

passed on to premises which do not belong to his employer.

LORD ATKINSON—I concur. I think this is a perfectly plain and simple case. The only question for decision is whether the workman was in the course of his employment when he fell into the docks. To answer that question one must find out from his contract of employment what he was employed to do—what rights this contract conferred upon him, what obligations it imposed. It unquestionably conferred upon him the right if permitted by the Dock Company to traverse the premises of that company from the dock gate to the place where the barge he was working on lay. It imposed upon him the obligation to do so. He had no right or obligation to do this save under and by reason of his contract of employment. In my view he was as much employed by his employer to get to the barge as he was to work upon it. Everyone of these remarks applies equally to the return journey from the barge to the dock gate when he knocked off work upon the barge. In argument some distinction was attempted to be drawn between the case where the workman has to traverse the private property of his employer to get to his work and that where to do so he has to traverse the private property of another with the consent of that other. I do not think that is a sound distinction. When a man walks along the public street to get to his work he is doing something which he has a perfect right to do irrespective altogether of his employment. The right does not spring from his employment at all. It belongs to him as a member of the public. I am clearly of opinion that this unfortunate accident happened to the workman in the course of his employment, and I do not think that any of the authorities cited are inconsistent with this conclusion. I am therefore of opinion that the decision appealed from was right and should be affirmed and this appeal dismissed with costs.

LORD BUCKMASTER—In this case there is no dispute as to the facts; indeed there was no conflict of testimony before the County Court Judge calling for decision. Had it been otherwise his determination of the result of rival evidence would, in the absence of extreme and unusual circumstances, be accepted as final. In my opinion, however, the learned County Court Judge has fallen into error in his endeavour to obtain from decided cases a fixed standard of measurement by which to test the meaning of the words in the statute “in the course of” and “arising out of” employment. Some of the reported cases, which have been fully referred to by the Lord Chancellor, appear to me to have made the same mistake and to have attempted to define a fixed boundary dividing the cases that are within the statute from those that are without. This it is almost impossible to achieve. No authority can with certainty do more than decide whether a particular case upon particular facts is or is not within the meaning of the phrase.

In the present instance the respondent was employed by the appellants to do work upon a barge which they had contracted to repair. The barge was situated on certain premises, namely, the South-West India Dock, under the exclusive control of the Port of London Authority. Access to and egress from these premises could only be obtained by the dock gates. In the circumstances of this case it was only as a workman employed to work upon the barge that the deceased was entitled to enter or remain upon the premises.

The accident that cost him his life occurred on his leaving the barge and while he was lawfully on the dock premises on his way out.

These circumstances are in my opinion sufficient to show that it was in the course of his employment that he met with his death. That the accident arose out of the employment has not been disputed.

I think therefore that the Court of Appeal was right, and that this appeal should be dismissed.

Their Lordships dismissed the appeal.

Counsel for the Appellants—H. Walker, K.C.—W. H. Duckworth. Agents—W. Carpenter & Sons, Solicitors.

Counsel for the Respondent—Shakespeare. Agents—Pattinson & Brewer, Solicitors.

HOUSE OF LORDS.

Friday, March 23, 1917.

(Before the Lord Chancellor (Finlay),
 Viscount Haldane, Lords Dunedin,
 Atkinson, and Sumner.)

LANCASHIRE AND YORKSHIRE RAILWAY COMPANY v. HIGHLEY.

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

Master and Servant—Workmen's Compensation—Arising out of and in the Course of Employment—Added Peril—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1.

An employee of a railway company in crossing the line to a messroom to which he had a right to go, chose to walk over the metals and under a goods train standing in a siding. The train started and he was killed. *Held* that the accident did not arise out of the man's employment, but occurred in consequence of his having run an additional and quite unnecessary risk.

Gane v. Norton Hill Colliery Company, 1909, 2 K.B. 539, distinguished.

Observed (per Lord Dunedin) that though a decision of a Court of higher or equal authority binds another Court as to propositions of law, it cannot bind it as to the findings in fact.

At delivering judgment—

LORD CHANCELLOR (FINLAY)—This case arises upon a claim for compensation under

the Workmen's Compensation Act made by the respondent in respect of the death of her husband.

The claim was disallowed by the County Court Judge, but he added that if he had been able to make an award he would have given £175, and on appeal the Court of Appeal allowed the claim, directing an award for that amount.

From this decision the Railway Company now appeal to your Lordships' House, asking that the decision of the County Court Judge in their favour should be restored.

The case turns upon the question whether the accident arose out of and in the course of the employment of the deceased.

