

HOUSE OF LORDS.

Friday, July 21, 1911.

(Before the Lord Chancellor (Loreburn),
Lords Atkinson, Gorell, and Robson.)

EVANS & COMPANY, LIMITED
v. ASTLEY.

(ON APPEAL FROM THE COURT OF APPEAL
IN ENGLAND.)

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1—“Accident Arising out of and in the Course of the Employment”—Death by Accident—Inference of Fact.

A brakeman was in charge of a train of three trucks pushed by an engine from behind, and was in the front truck. The train overtook on the same line a brakesvan drawn by another engine, and the two trains proceeded together, buffer to buffer, but uncoupled. After passing a certain point it was necessary for the trains to stop and then proceed in the reverse direction down a branch line, and it was the duty of a brakeman to alight and hold the points of the branch line by a lever. The brakeman in the truck, before the train stopped, tried to climb into the brakesvan, but in doing so fell and was fatally injured. It was not necessary to alight from the train while moving, and the ordinary method was for the brakeman to descend from the truck in which he was travelling. The brakesvan, however, was provided with a step closer to the ground than the buffer of the truck. The dependants of the brakeman successfully claimed compensation against his employers.

Held (diss. Lord Atkinson) that there was evidence upon which the County Court Judge might find in fact that the accident arose out of and in the course of the employment.

A workman was killed by accident in circumstances stated *supra in rubric* and in the judgments of Lords Atkinson and Gorell. His dependants claimed compensation from his employers, and the County Court Judge made an award which was affirmed by the Court of Appeal (COZENS-HARDY, M.R., and FLETCHER MOULTON, L.J., *diss. BUCKLEY, L.J.*).

The employers appealed.

Their Lordships gave considered judgments as follows:—

LORD CHANCELLOR (LOREBURN) — I agree with the majority in the Court of Appeal, though I must always hesitate in differing from the weighty opinion of Buckley, L.J.

Your Lordships have to decide whether there was any evidence upon which the learned County Court Judge might reasonably come to the conclusion that the deceased man was trying to climb from

the waggon on to the brake van with a view to using the step with which the van was furnished, and so alighting while the train was slowly passing the points. It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a court to act upon. Any conclusion short of certainty may be mis-called conjecture or surmise, but courts, like individuals, act habitually upon a balance of probabilities.

In the present case, the theory that this man climbed upon the van, or tried to do so, for his own purposes, whether to gossip with the other brakeman or to amuse himself, seems to me most improbable. The theory that he meant to get upon the van because in a couple of minutes the train would be passing the points, and he had to arrange the points and would save time by alighting where the points were, and could do so conveniently by using the steps which were on the brake van, whereas there were none on the truck, seems to me very probable. The facts being as I have just stated, point to it, and the only matter in question being the intention of the unfortunate man, I confess that I have no real doubt that this was just what he intended. The County Court Judge so found, and in my judgment was entitled so to find.

If that be so, the award must be sustained. This man was killed from a risk in its nature incidental to his kind of employment while doing his master's work, though in a most careless and dangerous manner. It was indeed argued here, for the first time I rather think, that in going from the truck to the van he quitted his employment, and that he was not employed to do what he did. The answer is that he was all the time doing what he was employed to do, though in the wrong way.

LORD ATKINSON—I regret that I am unable to concur in the judgment just delivered by the Lord Chancellor. I think there is no evidence in this case from which an inference could reasonably be drawn that the accident by which the deceased met his death arose “out of and in the course of his employment.”

It has been decided by this House, the English Court of Appeal, and other tribunals—first, that in claims under the Workmen's Compensation Act the burden of proving that the accident causing the injury to or death of the workman arose out of and in the course of his employment lies upon the applicant or plaintiff; and secondly, that the arbitrator or County Court Judge is the absolute judge of fact, and therefore that his findings of fact cannot be disturbed (in the absence of misdirection in point of law by himself of

himself) unless the evidence be such that no reasonable men or no reasonable man properly instructed, could arrive at the conclusion at which he has arrived. One finds not infrequently in cases under that Act surmises more or less shrewd of this arbitrator or judge, or conjectures more or less plausible, described as inferences of fact, although there are no data whatever from which the so-called inferences can reasonably be drawn.

