some explanation, the burden of proving that the authorities of the mine had done their duty in taking proper care of the safety of the miners lay upon the appellants. Channell, J., to my mind, misdirected the jury in placing the burden of proof upon the plaintiff in the action. I have been thus particular in pointing out why in my opinion this verdict cannot be allowed to stand, since I think that the learned Judge misdirected the jury as to the *onus* of proof; and though he left the question to the jury, he left it in such a way and with such a direction that it was hardly possible for them to find any other verdict. Yet though I am agreeing with the conclusion arrived at by the majority of the Court of Appeal, I am by no means prepared to adopt the reasoning by which that conclusion was arrived at. Indeed it is not too much to say that I dissent from some of the propositions involved in that judgment. I am very clearly of opinion that there ought to be a new trial, since I think that the conclusion arrived at was a consequence of the misdirection. I am therefore of opinion that the appeal should be dismissed, and I move your Lordships accordingly.

LORD ASHBOURNE—I concur.

LORD ATKINSON—I concur.

LORD GORELL—In the circumstances of this case I agree with my noble and learned friend the Earl of Halsbury that there should be a new trial, and I agree with him in expressing dissent from some of the reasons for a new trial which were given in the Court of Appeal.

LORD SHAW—I entirely concur.

Appeal dismissed.

Counsel for Appellants—Francis Williams, K.C.—Eldon Bankes, K.C.—Trevor Lewis. Agents—Bell, Brodrick, & Gray, Solicitors.

Counsel for Respondent—Sir R. B. Finlay, K.C.—Abel Thomas, K.C.—Sankey, K.C.—Clive Lawrence. Agents—Smith, Rundell, & Dods, Solicitors.

HOUSE OF LORDS.

Monday, December 13, 1909.

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

COLDRICK *v.* PARTRIDGE, JONES, & COMPANY, LIMITED.

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

Master and Servant — Common Employment — Negligence of Fellow-Servant — Accident after Working Hours—Acceptance of Risk.

Colliery-owners provided a free service of trains which the workmen used if they so desired in going to and from work. An accident occurred to a train owing to the negligence of a servant engaged in repairs on the railway, and another servant was killed while travelling in the train.

Held that the deceased workman in using the train had accepted the risk of his fellow-servant's negligence although his own work was over for the day.

The appellant was the mother of a workman who was killed in the circumstances stated *supra* in rubric. An action of damages at her instance against the colliery-owners was dismissed by BRAY, J., and the Court of Appeal (VAUGHAN WILLIAMS, FARWELL, and KENNEDY, L.JJ.).

At the conclusion of the appellant's argument their Lordships gave judgment as follows:—

LORD CHANCELLOR (LOREBURN) — The principle involved in the case of *Priestley* v. *Fowler*, 3 M. & W. 1, of which this appeal is an illustration, has been long settled, and repetition only tends to confuse a statement of law which has been well established. The question here is whether or not that principle is to apply to a case where the unfortunate man's work had actually been finished when the accident occurred, and the accident happened while he was returning home in a train furnished gratuitously by the employers to take workmen home, which they might use or not as they pleased. That the hours of work were over is immaterial, for the point is one of fact. Must it be implied that the deceased took the risk of accident when travelling in the train? The real argument, if the appellants are to prevail, must be that the risk was one not really incidental to the service, and that therefore there was no contract to be implied on the part of the deceased to take the risk of that journey. Now the law applicable to that question was stated long ago in the case of *Bartonshill Coal Company* v. *M'Guire* (3 Macq. 300) by Lord Chelmsford, L.C., in this House, and what he said was this—"It is necessary, however, in each particular case to ascertain whether the servants are fellow-labourers

in the same work, because although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other by carelessness or negligence in the course of his peculiar work is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him." I have no intention at all of trying to put the same thoughts in other words, for I think that those words are clear and sufficient. So that it comes to this—On these facts are we to imply a condition that the deceased took the risk of the negligence of the servant who left the scaffolding too near the line and thereby caused this accident? I think that Vaughan Williams, L.J., stated the conclusion accurately in his judgment—"The implied contract which arose as between the defendants and the servant was this—'Whenever I avail myself of the means of access which I see are provided at this colliery for the men on occasions of access or departure, I will take the risk of the negligence of those servants of yours who have the control of the railway or have the control not only of the running of the carriages, but also of the roadway itself and its necessary adjuncts, such as bridges or reparation of the four-foot way or anything else. I take these risks.'" It is impossible in every case of this kind not to wish that compensation should in some way or other be made payable to those who have suffered by the accident, but we have no right at all to stretch the law for any such humane purpose at the expense of other people. I do not think that the principle of this case differs from the case of *Tunney* v. *Midland Railway Company* (L.R. 1 C.P. 291), which was cited to the House in argument. I therefore shall move your Lordships that the appeal should be dismissed, with costs.

LORD ATKINSON—I concur. The question must always be what risk a person like the deceased must be supposed to have known and undertaken when he entered the service of the defendants. In this case he was entitled to the privilege of going to and returning from his work in his employer's train. He enjoyed that privilege because he was a workman, and in that character alone. It is admitted that if he had been bound by the terms of his employment to journey to and from his work in this train he could not have recovered damages, and in my opinion when he avails himself of the privilege given he must be presumed to have known the risks attending upon the journey and undertaken them quite as much as if he had been bound to do that which he was privileged to do and did.

LORD GORELL—I also concur. I agree with the judgments which have been delivered in the Court of Appeal. I might perhaps select one passage from the judgment of Kennedy, L.J., which summed up the position in this case very briefly and very clearly—"It seems to me that while there is not in this case, as there was in the case which has been referred to—*Tunney* v. *Midland Railway Company*—an actual contract, or as Willes, J., said in that case, it was not a part of that contract that the plaintiff should be carried in the train, it was the fair inference which Bray, J., has drawn from the relation of the parties that his user of that train coming from the work was to be a user carrying with it as a term the absence of liability on the employer of the responsibility for fellow-workmen whose fault, it is found by the jury, killed this poor man while using the train by virtue of the relationship—to use a neutral term—which had been created by the employer."

LORD SHAW—The language used from the Woolsack in this case accurately expresses the opinion which I have formed upon this case. I desire, however, to make an addition to that statement from my own point of view, in consequence of the argument upon certain authorities construing the Workmen's Compensation Act which has been presented so carefully and ably by the appellant's counsel. I adopt the language of Farwell, L.J., when he said—"I do not myself regard this case as one in any way affected by the workmen's compensation cases." Much weight was attached to a judgment in the case of *Davies* v. *Rhymney Iron Company* (16 Times L. R. 329). In pronouncing my judgment in this case I must not be taken as assenting either to the ratio of that judgment or to the deductions made from it in argument. Bray, J., dealt with that point in his observation that "where the employer, as here, has full control over the whole premises, a man might still be in the course of his employment though his actual work was over." That observation was one of much weight. Whether it will ultimately decide this question I do not know, but upon that matter I desire to reserve my opinion.

Appeal dismissed.

Counsel for Appellant — Abel Thomas, K.C.—Sankey, K.C. Agents—Metcalfe & Sharpe, Solicitors.

Counsel for Respondents—Francis Williams, K.C.—A. Parsons. Agents—Bell, Brodrick, & Gray, Solicitors.