The deceased George Thomas Highley was employed by the appellants as a labourer on their railway. Early on the morning of the 12th August 1915 he "checked on" at Sowerby Bridge, near Halifax, and was told by his foreman that he was to go to Goole to work there. He went with his foreman and other workmen by passenger train as far as Wakefield, where they were to change trains for Goole, and had to wait there for an hour and a half. The men had food with them, but in order to get hot water to prepare their breakfast they crossed from the platform on the north side of the Wakefield Station over the lines of railway between them and a messroom on the south side, as shown in the plan. At the messroom the man in charge was in the habit of supplying hot water to any servant of the company who applied for it. On arriving at the branch Goole line, to the south of the main line, the men found a train there which they supposed to be "dead," as owing to the convexity of the line, the engine was not visible to them. They proceeded to pass under the couplings of the carriages, and the deceased was in the act of doing so when the train moved on and he was killed on the spot. The men could have got round to the messroom from the down platform on which they were, without crossing any line of railway, if they had gone by a bridge over the line some little distance to the west, which would have taken them to the Calder Vale Road, but this would have taken some five or six minutes. They could also have avoided crossing the main line by making use of the subway shown in the plan, but this also would have been longer than the route which they took.

The foreman Baker stated in his evidence as follows, according to the Judge's notes—"8-30, usual breakfast time. Usually we took our breakfast so as to go by 7²⁵ to Goole. Customary for us to go to this messroom. We crossed metals—force of habit. Never warned not to take it. Have taken it since. Standing goods train there often, and we often pass through. No prohibition and no warning." *Cross-examined*—"Could have got there without crossing metals at all; five or six minutes by the safe route. We had one and a half hours at Wakefield this morning. We went to east end of down platform and then crossed nine lines and turned to right to mess. There is a subway, and if we used that we would have only two lines to cross and the

goods train would not have been in our way. We could have rounded the train, the end being only five or six trucks off, but we went under. We chose the way we did for our own convenience. We knew we could go what way we thought fit."

Under these circumstances the County Court Judge held that the accident did not arise out of the employment. The most material part of his judgment is as follows—"Mr Lawn, for the applicant, argued that the taking of his meals in the course of his working hours was part of the duty he owed to his employers. I thought this argument quite untenable, having regard to *Parker v. Owners of Steamship 'Black Rock,'* 1915 A.C. 725, and several other cases. There was no 'contractual obligation here' (to use Lord Sumner's words), 'no duty owed to the employer' (Lord Parker), that the deceased should be where he was in order to get food or for any other purpose. He chose to go that way for purposes of his own, and in doing so to run an additional and quite unnecessary risk in going between the waggons. Hence I found the accident did not arise out of his employment. Mr Perks, for the respondents, put in certain rules of the company prohibiting what the deceased did here. But in view of Baker's evidence that they had always crossed this way without warning or prohibition, 'by force of habit,' I could not hold the prohibition in the rules to be a 'genuine prohibition' as these words are employed by Lord Loreburn in *Barnes v. Nunnery Colliery Company,* 1912 A.C. 44." There is a certain amount of obscurity about this passage, but I think upon the whole that the learned County Court Judge must be taken as basing his judgment on two separate grounds. First, that the deceased while going to make preparations for his breakfast was engaged on his own business and not his master's, and second, that by going between the waggons as he did he ran an additional and quite unnecessary risk, and that for this reason the accident did not arise out of his employment. I regard the later passage with regard to the company's rules as relating merely to the fact that the deceased had walked upon the rails in infraction of rule 26 of the rules and regulations of the Railway Company, and as having no relation to his conduct in passing under the waggons.

The Court of Appeal reversed this decision. They held that getting their breakfast was covered by the men's employment, and on this they were, I think, right. They further held that crossing the line under the trucks did not prevent the accident so occasioned from arising out of the employment, and in doing so appear to have been chiefly influenced by the decision of the Court of Appeal in *Gane v. Norton Hill Colliery Company,* 1909, 2 K.B. 539. In that case the workman was injured while crossing a line of railway which was covered with trucks, the train having been set in motion while the plaintiff was crossing by getting under the buffers of the trucks. The County Court Judge had found that the accident did not arise out of and in the course of the employment, but his decision was reversed by the

Court of Appeal. The ground of their decision was most clearly stated by Farwell, L.J., and by Kennedy, L.J. The former said, at pp. 545-546, speaking of the judgment of the County Court Judge—"He also found that the way the man went on the day of the accident was the usual one for him to go, and the usual one for other men to go. I understand that to mean that notwithstanding the fact that the line was covered by trucks, as it was habitually, the men always used that route."

And the latter (Kennedy, L.J.) says, at p. 547—"No doubt one does look, as Farwell, L.J., has said, with some closeness to the question when you have, as you have here, a way which at the time had trucks across it, but I read the finding of the learned Judge clearly to mean that the applicant in going by this way, with or without trucks on it, was taking a course which the employers knew their men would take, and which he himself by experience had found himself authorised by them to take during the eighteen months he had been there."

