was Farrar, and here, as I have already said, I prefer the view as expressed by Parker, J., and Fletcher Moulton, L.J., to those that are opposed.

LORD ATKINSON concurred.

Their Lordships sustained the appeal.

Counsel for the Appellants—T. H. Carson, K.C.—Tomlin, K.C. Agents—Williamson, Hill, & Company, Solicitors.

Counsel for the Respondents—P. O. Lawrence, K.C. — R. Watson — H. A. Hind. Agents—Burn & Berridge, Solicitors.

HOUSE OF LORDS.

Tuesday, December 9, 1913.

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

PLUMB *v.* COBDEN FLOUR MILLS COMPANY.

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

Master and Servant— Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 1 — "*Arising out of*" *the Workman's Employment.*

A workman employed to do certain work by hand, and finding it more convenient to use his employer's machinery for the purpose, did so unknown to his employers and was thereby injured.

Held that though he had acted within the scope of his employment and could not be said by his conduct to have brought on himself a new and added peril, he had failed to show that the accident arose "out of his employment."

An award of the County Court Judge of Denbighshire in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) found, on the facts (detailed by Lord Dunedin in his judgment), that it was with the object of better discharging his duty that the workman adopted the procedure which led to the accident, and that the accident therefore arose "out of and in the course of his employment." The Court of Appeal (COZENS-HARDY, M.R., BUCKLEY and HAMILTON, L.JJ.) reversed this judgment and held that the accident did not arise out of the employment. The workman, Plumb, appealed to the House of Lords.

Their Lordships' considered judgment was delivered by LORD DUNEDIN, with the concurrence of the LORD CHANCELLOR and LORDS KINNEAR and ATKINSON, as follows:—

LORD DUNEDIN—I have not the slightest doubt as to the soundness of the judgment appealed from. As, however, we had the benefit of a very able argument and a copious citation of authorities, it may be of use to formulate the conclusions at which I have arrived.

The facts of the case are simple. The appellant was a foreman worker in the employment of the respondents, and his duties on the day on which he was injured consisted in the task, assisted by other workmen, of stacking bundles of sacks in a room in the respondents' premises. The work was done by hand. In the room in which this was being done there ran along the ceiling a shaft which transmitted power to machines in other rooms, but there were no pulleys on the shaft in this room, and it was not used in connection with any machine in this room. The stack had arrived at the height of about 7 ft., and the bundles could no longer be thrown up from the bottom. The appellant, who was on the top of the stack, then improvised a method of getting up the sacks. He put a rope round the revolving shafting, attached one end to the bundle, and sufficient tension being put on the other end of the rope to ensure friction, the sack was drawn up as by a crane. A bundle of sacks was drawn too far and stuck between the shafting and the ceiling. The appellant, to free the bundle, cut the rope. The bundle fell, and falling on the bundle on which the appellant was standing caused him to lose his balance. In his effort to recover equilibrium one arm got entangled with the rope which was round the shafting: he was pulled over the shafting and severely injured.

The question for decision is, did the accident arise out of his employment? The Court of Appeal held that it did not, and I agree with them.

It is well, I think, in considering the cases, which are numerous, to keep steadily in mind that the question to be answered is always the question arising upon the very words of the statute. It is often useful in striving to test the facts of a particular case to express the test in various phrases. But such phrases are merely aids to solving the original question, and must not be allowed to dislodge the original words. Most of the erroneous arguments which are put before the Courts in this branch of the law will be found to depend on disregarding this salutary rule. A test embodied in a certain phrase is put forward, and only put forward, by a judge in considering the facts of the case before him. That phrase is seized on and treated as if it afforded a conclusive test for all circumstances, with the result that a certain conclusion is plausibly represented as resting upon authority, which would have little chance of being accepted if tried by the words of the statute itself.

Under this reservation I propose shortly to examine some of the tests which have been found useful in the various cases which have occurred where the point was whether or not the accident arose out of the employment.

The first and most useful is contained in the expression "scope or sphere of employment." The expression was used in an early case, the case of *Whitehead* v. *Reader*, 1901, 2 K.B. 48, by Collins, L.J., who pointed out that the question of whether a servant had violated an order was not conclusive of

whether an accident so caused did or did not arise out of the employment, and put as the test, Did the order which was disobeyed limit the sphere of the employment, or was it merely a direction not to do certain things, or to do them in a certain way within the sphere of the employment?