In my view the present is a case of that description. Lord Watson pointed out this distinction in the clearest language in *Wakelin v. London and South-Western Railway* (12 App. Ca. 41). There the husband of the plaintiff was found dead on the defendants' line at a level crossing. The defendants' train did not whistle as it approached the crossing, and there was some evidence that the company managed the crossing negligently; but there was no evidence whatever from which it could, as a matter of fact, be reasonably concluded whether those in charge of the train negligently ran down the man or the man negligently ran against the train, though, if one were permitted to speculate, one might quite naturally conclude that, owing to the absence of whistling and the other negligent acts alleged to have been proved, it was more probable that the engine through negligence ran down the man than that the man negligently ran against the engine. The jury adopted the apparently most probable alternative, and found for the plaintiff in the action; but it was held by the Court of Appeal and by this House that they were wrong, and that there was no evidence to justify their finding. The passage in Lord Watson's judgment runs as follows—"The evidence appears to me to show that the injuries which caused the death of Henry Wakelin were occasioned by contact with an engine of a train belonging to the respondents, and I am willing to assume, although I am by no means satisfied, that it has also been proved that they were in certain respects negligent. The evidence goes no further. It affords ample materials for conjecturing that the death may possibly have been caused by that negligence, but it furnishes no data from which an inference can reasonably be drawn that as a matter of fact it was so occasioned."

The conclusions upon which the award of the County Court and, with all respect, the judgments of the majority Court of Appeal, appear to me to be based, are in truth, in my view, conjectures of the character indicated by Lord Watson, not reasonable inferences of fact drawn from established data. The first of these conjectures is set forth by the County Court Judge in these words—"I draw the inference from what occurred that the deceased when he met with the accident was preparing to get down from his engine (I presume he means truck) to attend to the points by the very dangerous way of first getting on the brake's van ahead where he would have steps to the ground when the proper time arrived for him to alight." I

shall refer presently to what, according to the terms of his employment, was "the proper time" for him to alight.

The second and third conjectures are set forth in the judgment of the Master of the Rolls, namely, first, that the brakeman in the front train did not intend to get out of his van to move the lever at the points which they were approaching, since he had done so at those which they had already passed over; and secondly, I use his own words, that "it was the business of the deceased according to the custom and courtesy as between brakemen on these occasions, to get down and work the lever in order that the two trains might go back into the siding."

The fourth conjecture, very similar to this last, is set forth in the judgment of Fletcher Moulton, L.J., in these words—"I come to the conclusion that as the other brakeman had opened the points, because in passing through those points his train was leading, it would probably be the business of Astley to open points which they were going to pass through when his train would be leading."

Now if one examines the evidence to discover the data from which these conclusions, alleged to be inferences of fact, are said to have been drawn, it will be found that the deceased, whose age is not stated, had been for four years in the appellants' employment. He had acted as brakeman (which, I presume, means a man who controls and works a brake) with William Fairhurst, an engine driver who had been in the appellants' employment for eight months before the accident. On the occasion of the accident the train of which he was the brakeman was composed of an engine and three trucks. Deceased was in the truck furthest from the engine, a six-ton waggon. Fairhurst, the engine driver, was under the control of the deceased. The engine was engaged in pushing, not pulling, the trucks into the company's shed over two sets of points. The waggon in which the deceased was being carried was therefore in front. In the regular course the train, if proceeding alone, would after passing over the points, stop, and it would be the duty of the deceased as brakeman to descend from his truck and raise the lever in order that the train might come back over the points. It was not necessary for the brakeman to get off the train while it was in motion. There is not a particle of evidence to show that he had ever done so, or that it was the custom or practice to do so; and there was a notice in the cabin that men should not get on to trains when moving. The buffer of the waggon in which he travelled was 3 ft. from the ground. The step of the brake van, hereafter referred to, was only 18 in. from the ground, the difference between their respective heights being thus only 18 in. There is not a particle of evidence in the case to the effect that on any occasion the deceased had experienced any difficulty whatever in descending from any waggon in which he was engaged, or ever evinced any desire to get a foothold,