The decision in *Gane's* case proceeded therefore entirely upon the finding that passage across a line of railway by going under the trucks which were upon it was recognised and authorised by the Railway Company. In the present case Lord Cozens-Hardy, M.R., after referring to *Gane's* case, said—"It seems to me that the principle in that case really covers this, and its facts are almost identical with it." Pickford, L.J., says—"I agree that the appeal should be allowed on the authority of *Gane v. Norton Hill Colliery Company*." Warrington, L.J., says—"So also with regard to the standing trucks upon the line; it seems to me that we cannot consistently with the case of *Gane v. Norton Hill Colliery Company* hold that that fact would make the crossing of that place outside the sphere of the man's employment." And again—"If I am right in the way in which I have worked out the position that the man was within the sphere of his employment in going to the mess-room, and in going to the messroom across some lines of railway, and even between some standing trucks, then, even if in doing so he incurred an unnecessary risk (that is to say, if he might have gone some other way which would have been safer), that might be an improper way of doing that which was in the sphere of his employment, but it does not take it outside that sphere."

A finding of fact in one case cannot be a safe guide as to a finding of fact in another case. *Gane's* case proceeded solely upon the ground that what the man did was authorised by the company. Whether that finding was right or wrong is for the present purpose immaterial. I feel myself unable to draw any such inference from the facts in the present case, and I read the judgment of the County Court Judge as containing a finding that the deceased was not acting in the course of his employment in crossing under the trucks, and therefore that the accident did not arise out of it. It is on that ground I think his judgment right.

No doubt the distinction between acts done in the course of the employment but

in an improper way and acts done outside the course of the employment altogether may be a fine one. This is illustrated by the difference of opinion in this House in the case of *Herbert v. Samuel Fox & Company, Limited*, 1916 A.C. 405. In the present case the facts seem to me to put it under the second of these two categories, and I am certainly not prepared to reverse the finding of the County Court Judge, which is, as I read it, to the effect that it was outside the course of employment.

It has been often pointed that it is highly undesirable that findings of fact by the County Court Judge in workmen's compensation cases should be overruled in Courts of Appeal. I would refer especially to what was said on this subject in the case of *Baker v. Earl of Bradford*, 114 L.T.R. 1144, in your Lordships' House.

For these reasons, in my opinion, the decision in the Court of Appeal should be reversed and the decision of the County Court Judge restored.

VISCOUNT HALDANE—I think that in order to satisfy the words "injury by accident arising out of and in the course of his employment," the workman, or those claiming on his account, must show that two conditions have been satisfied. The injury by accident must have occurred as something which would not have occurred but for the circumstance of the employment and as having been something due to it, the employment, and it must further have occurred during its currency. As to the second of these conditions there appears to me to be no room for doubt that it was fulfilled in the case before us. The real question which arises relates to the first condition.

As to this it must be borne in mind that the County Court Judge has expressly found that it was not fulfilled, and that a Court of Appeal ought not to review his finding unless it is clear either that there was no evidence to support it, or that the finding was on the face of it erroneous in law.

I think that there were facts proved on which the County Court Judge could find that to pass between the trucks of the goods train was not an act which the directions given to the men employed in terms required them to do, and the only question open is whether it was an act which they were entitled in law to treat as one within their discretion in the execution of their duty. It was not found that the servants of the company had any general authority to walk over the line. There was indeed a rule—rule 26—which appears to have forbidden it excepting where some duty actually required it to be done. But it was also found that the company's servants had been in the habit of disregarding this rule, and that it was not enforced. Although, therefore, it might have been negligent to act as the workman did in the case before us, that would not in itself prevent the respondent from recovering. But none the less I think the existence of the rule was relevant evidence on the question whether what happened was due to the circumstances of the employment,

and could be taken into account by an arbitrator in deciding whether the injury by accident was due to a risk assumed independently of the employment and outside it, as distinguished from being an injury which was the result of a mere act of negligence in executing the employment. In doing what he did in crossing the line by going under the trucks without ascertaining whether the train might not begin to move, was the workman arrogating to himself a title to do something which he was neither engaged nor entitled to perform? This is one of the tests prescribed in the judgment of Lord Dunedin in *Plumb v. Cobden Flour Mills Company*, 1914 A.C. 62, 51 S.L.R. 861, and I think that it is the test which should be applied in the present case. It explains the meaning of the phrase which is often used "added peril," as meaning a peril voluntarily superinduced on what arose out of the employment and cumulative to it, to which the workman was neither required nor had authority to expose himself.

There are grounds for criticism of the language in which the County Court Judge applied the law as thus laid down. He seems to have thought that the taking of his meals was not within the scope of the employment of the workman. But when he goes on to say that there was no duty on him "to be where he was in order to get food or for any other purpose" he does not seem to find that the nature of the employment was not the cause of his going between the trucks; and I do not think that there was any evidence on which he could have found otherwise. The workman could have gone to get the hot water he wanted without taking the altogether unnecessary peril of passing between the trucks, and I can discern no evidence which would justify a finding that this peril was other than an independent one which he added quite superfluously and entirely of his own initiative. It was accordingly not a case in which, as the Court of Appeal seems to have thought, he was doing what was within the sphere of his employment merely in a wrong way. In *Gane v. Norton Hill Colliery Company*, 1909, 2 K.B. 539—an authority on which the Court of Appeal relied—the workman was indeed injured when trying to pass under a train of trucks. But there the way taken was the usual and most convenient one, and it was habitually taken by the workmen generally with the knowledge and consent of their employers. Here there is no evidence which establishes a real analogy to that case. Although I think that the County Court Judge might have given more precise reasons for his finding, I am of opinion that there was evidence to warrant it, and that it discloses on its face no error in law. The Court of Appeal ought therefore to have accepted it.

