 1897 unless the employers can prove that the injury was "attributable to the serious and wilful misconduct" of the workman. That the burden of proving this was on the employers is beyond question. We are not dealing with negligence, but with something far beyond it, and we are applying a remedial statute. I can perceive no evidence of serious and wilful misconduct. No doubt it was misconduct to enter the lift when not in charge of a load, for that was a disobedience of orders lawfully given. It was "wilful" in the sense that the man presumably entered of his own accord, but the word "wilful," I think, imports that the misconduct was deliberate, not merely a thoughtless act on the spur of the moment. Further, the Act says that it must be "serious," meaning not that the actual consequences were serious but that the misconduct itself was so. If a servant was found once using the front door instead of the back door contrary to orders, it would be misconduct, no doubt. Could anyone say that it was serious misconduct? So here the lift was intended for use by workmen in charge of a load, forbidden to workmen not in charge of a load. The offence was not that the man used it, but that he used it without a load. I cannot agree that a lift is an appliance so dangerous that the use of it, when believed to be in proper condition and intended for use, does of itself amount to serious misconduct. Certainly it is for the arbitrator under the Act to decide questions of fact; but when there is no evidence it is for the Court to interpose. Accordingly, I am of opinion that an order should be made declaring the appellant entitled to compensation, and directing the County Court Judge to assess the amount.

LORD JAMES OF HEREFORD—In order to determine this case it is necessary to bear in mind the scope and object of the Workmen's Compensation Act. The main object was to entitle the workman who sustained injury whilst engaged in certain employments to recover compensation from the employer although he was guilty of no default. The intention was to make "the business" bear the burden of the accidents that happened in course of the employment, and relief from this liability is not found even if the injured workman be guilty of negligence. The doctrine of contributory negligence was superseded by the Act. But it was thought that if no check was placed on the workmen they might be induced recklessly to induce accidents of a serious character affecting many lives and much property, and so the Act of 1897 contains the provision that if the workman be guilty of "serious and wilful misconduct" he will be disentitled from recovering compensation. Now it is impossible to give any general definition of the words "serious and wilful misconduct;" application of them must be made to each case as it arises. But the use of the word "serious" shows that misconduct alone will not suffice to deprive the workman of compensation. The class of misconduct that would do so might well be represented by such instances as if a workman whilst working in a mine in certain seams of coal struck a match and lit his pipe, or if he walked into a gunpowder factory with nailed boots, refusing to use the list slippers provided for him. Of course these are but instances illustrating conditions of absolute disregard of the lives and safety of many. But, on the other hand, misconduct may well exist that is not "serious" in its nature, and therefore does not destroy the right to compensation. The circumstances of the case before your Lordships may be dealt with by way of illustration. A lift is provided in a factory—the object of the employer is that it shall be used by men when in charge of loads—and notices forbidding other use are placed in the factory. I will assume that, without the fact being brought to the knowledge of the employer or his representatives, the workmen generally and the deceased man on the occasion in question used this lift although they were not in charge of any loads, but from the nature of things no danger could be anticipated from the use of the lift. It was intended to be used by men ascending and descending. If there was a load in the lift the danger of its use could not be diminished—possibly it might be increased. No result producing injury to anyone could be anticipated by the use of the lift by the individual workmen. The misconduct, therefore, is reduced to the bare breach of a rule, from which breach no injuries, actionable or otherwise, could reasonably be anticipated. Does this amount to serious misconduct. In my opinion it does not. I think that there is a test which may fairly be applied. Supposing that the employer, on learning that a workman had travelled in the lift without a load, had dismissed him without notice, and that in consequence an action had been brought by the workman. The question whether the misconduct was sufficient to justify the dismissal without the notice contracted for would be for the jury to determine. I feel sure that most juries would certainly hold that no ground for dismissal had been shown. Yet I think that the words of the statute "serious misconduct" represent a higher standard of misconduct than that which would justify immediate dismissal. I think it worthy of observation that although it ought—under the circumstances that occurred at the hearing before the County Court Judge—to be assumed that there was no acquiescence in the user by the employer, yet the fact that the

deceased man and other workmen openly used the lift—for they could not do so secretly—shows that they at least did not think that their conduct would be regarded as liable to much penalty. I would also add that serious misconduct cannot be construed by the consequences of any act. A man may be told not to walk on the grass. He does so, slips up, and breaks his leg. The consequences are serious, but the misconduct is not so. If the case were sent down for a further hearing, the only material fact which could be added to those already proved would be that the employer had no notice of the user of the lift. In giving this judgment I have assumed that such was the case. I therefore think that all the facts are sufficiently before your Lordships to enable you to form a final judgment in the case, and mine is that the plaintiff is entitled to recover.