step, or platform nearer the ground than the wheel or buffer of his waggon, from which to descend, or any desire to descend from his waggon while it was in motion, but, according to the finding of the County Court Judge, he was seized on this occasion with a strong desire, which he is not proved to have ever manifested before, to do both these things, namely, to descend while his waggon was moving, and to obtain a platform 18 in. lower than the buffer of his waggon from which to descend—so strong a desire indeed that to gratify it he attempted to do the dangerous and reckless thing which cost him his life. In the progress of this train towards the shed it overtook, near the points close to a place called the Wood Pits, an engine and brake van, also belonging to the appellants, proceeding in the same direction, engine in front. The two trains came into touch, buffer to buffer, but were not coupled. As they reached the Wood Pits the trains stopped; the man in the brake van got down, held the points' lever until the two trains passed over them, and then got into his van again. The trains accordingly proceeded on their route for sixty or seventy yards; they were then travelling at about seven or eight miles an hour, and were about a quarter of a mile distant from the points which they were approaching. Just as the brakeman in the brake van had put on his coat and was taking his tea, the unfortunate deceased sought to clamber from his waggon into the brake van, passing over the ledging of the van, which was 3 ft. 6 in. higher than the buffer of his waggon. He fell and was killed.

It is suggested by the Master of the Rolls that, according to the "custom and courtesy" amongst brakemen, as I understand him, it would be the duty of the deceased to work the switch lever at the points they were approaching, either because the other brakeman had done it at the Wood Pit points, or because the train of the deceased would be the leading train when coming out again over the points. But there is not a suggestion of anything of the kind in the evidence, and besides, if there was such a custom or practice, and if the deceased had this desire to conform to it, it appears to me impossible to explain why he did not mount into the brake van at Wood Pit points when the trains were stationary, but waited to do so till they had proceeded sixty or seventy yards upon their journey and were travelling seven or eight miles per hour. The driver Fairhurst stated that the deceased had no reason to get out of his waggon for anything connected with the train. The brakeman into whose van he went was not examined, and none of the witnesses who were examined suggest that the deceased up to the attempted transit to the brake van ever indicated an intention or desire to do what is attributed to him. No explanation of his action is given by them. One would think that if this "custom and courtesy" amongst brakemen existed the engine driver must have known something about

it. The last conjecture appears to me to be the most baseless of all, namely, that the brakeman by putting on his coat and taking his tea gave notice or announced to the deceased that he the vanman did not intend to work the lever of the points a quarter of a mile ahead, and that therefore the deceased should do it. The surmise that he went into the van to share the tea or to gossip with the vanman is as it appears to me quite as plausible as that he went into it to work the lever at the points which they were approaching.

I have gone through the evidence thus minutely because of my unfeigned respect for the learned Lords Justices who formed the majority of the Court of Appeal from whom I differ. I think that there was no evidence sufficient to sustain the conclusion to which they and the County Court Judge have come, that these conclusions are in truth mere conjectures or surmises for which this case, no doubt, like that of *Wakelin*, may afford ample material, but are not at all inferences of fact reasonably drawn from sufficient data. In my opinion the judgment of Buckley, L.J., was clearly right, and that of the Court of Appeal erroneous. The appeal, I think, should therefore be allowed with costs.

I wish further to state that in my opinion it was the bounden duty of the deceased, who was in charge of the train, to remain upon it; that he had abandoned his post of duty in leaving it; and though it is not necessary for the purposes of this case to decide the question, I wish to point out that if a workman be employed to do a certain thing, and a place be assigned for him in which to do it, and he chooses to attempt to do the same thing in a wholly different, unauthorised, and a much more dangerous place, thereby exposing himself to a risk not incidental to the reasonable discharge of his duties, and is injured by an accident arising from his added risk, it by no means follows that the injury he sustains can be treated as arising out of and in the course of his employment. For instance, if one should employ a carpenter to saw timber and make doors, and assigned to him a workshop in which to carry on this work, but if, instead of doing the work inside the workshop he should attempt to do it on the roof of the building, and fell and was injured, it does not appear to me, as at present advised, that the accident, due to a new risk added by the workman's own rashness, could be held to be an accident arising out of or in the course of his employment. The workman in such a case by his own act in effect, I think, changes the whole nature and character of his employment. He makes it something quite different from that contemplated by his contract of service, and his conduct is in my mind generically different from the mere doing of the thing which he is employed to do in the place appointed carelessly or negligently, for he goes into a dangerous place he was not employed to be in, and had no right to be in. So that even if it were established in this case, which, I think, it is not, that Astley's object in

scrambling into the van was to enable him to descend more easily while the train was in motion with a view to open the points, I should still be inclined to doubt whether the injury which he received arose out of or in the course of his employment.