LORD DUNEDIN—The learned County Court Judge as arbitrator found that the accident did not arise out of the employment. It is said that this finding is in the circumstances not a finding of fact, but a conclusion reached upon a wrong view of the law. Much of the argument was accord-

ingly directed to the determination of the precise import of two sentences of his judgment. After citing *Parker v. Owners of Steamship "Blackrock"*, 1915 A.C. 725, as negating the proposition that a workman when he goes for material for his dinner is fulfilling a duty to his employers (it is unnecessary here to examine what that case actually did determine), he goes on to say—"There was no contractual obligation here, no duty owed to the employer, that he should be where he was in order to get food or for any other purpose. He chose to go that way for purposes of his own, and in doing so to run an additional and unnecessary risk in going between the waggons. Hence I find that the accident did not arise out of the employment."

Now the first remark that must be made on this is that if "purposes of his own" meant purposes which under the conditions of his employment he was neither compelled to do nor was contemplated as doing, then there was no actual need to say more. I can best make my meaning clear by citing the case of *Reed v. Great Western Railway Company*, 1909 A.C. 31, where Lord Macnaghten expressed himself as follows—"Here the evidence shows" (the engine-driver had left his engine and gone across the lines to get a book from another engine-driver) "that it was for a purpose of his own, and not in the execution of his duty or in the interest of his employers, that the injured man exposed himself to the risk which caused his death. . . . At the time when the accident happened the man was about his own business, not about the business of his employers. For the moment he had put himself outside the area of protection which the Legislature has carefully marked out." Nevertheless the learned Judge in saying more may quite justifiably have given an additional reason for his judgment. If so the second part of the sentence may legitimately mean that the man by his own unnecessary action incurred an added peril foreign to the ordinary perils of his employment, and that the accident accordingly did not arise out of the employment. In other words, suppose the judgment had run thus—The case fails in two particulars, either of which failures is fatal. I find as a fact that the man was engaged at the time on purposes of his own unconnected with his employment. I also find that the peril he encountered was not a peril which can be regarded as a possible incident of his employment, but was one of his own creation by his own ultraneous action. Such a judgment might have been attacked on the ground that there was no evidence which could reasonably support the findings, but it would, I apprehend, have been quite unimpeachable in point of law.

The respondent's counsel, however, argues—and I think in this he has to a great extent the support of the learned Judges of the Appeal Court—that the real meaning of the second sentence is that in going the way he did the workman did not go out of the sphere of his employment, but only made his employment more dangerous by his own carelessness.

If I had to decide I should prefer the former construction, but in the view I take it is not necessary to determine which of these views is correct in order to decide this case. For the most that can be made of the second sentence by the respondent is that it does not actually find that the workman had by adding a peril to his employment so gone beyond his employment that the accident did not arise out of his employment. It is true that counsel argued that the reading of the sentence as he read it amounted to a finding, or rather amounted to an inferred finding, that the workman was in the course of his employment, and that the accident arose out of it. That appears to me to be a hopeless contention, and if upheld would, I think, astonish no one so much as the learned County Court Judge. Leaving, therefore, as undetermined the true meaning of the second sentence, the case stands upon its own facts as proved and the inferences to be drawn therefrom. That, indeed, is the way that the Court of Appeal took it, and they then decided it upon the view that it was ruled by the case of *Gane v. Norton Hill Colliery Company*, 1909, 2 K.B. 539, which bound them. *Gane's* case is not binding upon your Lordships, though it has been cited with seeming approval in at least one case in this House. *Gane's* case, however, when properly understood, was in my view rightly decided; but with deference to the learned Judges of the Court of Appeal, I do not think they have fully appreciated on what the soundness of the decision in that case entirely depends. They have treated it as if it settled that where a man left work by going over a siding and crawling under a waggon, and it was shown that many men had done so before, the risk entailed by crawling under the waggon was a risk of the employment. *Gane's* case did not decide that. It depended entirely on the view as to the facts that the method of leaving the works by a particular route which entailed crossing the siding and crawling under trucks, if any were standing there, was not only the usual method, but was recognised as such by the employers. Farwell, L.J., says—"Notwithstanding that the line was covered by trucks, as it was habitually, the men always used that route"; and Kennedy, L.J., says—"I read the finding of the learned Judge clearly to mean that the applicant in going by this way, with or without trucks on the route, was taking a course which the employers knew that their men would take, and which he himself by experience had found himself authorised by them to take during the eighteen months he had been there." This is right, for if an employer, well knowing the facts, acquiesces in the employment being conducted in a certain way, even though that way involves what may be called an added peril, then really he is content that that peril should be held as an ordinary peril of the employment. But if it was not for that finding the judgment in that case could not in my opinion be supported. Whether the finding was justified on the evidence is a matter with which we have nothing to do,

but it is on that finding and on that finding alone that the law of the case depends. I should like to add, that though a decision of a Court of higher or equal authority binds another Court as to propositions of law, it cannot bind them as to the findings in fact. No doubt if the facts of two cases are so similar as to be practically identical the second Court will hesitate long before it comes to a different conclusion. Nevertheless the facts of two different cases cannot, *ex natura rei*, be actually identical, and it is never incumbent on a Court to import the finding of fact in one case into another.

