While returning to his own engine he was knocked down and killed by a waggon in course of shunting.

The County Court Judge awarded £300 compensation, but the Court of Appeal (COZENS-HARDY, M.R., FLETCHER MOULTON and FARWELL, L.JJ.) set the award aside on the ground stated *supra* in rubric.

The widow appealed.

The House took time for consideration.

LORD CHANCELLOR (LOREBURN)—In this case one Reed, an engine-driver in charge of his engine, got down from it while it was at rest and crossed a siding to receive from a friend a book unconnected with his duties. On returning he was knocked down by a waggon then being shunted and killed. The only question in dispute was whether or not the accident which killed him was one "arising out of and in the course of his employment." I cannot think that it was. I agree that labour is often intermittent. If a man is in the place of his employment and during its hours uses such intervals otherwise than in working, and while doing so is injured by one of the dangers to which the employment exposes him, that may be an accident within the statute. He may be in such case required to be in attendance and in that respect engaged on his duty, though not actually doing work. But here this man was where he was not entitled to be, and was not working but pleasing himself. It is not that he thereby violated a rule, but that the accident did not arise out of or take place in the course of the employment at all. It took place while for the moment he quitted his employment. No doubt allowance must be made for the habits of business, and the Act must be applied reasonably; but in this case I can see no ground for allowing compensation.

LORD ASHBOURNE concurred.

LORD MACNAGHTEN—I am of the same opinion. I think that the judgment of the Court of Appeal was right, for the reasons given by the Master of the Rolls. I agree with the Master of the Rolls in thinking that in all these cases it is incumbent upon the claimant to make out that the accident in respect of which compensation is claimed arose out of and in the course of the injured man's employment, not upon the employer to prove the contrary. But here the evidence shows 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. He had been warned against doing the very thing which he ventured to do. He was, of course, wrong in disregarding the injunctions of his employers. But it is not on the ground of misconduct that his dependants are now without remedy. 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. The case, in my opinion, is not within the scope of the enactment at all. I think that the appeal must be dismissed with costs.

LORD CHANCELLOR—Lord James of Hereford, who heard the arguments, but is not able to be present to-day, desires me to say that he agrees in the judgment proposed.

Judgment appealed against affirmed.

Counsel for Appellant—C. A. Russell, K.C. —Lleufer Thomas—John Plews. Agents—Metcalfe & Sharpe, Solicitors, for R. T. Leyson, Swansea.

Counsel for Respondents—M. Lush, K.C. —Douglas Bartley. Agent—R. R. Nelson, Solicitor.

HOUSE OF LORDS.

Monday, December 14, 1908.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lords Robertson and Collins.)

GENERAL BILLPOSTING COMPANY *v.* ATKINSON.

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

Master and Servant—Contract of Service—Stipulation by Servant in Restriction of Trade — Wrongful Dismissal — Servant Receiving Damages — Enforcement of Stipulation.

A company manager obtained damages for wrongful dismissal against the company. His contract of service had bound him not to carry on competing trade. *Held* that the company were no longer entitled to enforce this restriction in consequence of their breach of contract.

The appellants engaged the respondent as manager of their company for a year under a contract which bound him not to carry on a competing business at the expiry of the engagement. They dismissed him wrongfully and he recovered damages in an action against them. Afterwards he carried on a competing business and the appellants in turn sued for an injunction and damages.

The Court of Appeal (COZENS-HARDY, M.R., MOULTON and BUCKLEY, L.JJ.) gave judgment for the dismissed manager, the respondent, reversing an order of NEVILLE, J.

The company appealed.

The House took time for consideration.

EARL OF HALSBURY—I have had the advantage of reading the judgment which is about to be delivered by Lord Collins, and I concur in it.

LORD ROBERTSON—[Read by the Lord Chancellor]—If this case be considered for a moment on its own merits and substance (apart in the meantime from authority), it

is extremely difficult to be reconciled to the appellants' contention. The respondent's position in entering into the contract is a very intelligible one. He says, I am bill-poster, and I desire occupation, either on my own account or in the service of others. If I enter the employment of others, I am willing to give up the right to trade on my own account to the extent specified in this agreement. I do not desire to have it both ways. The claim of the appellants, on the other hand, as now put forward, is that, taking him at his word, as expressed in the contract, and getting his services, they are to be entitled both to deprive him (against the contract) of the right to serve them and also of the right to serve himself. It seems to me that the covenant not to set up business is not only germane to but ancillary to the contract of service, and that once the contract of service is rescinded, the other falls with it. I have only to add that the suggestion that the respondent has already received his *quid pro quo*, in that he has had the appellants' wages for a considerable time, ignores the equally important fact that they have had his services for the same period.

LORD COLLINS—I am of opinion that the unanimous decision of the Court of Appeal in this case should be affirmed. The rule pressed upon us by Mr Russell from the notes to *Pordage* v. *Cole* (1 Wms. Saund. 548) cannot be intended to apply to every case in which a covenant by the plaintiff forms only a part of the consideration and the residue of the consideration has been had by the defendant. That residue must be the substantial part of the contract; and if in the case of *Boone* v. *Eyre* (1 H. Bl. 273, n) two or three negroes had been accepted and the equity of redemption not conveyed, I do not apprehend that the plaintiff could have recovered the whole stipulated price and left the defendant to recover damage for the non-conveyance. See *per* Pollock, C.B., delivering the judgment of the Court in *Ellen* v. *Topp* (6 Ex. 424). Further, in *White* v. *Beton* (7 H. & N. 42) Bramwell, B., quotes with approval the remark of Lord Kenyon, C.J., in *Campbell* v. *Jones* (6 T.R. 570)—"Whether these kinds of covenants be or be not independent of each other, must certainly depend on the good sense of the case." The reason for the rule itself is said by Serjeant Williams to be that "where a person has received a part of the consideration for which he entered into the agreement it would be unjust that because he has not had the whole he should be permitted to enjoy that part without either paying or doing anything for it." But in this case, as pointed out by Mr Manisty, the defendant has given an equivalent in service for the remuneration he has received in salary. He stands, therefore, outside the reason of the rule. But I think that this case may be, and in fact has been, decided on broader lines than those laid down in the notes to *Pordage* v. *Cole* as to mutual and independent covenants. I think that the true test applicable to the facts of this case is that which was laid down by Lord Coleridge, C.J., in *Freeth* v. *Burr* (L.R., 9 C.P. 208), and approved in *Mersey Steel Company* v. *Naylor* (9 A.C. 434): "That the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract." I think that the Court of Appeal had ample ground for drawing this inference from the conduct of the employers here in dismissing the defendant in deliberate disregard of the terms of the contract, and that the latter was thereupon justified in rescinding the contract and treating himself as absolved from the further performance of it on his part. I think that the appeal should be dismissed.

LORD CHANCELLOR (LOREBURN) concurred.

Judgment appealed against affirmed.

Counsel for the Appellants—C. A. Russell, K.C. — Hildyard. Agents — Robinson & Bradley, Solicitors, for Lundi, Shortt, & Fenwicke, Newcastle-upon-Tyne.

Counsel for the Respondent — Manisty, K.C.—Dighton Pollock. Agents—Rawle, Johnstone, & Company, Solicitors, for Cooper & Goodger, Newcastle-upon-Tyne.