I further especially desire to guard myself against being supposed to concur in that portion of the judgment of Fletcher Moulton, L.J., in which he states what in his opinion is the principle which ought to be applied to the presumption which he considers arises in the case of the death of a workman due to the dangers of his employment.

LORD GORELL—The question in this case, which has been very fully argued, is whether the accident in question arose out of the deceased man's employment? And the answer to this question depends on whether there was any evidence which justified the County Court Judge in drawing the inference from what occurred "that the deceased when he met with the accident was preparing to get down from his engine to attend to the points by the very dangerous way of first getting on to the brake van ahead, where he could have steps to the ground when the proper time arrived for him to alight." On the one side it is said that there was evidence from which this inference might reasonably be drawn, and on the other that there was no evidence to support it, but that the matter rested only on surmise.

Astley, the deceased, was brakesman on a train consisting of an engine and three trucks, and was in charge of the train. The trucks were being pushed by the engine, and Astley was in the front truck. From the evidence it would seem that the truck was an open truck, with no steps down from it, and not a brake van, and, as far as I understand, he had not when in the truck anything to do with braking, but had to give orders to the driver and fireman, and to get down to change the points when necessary. It also appears that the train was making for the company's shed, where, presumably, duties with regard to moving the train would end or for a time. The train overtook another train with an engine in front and a brake van behind which had steps by which to get down from it, and the two trains travelled buffer to buffer, but not coupled. At points at Wood Pit the trains stopped; the brakesman in the front train got down, opened the points, and held them open till both trains passed, and then got into his van again. He proceeded to put on his coat, get his can, and take his tea. The train proceeded in the direction of some further points some quarter of a mile further on, where the trains would have to stop, and the points would have to be opened and kept open while the trains were shunted back on to the branch leading to the shed. As the trains were thus proceeding, and before they had reached these other points and stopped, the deceased attempted to get into the brake van in front of him, but fell and was killed. To

open the points one of the men would have to get down. The brakesman in the front van was acting as if he did not intend to do so. The fireman, who attended on subpoena, does not express any opinion as to what Astley's object was in getting out of his truck; and the engine driver, who was a witness for the defendants, could suggest no reason for his doing so. The brakesman, who might have thrown more light on the matter than anyone else, was not called by either side. The account of the accident is somewhat meagre, but when it is remembered that one of the men had to get down; that the other man did not seem to be preparing to do so, but the contrary; that it was easier to get down, especially if the trains were still moving, by the steps of the brake van which came down to 18in. from the ground than off the truck, which had no steps and the buffers of which were 3ft. from the ground; that to jump down opposite the points as the trains passed and to open the points after the trains had passed and were about to come back might easily be done; and that as the trains were going to the shed there could be no possible object in getting out of the truck into the van for a momentary chat—it seems to me that it is most reasonable to infer that Astley, having nothing to keep him in his truck, did not intend to abandon his post and did not in fact abandon it, but was doing what he did in order to be ready to work the points; and that this is not a matter of mere surmise or of an inference which can reasonably be drawn either way, but that the County Court Judge had evidence upon which he could reasonably draw the inference which he did draw.

I am therefore of opinion that the judgment of the Court of Appeal should be affirmed.

LORD ROBSON—There is no doubt that the deceased workman in this case met his death by accident while in the course of his employment, and the only question is whether there is evidence justifying the conclusion that the accident "arose out of" his employment. His work at the time was that of a brakesman. The train upon which he was placed consisted of two parts which were running together as one train, although not coupled; and upon the other part of the train there was another brakesman, who just before the accident was apparently intent on his tea. The train was approaching a set of points, where it would be necessary for one or other of the two brakesmen to get down from the train and work the lever. The deceased was seen to get out of his truck in order to get into the brake van, from which descent and ascent were rather easier than they were from his own truck. In thus changing his position he slipped and was instantly killed.