As to the law on the subject of added perils, I cannot add to what was said in the case of *Plumb v. Cobden Flour Mills*, 1914, A.C. 62, 51 S.L.R. 861, as to which I would like to point out, that although it is contained in a judgment which bears my name, that was really the considered judgment of the House and does not therefore at all rest on my individual authority. It is with insistence laid down in that judgment that the question is always whether the case falls within the words of the Act, and that "added peril" is a test only, though a very convenient test in certain circumstances. I refer particularly to the closing words of the judgment.

Now here there is not a shred of evidence bringing home to the appellants an acquiescence in the man choosing as a regular practice to crawl under trucks instead of going round them. That there was acquiescence in the practice of going to the messhouse, and of doing so by crossing the lines, I do not doubt. Neither do I doubt that the getting of hot water to prepare his breakfast was a legitimate incident of the man's employment, so that the facts here would not warrant a finding of the same sort which formed the basis of judgment in *Reed's* case above cited. I hold that the man was entitled to go to the messhouse and entitled to cross lines to get there. But then it must be remembered that this is not the case of a defined road or track. The lines might be crossed at any point. They were free to be crossed on this occasion if the man had deviated five truck lengths to the right. Instead of that he ducked under the couplings of a set of trucks, not in a proper siding or lye, but on the regular goods running line, without taking the trouble to see if there was an engine attached. In doing so in my judgment he clearly added a peril to his employment to which the employer had given no sanction, with the result that the ensuing accident was not an accident arising out of his employment. I think the appeal should be allowed and the judgment of the County Court Judge restored.

LORD ATKINSON—I concur. The learned Lords Justices appear to me to have based their judgments in this case on the supposed authority of the case of *Gane v. Norton Hill Colliery Company*, 1909, 2 K.B. 539. I arrive at that conclusion from reading the following passages from their judgments. The Master of the Rolls, in commenting on the latter case, said—"It seems

to me that the principle in that case really covers this, and its facts are almost identical with it." Pickford, L.J., said—"Now all I can say is, that it seems to me that that state of things is governed by the case of *Gane v. Norton Hill Colliery Company*, and on that authority, assuming the going to the messroom at all to be within the man's employment, I think the learned County Court Judge was wrong. I agree that the appeal should be allowed on the authority of *Gane v. Norton Hill Colliery Company*." Warrington, L.J., expressed himself to a like effect. With all respect to the learned Lords Justices, I am quite unable to accept their view on this point. I think the facts of *Gane v. Norton Hill Colliery Company* are quite different from those of the present case, as I shall presently endeavour to show, and that the cases are therefore distinguishable. If they are not distinguishable, then speaking for myself I have no hesitation in saying that I think *Gane's* case was not rightly decided. I cannot accept the principle that if an employer should give his workman, employed by the day, permission merely to leave his place of work and traverse his employer's close to get a place fit for him to eat his dinner or take his breakfast, the workman would be doing something within the sphere of his employment in scrambling over or crawling under a machine of the employer's, which he might find in the close, especially when he was not confined to the use of any particular path in the close and could with ease quickly walk round the machine. If permission was given to the deceased and his fellows to cross the line at all, from the down platform to the messhouse, no precise line of route was in any way defined or indicated either by the points of departure and arrival or in any other way. The evidence shows that the men were free to choose their own particular route, to deviate from the line they actually took at the start, so as to go round the tail of the train only five waggons away from the site of the accident. They must have seen this train, and with the opportunity of walking round it easily available they deliberately, and for all purposes unnecessarily, chose to advance upon the train of trucks itself and pass under it. In my view the mere permission to traverse a close not on any marked path or by any prescribed route does not imply a permission to climb over or scramble under a machine which may happen to lie across the route chosen arbitrarily by the person receiving the permission. Such an act would not, I think, amount to the negligent doing of an act within the scope of the workman's employment according to the principle of the case of *Blair & Company, Limited v. Chilton*, 115 L.T.R. 514, but would be an act done altogether outside the sphere of that employment, according to the principle laid down with such clearness by Farwell, L.J., in this very case of *Gane v. Norton Hill Colliery Company*, at p. 545 of the Report. He there said—"All those things that he, namely, the workman, is to do by virtue of his contract of service he is for the purpose of the Act employed to do, and they are