LORD ROBERTSON—The question whether two adjectives and a substantive involving censure are appropriately applied to a particular act clearly ascertained would be one which might well cause difference of opinion. I own that I take a somewhat stricter view than appears to prevail in the House to-day, and think that a breach of the regulation directly relating to personal safety might well come within the language of the section if committed intentionally and of choice, even although the thing done did not involve anything morally censurable. But the question being one of conduct is one of circumstances; and I justify my acquiescence in this reversal on the ground that I am not confident that we really know how or why this man came to enter the lift.

LORD ATKINSON—I concur, though not without considerable doubt, in the opinion that, while there was evidence before the County Court Judge upon which he might legitimately have found that the deceased man had been guilty of wilful misconduct on the occasion of the happening of the accident which caused his death, yet that this evidence did not amount to proof that his misconduct, though wilful, was in addition serious within the meaning of the first section of the Workmen's Compensation Act. In none of the authorities to which we have been referred has it been attempted to define serious misconduct. It is scarcely susceptible of precise definition. What amounts to serious misconduct in any given case is a question of fact to be determined by the judge of first instance on the facts of that case, and the function of the Court of Appeal and of your Lordships' House is confined to deciding the question of law whether there was any evidence to sustain this finding. In the present case the misconduct of the deceased consisted wholly and entirely in his having deliberately and in disregard of the express prohibition in writing of his employers, of which he must be taken to have been aware, used for his own purposes as a passenger lift a certain hoist erected by his employers in their factory, and designed and intended by them to be used only for the carriage of goods, the workmen in the factory being forbidden to use it except when bringing up or down the loads of goods of which they were in charge. It was proved in evidence that the men frequently disregarded the notice and used the lift as a passenger lift; but it was found as a fact by the judge that this illegitimate user was unknown to the defendants. No evidence whatever was given to show that there was any difficulty in using the lift, or that the deceased was unacquainted with the proper method of managing and controlling it, or that any accident had ever resulted from the use of it, authorised or unauthorised. There was no person in exclusive charge of the lift, and it appeared to have been managed and controlled on each occasion of its use by the man or men who required to use it. Under these circumstances one must, I think, come to the conclusion on the evidence that there was no reason to apprehend any immediate or proximate danger in the unauthorised use of the lift, or that the deceased knew or believed that there was any risk, or, if risk at all, any but a very remote risk of injury or accident to himself, his fellow workmen, or to the machine itself. The necessity which undoubtedly exists for the strict maintenance of discipline amongst the hands engaged in factories and other establishments where machinery is used and the grave dangers which might result if any general laxity of discipline were permitted to prevail, tend to render important breaches of rules adopted for the conduct of business which in other places and under other circumstances might fairly be regarded as trivial; and it is the consideration of this secondary effect of the disobedience to orders or of violation of rules which causes me to entertain great doubt as to the correctness of the conclusion to which I have come. I do not find, however, that much reliance was placed upon these considerations in the authorities to which we have been referred. The danger that if men engaged in mines or factories are permitted without risk of loss to transgress in small things they may be tempted to transgress in great things was not insisted upon, and indeed if by reason of this secondary effect of the violation of rules unimportant in themselves the wilful misconduct of a workman has always to be regarded as serious, the word "serious" might be regarded as surplusage and the position of the workman would be rendered worse than it was before the Act was passed. In *Rumboll* v. *Nunnery Colliery Company* (80 L.T. Rep. 42), *Reeks* v. *Kynock* (18 Times L. Rep. 34), and *Smith* v. *South Normanton Colliery Company* (88 L.T. Rep. 5; (1903) 1 K.B. 204) the Court of Appeal apparently considered that it was not every violation by a workman of a rule, general or special, framed for the regulation of the industry in which he was engaged, or every deviation from or disobedience to the orders of a manager or superior, however wilful, which could be regarded as necessarily