It is contended by the appellants that in this state of the facts there is nothing to show that he was doing his master's work at the time of his death. They say that the facts are consistent with his having left his work for his own pleasure or pur-

poses. What precise intention he had in his mind is of course not now susceptible of direct proof, and the Court must look at all the circumstances to see if they give rise to a reasonable and definite inference on the matter in question. If they give rise to conflicting inferences of equal degrees of probability, so that the choice between them is mere matter of conjecture, then the applicant has failed to prove her case. But is that shown to be the case here? On the one hand it is said that climbing from one truck into another is not, *prima facie*, a matter of pleasure, and was a manœuvre which if safely performed would have facilitated the next piece of work which he had to do or may probably have intended to do. On the other hand the appellants say, and it is of course possible, that the deceased may have been getting into the brake van merely in order to leave his proper duty and waste his time in the society of the brakeman. That, however, would have been a wrongful intention on his part, and as such it is not lightly to be presumed against him.

Where a workman is killed in the course of his employment while engaged in some act reasonably consistent with his master's service, I think that it requires some more definite evidence than the defendants can suggest in this case in order to found the inference that he was moved by a wrongful intention. In these circumstances I think that the inference drawn by the County Court Judge was the only inference properly open to him, and that this appeal fails.

Appeal dismissed.

Counsel for Appellants—Rigby Swift—G. C. Rees. Agent—W. Pingree Ellen, Solicitor.

Counsel for Respondents—Stewart Brown—Alfred Elias. Agent—H. Verdon Baines, Solicitor.

HOUSE OF LORDS.

Monday, October 30, 1911.

(Before the Lord Chancellor (Loreburn), Lords Atkinson, Shaw, and Mersey.)

BROWN v. TURNER, BRIGHTMAN, & COMPANY.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Ship—Charter-Party—Time-Charter—Exceptions—Strikes.

A time-charter of a ship contained the following exceptions—"The owners and charterers shall be mutually absolved from liability in carrying out this contract in so far as they may be hindered or prevented by . . . strikes." The charterers ordered the ship to the port of N. at a time when to their knowledge a strike was there in operation. Owing to the strike the ship could not

obtain a cargo at N. Under the charter-party the charterers could have withdrawn the vessel from the area of the strike and traded with it elsewhere. The charterers refused to pay hire for the period of the ship's stay at N.

Held that the charterers were not protected by the exception, and were bound to pay the hire.

In an arbitration between the charterers and owners of a ship the arbitrator found the facts proved as stated *supra in rubric*, and decided in favour of the charterers, subject to the opinion of the Court. Judgment by Bray, J., in the charterers' favour was reversed by the Court of Appeal (COZENS-HARDY, M.R., FLETCHER MOULTON and FARWELL, L.JJ.).

At the conclusion of the argument for the appellants their Lordships gave judgment as follows:—

LORD CHANCELLOR (LOREBURN)—I agree with the conclusion at which the Court of Appeal has arrived.

The question is a very short one. It turns upon the construction of a clause in this charter-party—whether the charterers were prevented from carrying out this contract by a strike. If by carrying out the contract is meant merely performing the obligation due from the charterers to the owner or the owner to the charterers, then it is quite clear that the strike did not prevent the charterers from doing what they were bound to do, viz., paying the hire of the ship. If upon that clause it can be said that the charterers were prevented from carrying out this contract because they were prevented from enjoying the rights bestowed upon them, then equally I think that the strike has not prevented that. They used all their rights all the time. They took the ship to the port; they chose to keep her there, but the only misfortune was that they could not get a cargo. It was no part of the obligation of the owners to see that they got a cargo. To my mind the real meaning of this clause is that placed upon it by the Court of Appeal. Even if it were not so I do not think that the appellants could succeed, for the reasons which I have stated.

LORD ATKINSON—I concur.

LORD SHAW—In this case the arbitrator found that there were other trades in which vessels might be employed within the limits of the charter which would not have been interfered with by any strike. That has been put in purposely by the arbitrator in order to have some effect given to it. When I look to the contract I observe, as is usual in such cases, that the charterers have a right to direct the movements of the vessel. In sending this vessel at a certain date they knew that they were sending it within the area of the strike. Under the charter-party it was clear that they had the power of withdrawing it from the area and placing it elsewhere, and according to the finding of the arbitrator they could have done so, so that the vessel might