therefore within his contract of employment. I must qualify this by saying that he must make use of reasonable facilities and rights given to him in this way. I am led to make that observation by Mr Simon's argument with regard to the swing bridge. It is obvious to my mind that it cannot be said that because by the terms of a man's employment he was entitled to use a way out of the works over a swing bridge he is entitled to jump across when the swing bridge is open for the purpose of some boat or barge passing through. It would not be a question of negligence or misconduct, or anything of that sort, but it would not be within the terms of his employment that he should use the swing bridge when open at all. It may well be within the terms of the employment to use a track when it is properly and fairly open, but not to use it when it is not." He then proceeds to deal with the finding of the County Court Judge, and said—"He does not rely on the facts that the trucks were there as showing that the path was not open to the man to use if he thought fit, but he has found that the trucks and engines were put upon the line and that the trucks would reach up to the screen when the coal was put on. He also found that the way the man went on the day of the accident was the usual one for him to go and for other men to go. I understand that to mean that notwithstanding the line was covered by trucks, as it was habitually, the men always used that route." Kennedy, L.J. (p. 546) says—"No doubt one does look, as Farwell, L.J., said, with some closeness on the question when you have, as you have here, a way which at the time had trucks across it, but I read the finding of the learned Judge clearly to mean that the applicant in going by this way, with or without trucks on the route, was taking a course which the employers knew their men would take, and which he himself by experience had found himself authorised by them to take during the eighteen months he had been there. On this particular occasion it appears that two men immediately in front of him had passed over in safety, doing the same thing as he did; therefore if there was any inference to be drawn it would be this, that somebody carelessly, although he ought to have known that the employers recognised this as the daily method of going from the works used by a large number of men, chose to set the trucks in motion when this unfortunate man was in a position to cross, and when he had a right to say, 'This is the way which my employers recognise, and their servants ought to have known it is being used by us.' But be that as it may, I am quite sure, if there had been anything which might be called a deviation from the natural course of the servant's employment in going as he did the learned Judge would have found it, and, what is more, I have no doubt evidence would have been adduced by the other side to show that it was so." The facts of the case are not very fully stated. It is found that the trucks on this occasion went up to the screens where the coal was put on. How far they extended down the line, or whether

they could have been readily outflanked or gone round, as it were, does not appear, or whether or not the route the men were authorised to take was direct from the foot of the stairs to the other side of the line. All the County Court Judge found upon this point was that route No. (3) "was down some steps to rails crossed by the bridge and across the rails on the level." From these remarks of the learned Lords Justices Farwell and Kennedy I think it is clear that they thought the respondents' workmen, including the applicant, were authorised by their employers not only to cross the rails at the particular point, but that when they should find their progress obstructed by trucks standing upon the rails they were also authorised to get through the line of trucks by passing under the buffers as the applicant had attempted to do. If that was the conclusion to which the Court of Appeal came as to the method of crossing expressly or impliedly authorised by the applicant's employers, then it appears to me that there is not anything to quarrel with in their decision, but if they meant to decide that wherever permission or authority is given by an employer to his workmen merely to cross the line of railway that necessarily impliedly authorised them to pass under or over any trucks they may when crossing find in front of them even when they can readily deviate and walk round those trucks, then in my view the decision was erroneous, and I refuse to follow it.

Now if one contrasts the findings of the County Court Judge in this last case with the findings in the present case one will be struck at once with their dissimilarity. In the former the learned County Court Judge found that the way the applicant went on the day of the accident was the usual one for him to go, the usual one for the men who lived in the other direction to go, and the only way which he and they went except on Saturdays. He then adds—"I am driven to the conclusion, that being so, that it was with the knowledge of the respondents that the men went that way, and that the respondents never suggested that they should not go that way." In the latter the only findings at which the learned Judge arrived are—(1) That the prohibition in the rules was not a genuine prohibition within the meaning of Lord Loreburn's judgment in *Barnes v. Nunnery Colliery Company*, 1912 A.C. 44, 49 S.L.R. 688. (2) That the accident did not arise out of the workman's employment. There is no finding by him such as there was by the County Court Judge in the former case, to the effect that it was the usual practice for men in the position of the deceased and the other employees of the respondents who desire to reach the messhouse to cross these rails where the deceased attempted to cross them; no finding to the effect that it was the usual practice of such persons, when in the act of crossing they happened to find before them a train of trucks they could readily have worked round, to pass under the train instead of going round it. Nor yet a finding to the effect that these prac-