amounting to serious misconduct. Indeed, if the word "serious" used in this connection is to have any force or weight given to it at all, it must, I think, mean at least that where the risk of loss or injury resulting to any person or thing from the doing of any particular act is very remote, or where that loss or injury, even if probable, would be trivial in its nature and character, the doing of that act, however wilful, does not amount to "serious misconduct" within the meaning of this statute, sufficient to deprive an injured workman of the benefits conferred upon him by the statute, unless the indirect influence of the act upon the discipline of the factory is to make every transgression serious. In *Rumboll* v. *Nunnery Colliery Company* the rule deliberately violated by the men—a rule which they had shortly before the happening of the accident been directed by the deputy-manager to carry out in a particular way—namely, a rule requiring that the roof of the mine should be adequately propped—was one of those rules the neglect of which amounted to an offence against the Coal Mines Regulation Act 1887, subjecting the offender to a penalty of £2 at the least, to be recovered summarily. The breach of that rule was deliberate. There was no question about that. The danger caused by the neglect of it was grave, immediate, and well recognised, and its violation therefore less excusable than the disregard in this case of the requirements of the notice, yet Smith, L.J., in giving judgment said that he could not regard the violation of these general rules so punishable and so necessary to be observed for the safety of the work as in itself and as a matter of law to amount to serious and wilful misconduct within the Workmen's Compensation Act 1897. In the present case there was no evidence that the danger of loss or injury resulting to anyone from the use of the lift was immediate or probable. Nor was any evidence given by the respondents on many points on which one would suppose that it might have been given, such as the nature of the mechanism of this lift, the mode in which it was worked, regulated, and controlled—whether there was any means of communication between the interior of the lift and the upper floor, so that the person actually using the lift might give some warning to those on the upper floor and so prevent any attempt by the use of the lever on the upper floor to cause the lift to ascend or descend. For all that appears, it may well be that this unfortunate accident was caused by the lift being, by the use of this lever on the top floor, suddenly made to ascend just as the deceased had brought it to a standstill and was in the very act of getting out of it. And, speaking for myself, I may say that, had it been proved that such means of communication as I have indicated existed, that these means of communication were used by those legitimately using the lift, that the deceased had refrained from giving any warning, and that the accident had occurred in the way supposed owing to the absence of that warning, I should have held that there was abundant evidence of wilful and serious misconduct on the part of the deceased. The respondents, however, preferred to stand upon the letter of this notice and to rely exclusively on the infraction of their rule. They have not therefore, in my opinion, given any evidence to sustain the onus of proof thrown upon them by the statute; and I accordingly think the appeal should be allowed.

Judgment appealed from reversed.

Counsel for the Appellant—W. H. Owen—E. H. Chapman. Agents—C. J. Smith & Hudson, Solicitors.

Counsel for the Respondents—C. A. Russell, K.C.—T. Hollis Walker. Agents—R. F. & C. L. Smith, Solicitors.

PRIVY COUNCIL.

Thursday, May 17.

(Present—the Right Hons. the Earl of Halsbury, Lord Macnaghten, Sir Arthur Wilson, and Sir Alfred Wills.)

M'LAUGHLIN *v.* WESTGARTH AND ANOTHER.

(On Appeal from the Supreme Court of New South Wales.)

Statute—Interpretation—Clause of Protection—Special Enumeration of Persons Protected—Person Not so Included Not Necessarily Excluded from Protection.

When a statute contains a special enumeration of protected persons it does not necessarily follow that a person not included in the enumeration is excluded from the protection afforded by the statute.

This was an appeal from a rule or order of the full Court of New South Wales (Darley, C.J., Owen and Pring, JJ.), dated 27th October 1904, which had dismissed an action of damages for wrongous confinement brought by an alleged lunatic against his committee.

The Australian Lunacy Act of 1898 contains clauses of protection specifically protecting various persons, &c., in their dealings with lunatics. The committee of a lunatic is not included in the enumeration, and the only point of interest in the present case, was whether the committee were, owing to that omission, *ipso facto* excluded from the protection of the Act.

The Earl of Halsbury—Their Lordships are of opinion that this is an extremely clear case. The construction of the particular section of the New South Wales Lunacy Act is not a very important point for their Lordships to determine. It may be that modern statutes are drawn with greater particularity and minuteness. The misfortune in the framing of those statutes is that any body of persons, seeing a possi-