In the case of *Conway* v. *Pumpherston Oil Company*, 1911 S.C. 660, 48 S.L.R. 632, in the Court of Session, I adopted the phrase of Collins, L.J., and pointed out that there were two sorts of ways of frequent occurrence in which a workman might go outside the sphere of his employment—the first, when he did work which he was not engaged to perform, and the second, when he went into a territory with which he had nothing to do. This case was approved and followed by the Court of Appeal in *Harding* v. *Brynddu Colliery Company*, 1911, 2 K.B. 747. The expression has been used in many other cases which it would be tedious and unnecessary to cite.

I am of opinion that this test is both sound and convenient, but it is not exhaustive, and it is not the most convenient for every statement of facts. Taken as it is, there may, and often will be, circumstances in which the application may be difficult and opinions may differ.

I pause here to notice an ingenious argument proposed by Mr Davenport, founded on the cases I have cited. Founding on the cases of *Conway* v. *Pumpherston Oil Company* and *Harding* v. *Brynddu Colliery Company* he said—"If this man had been told not to touch this shaft he would have received compensation, for he was doing his master's work, and it would have been merely disobedience. Why should he be worse off because he was told nothing about the shaft?" The fallacy of this consists in not adverting to the fact that there are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere.

In the case of *Barnes* v. *Nunnery Colliery Company*, 1912 A.C. 44, 49 S.L.R. 688, Lord Moulton put it thus—"The boy was guilty of disobedience; was this out of the scope of his employment, or only a piece of misconduct in his employment?" Though Lord Moulton arrived at a different result on the facts from that of the majority of the Court of Appeal, and that of this House, yet no fault is to be found with the question as put, and in this House the Lord Chancellor (Earl Loreburn) said the same thing in other words—"Nor can you deny him compensation on the ground only that he was injured through breaking rules. But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do, and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment." The Lord Chancellor there put the test cumulatively, because that fitted the facts of the case in which boys in a mine rode in tubs—a thing they were not employed to do, and which they had been expressly told not to do. But I imagine the proposition is equally true if he had expressed it disjunctively, and used the word "or" instead of "also."

In the cases in which there is no prohibition to deal with, the sphere must be determined upon a general view of the nature of the employment and its duties. If the workman was doing those duties he was within it, if not he was without it, or, to use my own words in the case of *Kerr* v. *William Baird* (1911 S.C. 701, 48 S.L.R. 646), an accident does not arise "out of employment" if at the time the workman is arrogating to himself duties which he was neither engaged nor entitled to perform.

As I have already said, however, the question of within or without the sphere is not the only convenient test. There are others which are more directly useful to certain classes of circumstances.

One of these has been frequently phrased interrogatively. Was the risk one reasonably incidental to the employment? And the question may be further amplified according as we consider what the workman must prove to show that a risk was an employment risk, or what the employer must prove to show it was not an employment risk.

As regards the first branch, I think the point is very accurately expressed by Cozens-Hardy, M.R., in the case of *Craske* v. *Wigan* (1909, 2 K.B. 635), where he says—"It is not enough for the applicant to say, 'The accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place.' He must go further, and must say, 'The accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some peculiar danger.'"

As regards the second branch, a risk is not incidental to the employment when either it is not due to the nature of the employment or when it is an added peril due to the conduct of the servant himself. Illustrations of the first proposition will be found in all the cases where the risk has been found to be a risk common to all mankind, and not accentuated by the incidents of the employment. In application to facts the dividing line is sometimes very nearly approached, but I think that in all the cases the principle to be applied has been rightly stated. The cases themselves are too numerous to cite, but I may mention as illustration the two lightning cases of *Kelly* v. *Kerry County Council* (42 Ir. L.T.R. 23) and *Andrew* v. *Failsworth Industrial Society, Limited* (1904, 2 K.B. 32), where on the facts the stroke of lightning was held in the Irish case to be a common risk of all mankind; in the English case a risk to which by the conditions of employment

the workman was specially exposed. Both these cases, in my humble judgment, were rightly decided.