tices, if they existed, were ever known to or consented to by the respondents or their agents. No doubt it is well established, where the relevant and material facts in such a case as this are either found or not disputed, that the question of whether the accident arose out of the workman's employment is a question of law, not of fact—*Herbert v. Samuel Fox, Limited*, 1916 A.C. 405; *Gane v. Norton Hill Colliery Company*. In the absence of all findings such as above mentioned, it is necessary to examine the evidence somewhat in detail to discover what material or relevant facts were taken as undisputed. I do not know whether I am correct in thinking that in the Court of Appeal it was rather assumed that if once it was shown that the deceased had the right to cross to the messhouse there was an end of the case, and that in doing what he did he was acting within the sphere of his employment, negligently no doubt, but still within the sphere of his employment. If it was so assumed, then with all respect I think the assumption was erroneous. It might well be that the deceased had permission to go across the line to the messhouse, and yet on the sound principle laid down by Farwell, L.J., in *Gane v. Norton Hill Colliery Company*, at p. 545, that the act done by the deceased amounted to an unreasonable use of the facilities and rights given to him, and was therefore an act outside the sphere of his employment and not merely an act within that sphere done negligently. Of course if the deceased was entitled in crossing the line to choose a route which brought him up against a train of trucks which he could readily have avoided, and then to pass under them, as he attempted to do, his omission to ascertain whether the train was a live or dead train before he attempted to pass would amount to negligence.

The notes of the learned Judge on the user of his privilege are rather condensed. Baker, who like the deceased, was not a member of the Wakefield staff, was the chief witness for the applicant. Both of these men were rather in the position of travellers who had missed their train and had one and a-half hours to wait for the succeeding train to their destination. In his examination-in-chief Baker said—"It was customary for us to go to this messhouse. We crossed metals—force of habit. Never warned not take it (namely route) across. There were goods trains there often, and we passed through—no prohibition and no warning." First, a goods train guard, stated trains often stand on the granary siding and men pass through often. He does not say whether these men were members of the Wakefield staff or not. It is clear from this evidence, and was not disputed, that, as I have already pointed out, there was no marked or defined route across the line which men took on their way to the messhouse—no particular point from which they should start or particular point at which they should arrive. They might, consistently with this evidence, have crossed the line where they chose, no limits being indicated. This therefore is the kind of

thing which must be held to have been expressly or impliedly authorised by the respondents in order to sustain the applicant's case. It is a thing wholly different in kind from passing over an obstacle which so blocks the way and arrests the privileged wayfarer's progress that he must either stand still and give up the attempt to pass or surmount the obstacle, so that even if it be assumed that the deceased had the right to go to the messhouse, which has not been found, his act in attempting to pass as he did was I think outside his sphere of employment, and accordingly the accident by which he lost his life did not arise out of his employment. I do not think that the case of *Brice v. Edward Lloyd, Limited*, 1909, 2 K.B. 804, referred to by Lord Cozens-Hardy, M.R., is in conflict with this conclusion. The decision in that case did not mean that a workman is at liberty to take his meals on any part of the employer's premises, however dangerous or unsafe the place may be. And Farwell, L.J., repeated what he had said in *Gane v. Norton Hill Colliery Company* in reference to the swing bridge, and proceeded to say—"I think a workman's employment is not confined to the actual work upon which he is engaged, but extends to those actions which by the terms of his employment he is entitled to take, or where by the terms of his employment he is entitled to take his meals upon the employer's premises. But the employment does not extend to the doing of things which are unreasonable or which he is expressly forbidden to do." Here the workman was doing what he was forbidden to do by the employer, not expressly, but in the sense that he was doing that which was not allowed. It was accordingly held that the act which brought about the accident was outside the scope of the deceased's employment, and that the accident therefore did not arise out of that employment. It will be observed that the learned Lord Justice put unreasonable acts and forbidden acts on the same level, each lying outside the sphere of the workman's employment. Well, if all the privilege given to the workman in the present case was merely to cross the rails to the messhouse, nothing could well be more unreasonable than the mode in which he attempted to exercise this privilege. It is exactly on a par with jumping over the gap made by the opening of the swing gate.

The appeal should, I think, be allowed with costs here and below.

LORD SUMNER—Whether in any given case an accident arises on the one hand out of the injured person's employment, although he has conducted himself in it carelessly or improperly, or on the other hand arises not out of his employment but out of the fact that he has gone outside the scope of it or has added to it some extraneous peril of his own making, or has temporarily suspended it while he pursues some *excursus* of his own, or has quitted it altogether, are all questions which, often as they arise, are susceptible of different answers by different minds and are always questions of some nicety. So it is here. I doubt if any uni-

versal test can be found. Analogies, not always so close as they seem to be at first sight, are often resorted to, but in the last analysis each case is decided on its own facts. There is, however, in my opinion, one test which is always at any rate applicable, because it arises upon the very words of the statute and it is generally of some real assistance. It is this—Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment. To ask if the cause of the accident was within the sphere of the employment, or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or conversely, was an added peril and outside the sphere of the employment, are all different ways of asking whether it was a part of his employment that the workman should have acted as he was acting, or should have been in the position in which he was, whereby in the course of that employment he sustained injury.

On the facts of this case, uncontradicted, accepted on all hands and found by the learned County Court Judge, the deceased was killed because he was passing between two of the trucks of a train at the moment when the engine shunted it. I accept that it was in the course of his employment that he should have been preparing to get his breakfast at the time in question, that he should have been going to the messroom for hot water for that purpose, and that in order to get the hot water he should have been traversing a number of pairs of rails one of which was and others of which might have been in use by moving or moveable trains. All the same, the question is how came he between the trucks when the train was put in motion, not how came he upon the part of the station-yard occupied by rails.

The plan which was put in evidence before the County Court Judge shows that there was no fixed track across the railway lines leading from the platform at which the deceased alighted to the messroom, nor was there any evidence that the workmen were left free to shape their own course across the rails. There was no evidence of any practice known to the employers for workmen to pass between the trucks of a train whenever and wherever they encountered them in order to save the trouble of going round the end of it. I think that the present case is within the principles applied in the cases of *Hendry v. United Collieries Limited* (No. 2), 1910 S.C. 710, 47 S.L.R. 635, and *M'Laren v. Caledonian Railway Company*, 1911 S.C. 1075, 48 S.L.R. 885, and is distinguishable from that of *Gane v. Norton Hill Colliery Company*, 1909, 2 K.B. 539, the basis of which I take to be that in that case there was found to have been a track or route between given points by which the workmen, to the knowledge of their employers, were accustomed to leave work when so

minded, although it was occasionally obstructed by a line of waggons drawn across it.

The reasons which the learned County Court Judge gives for his award in the present case show sufficiently that he found the deceased and his companions to have been making a route for themselves in circumstances not only of additional but of obvious and unnecessary peril, rather than following a recognised route, which, by being tolerated in spite of the printed regulations, had come within the ambit of the employment. I do not therefore think it necessary to consider whether his reasoning was in all respects right, though as it seems to me he pressed the observations quoted from the case of the steamship "*Blackrock*" to purposes for which they were not intended.

With great respect to the judgments of the Court of Appeal in a matter where opposite opinions may well be entertained, I think that on the uncontradicted evidence, accepted as I take it to have been by the Judge, of fact, the present is a case of an accident arising not out of but outside of the employment, since at the time of his death the workman was in no sense doing that which was part of or fell within his employment (whether he was or was not acting with care therein), but was for his own purpose, namely, the convenience of the moment, thoughtlessly pursuing a course which fell outside of his employment. In that act unhappily he met his death. The proposition before the Court of Appeal was that the learned County Court Judge had arrived at his award on the facts either in a manner which showed that his conclusion had been controlled by some error of law or on a supposition of the existence of evidence of which in fact there was none that a judicial tribunal could reasonably give effect to. I do not think this proposition was made out, and therefore the appeal should succeed.

Their Lordships sustained the appeal.

Counsel for the Appellants—H. Gregory, K.C.—T. P. Perks. Agents—Woodcock, Ryland, & Parker, for A. de C. Parmiter (Solicitor to the Company), Solicitors, Manchester.

Counsel for the Respondent—Shakespeare—E. Dale—Lawn. Agents—Burton, Yeates, & Hart, for Hart, Jackson, & Sons, Solicitors, Barrow-in-Furness.

HOUSE OF LORDS.

Thursday, June 14, 1917.

(Before the Lord Chancellor (Finlay), Earl Loreburn, Lords Shaw, Parker, and Parmoor.)

DENNIS *v.* WHITE & COMPANY.

(APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1906.)

Master and Servant—Workmen's Compensation—“Arising out of” Employment—Collision whilst Riding a Bicycle—Risk Run by the General Public—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1).

The appellant was sent a message by his employer on a bicycle. While riding the bicycle he collided with a motor car and was injured.

Held that the accident arose out of the employment, the fact that the risk was one common to any cyclist being immaterial.

Authorities reviewed.

At delivering judgment—

LORD CHANCELLOR (FINLAY)—This is a claim for compensation under the Workmen's Compensation Act. The appellant was in the employment of the respondents, who are builders, and on the day of the accident was by the orders of the respondents riding a bicycle through the public streets, having been directed to go on the bicycle to get some plaster. He came into collision with a motor car and his leg was broken.

The County Court Judge found that the respondents were not liable, and his decision was affirmed by the Court of Appeal, Sargant, J., dissenting. The County Court Judge gave no reasons for his decision. The majority of the Court of Appeal decided against the claim on the grounds that the risk which had resulted in the accident was not special to the employment but was an ordinary street risk shared by the claimant with the ordinary members of the public, and that the question was one of fact. Sargant, J., dissented on the grounds that he thought that riding a bicycle in the streets of London on an average once a day involved an appreciable extra danger, and that the inferences to be drawn were of mixed law and fact.

In my opinion the decisions below were erroneous and should be reversed.

The only question is whether the accident arose out of the employment. It is not disputed that the appellant was riding the bicycle in the course of his employment and by the orders of his employer. The risk of collision under such circumstances is incidental to the use of a bicycle. It is a risk inherent in the nature of the employment, and it was the cause of the accident. It follows that the accident arose out of the employment. It is quite immaterial that the risk was one which was shared by all members of the public who use bicycles for such a purpose. Such as it was it was a