An illustration of the second proposition will be found in the case already cited of *Barnes* v. *Nunnery Colliery Company*, where Lord Atkinson said—"The unfortunate deceased in this case lost his life through the new and added peril to which by his own conduct he exposed himself, not through any peril which his contract of service directly or indirectly involved or at all obliged him to encounter."

Lord Atkinson added the words "It was not, therefore, reasonably incidental to his employment. That is the crucial test." In the case of *Watkins* v. *Guest, Keen, & Nettlefolds, Limited* (106 L.T.R. 818), Lord Moulton criticised this sentence as cutting out the sub-section as to serious and wilful misconduct. With great deference to my noble and learned friend, I think he was forgetting that Lord Atkinson was only applying a test and not substituting it for the words of the Act. I cannot see that the serious and wilful misconduct section really introduces any difficulty. Reverting to the words of the Act, you have first to show that the accident arises out of the employment. Then in the older Act came the rider that even when that was so the workman still could not recover if the accident was due to the serious and wilful misconduct of the workman himself—a rider limited in the later Act to cases where death has not ensued. But the very fact that it is a rider postulates that the accident is of the class which arises out of the employment. A man may commit such a piece of serious and wilful misconduct as will make what he has done not within the sphere of his employment. But if death ensues and his dependants fail to get compensation it will not be because he was guilty of serious and wilful misconduct, but because the thing done, irrespective of misconduct, was a thing outside the scope of his employment. I have forborne to comment on the particular application to the facts of each case of the principles laid down in them. But in view of what has been said I think I must add that in my view the judgment of Buckley, L.J., who dissented in *Watkins* v. *Guest, Keen, & Nettlefolds*, was more in accordance with what has been laid down in this House in the case of *Barnes* v. *Nunnery Colliery Company* than the judgment of the majority.

Tried by either of the two tests I have examined, the appellant in this case seems to me equally to fail. But he does fail, not because he was acting outside the sphere of his employment, nor because by his conduct he brought on himself a new and added peril, but because he has failed to show any circumstances which could justify a finding that the accident to him arose "out of his employment."

Their Lordships dismissed the appeal.

Counsel for the Appellant—H. C. Davenport—T. H. Parry. Agents—Hurford & Taylor, for J. B. Marston, Wrexham, Solicitors.

Counsel for the Respondents—Scott Fox, K.C.—R. K. Chappell. Agents—Pritchard, Englefield, & Company, for J. N. Glover, Liverpool, Solicitors.

HOUSE OF LORDS.

Wednesday, December 10, 1913.

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

CHARRINGTON & COMPANY, LIMITED *v.* WOODER.

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

Contract — Construction of Agreement — "Market Price."

The lessors of a "tied house" agreed to supply their tenants with malt liquors at "the fair market price." The respondent claimed to be supplied at such price as he could have bought in the open market, the appellants to charge the ordinary rates applicable to tied houses. *Held* that the "market price" was the ordinary price charged to tied houses.

Lord Atkinson's judgment contains a full statement of the *facts* of the case, which was originally tried before Lord Alverstone, C.J., and a special jury, who found in favour of the appellants.

Their Lordships' considered judgment was delivered as follows—

Lord Chancellor—If the appellants are right in their construction of the covenant in the underlease of the 4th July 1900, I think that they are entitled to succeed, both on their claim and on the respondent's counter-claim in the action. For the only real question is that of the construction of the covenant in question. It is suggested for the respondent that he is entitled to a new trial on the ground that Lord Alverstone, C.J., ought to have left to the jury as a separate question whether, even on the footing that the fair market price was the price to the lessee of a tied house, fair market prices were charged on that footing. But I do not think that the respondent really asked that such an issue should be put to a jury, and he brought forward no evidence on which he could have succeeded on it. The real point to be determined is whether the language of the covenant means that the fair market price was the price to be paid by a tenant of a tied house, as distinguished from the price at which beer could be bought in an altogether open market.

It is evident that the Court of Appeal and the Lord Chief-Justice himself were much influenced by the previous decision of the Court of Appeal in *Russell* v. *Crawford* (not reported), a decision to which the Lord Chief-Justice was a party. There it had been held that in an analogous covenant the words "fair current market price"