H. C. OF A. 1937. HANSON v. HANSON.

In the view which I have taken it is unnecessary to decide the preliminary objection that the appellant was estopped from bringing the appeal or to say whether the appeal was competent without an order granting leave to appeal.

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Unmack & Unmack.*

Solicitor for the respondent, *L. D. Seaton.*

[HIGH COURT OF AUSTRALIA.]

HENDERSON . . . . . APPELLANT;
APPLICANT,

AND

THE COMMISSIONER OF RAILWAYS (WESTERN AUSTRALIA) . . . } RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1937. PERTH, *Sept.* 29, 30. SYDNEY, *Dec.* 10. Latham C.J., Dixon and McTiernan JJ.

Workers' Compensation—Injury by accident—"In the course of the employment"—Accident on employer's premises during meal time—Railway employee crossing line to reach camp provided by employer—Prohibited act—Workers' Compensation Act 1912-1924 (*W.A.*) (*No.* 69 *of* 1912—*No.* 40 *of* 1924), *sec.* 6 (1).*

A railway ganger, who was in charge of men erecting fences near a railway station close to which their camp was situated, was killed by a train during the luncheon hour while crossing the line on his way to the camp. Instead of getting on to the rails in order to cross the line, the deceased could have used a level crossing near the scene of his work or an overhead bridge leading from the station platform along which he had walked before proceeding to cross the line. A regulation, which had the force of law, and of which the

* Sec. 6 (1) of the *Workers' Compensation Act* 1912-1924 (W.A.) provides: "If in any employment personal injury by accident arising out of or in the course of the employment, or whilst the worker is acting under his employer's instructions, is caused to a worker, his employer shall . . . be liable to pay compensation."

H. C. OF A. 1937.

HENDERSON v. COMMISSIONER OF RAILWAYS (W.A.).

deceased had notice, prohibited employees from walking on the line except in the execution of their duty. The camp was provided by the employer in accordance with the terms of employment, and the deceased was authorized, but not bound, to live there. The deceased's hours of work were specified as being from 8 a.m. to 12 noon and 1 p.m. to 5 p.m., but, in addition to directing the work of his men during those hours, he had to check the tools used, to keep time sheets, to attend to correspondence and to issue railway concession passes.

Held, by *Dixon* and *McTiernan* JJ. (*Latham* C.J. dissenting), that the accident which caused the death of the deceased had occurred in the course of his employment, and, therefore, his widow was entitled to compensation under the *Workers' Compensation Act* 1912-1924 (W.A.).

Decision of the Supreme Court of Western Australia (Full Court) reversed.

APPEAL from the Supreme Court of Western Australia.

Robert Henderson (hereinafter called the deceased) was employed upon the terms of an industrial agreement by the Commissioner of Railways of Western Australia as a ganger supervising men engaged in erecting fences near the Yarloop railway station. In addition to directing the work of the men, his duties included checking the tools used, keeping time sheets, attending to correspondence and issuing railway concession passes to the men. The deceased and the men lived at a camp situated on the railway premises near the place at which they were working. It was not a term of his employment that the deceased should live at the camp, but he was authorized to do so. During the interval for lunch the deceased proceeded to go to his camp and whilst crossing the railway line was struck by a train and was killed. There were two safe routes by which the deceased could have passed from the scene of his work to his camp: a level crossing near the scene of his work and a public road outside the railway premises, and an overhead bridge leading from the railway station, across the railway line, to that side upon which the camp was situated. The deceased did not use either of these routes, but, after walking along the station platform, got down on to the rails to cross the line and was then struck by the train. A statutory regulation, a copy of which had been given to the deceased, prohibited employees from walking on the line except in the execution of their duty.

In the Local Court at Perth the deceased's widow claimed against the Commissioner of Railways compensation for his death under the *Workers' Compensation Act* 1912-1924 (W.A.). The magistrate who constituted the court dismissed the claim, and the Full Court of the Supreme Court of Western Australia upheld his decision.

From the decision of the Supreme Court the applicant appealed to the High Court.

E. A. Dunphy, for the appellant. The accident arose out of and occurred in the course of the deceased's employment. The evidence shows that he was employed on a contract of service as a ganger and was, therefore, on duty continuously during the day. Specific proof is not necessary that he had to be there always. His duties included administrative and organizing work as well as the ordinary labouring work. It was his duty to go to the camp as he was in charge of the camp. There were no hours of employment as far as he was concerned ; that is, they were not fixed, and it was necessary for him to live on the job. The camp was not established solely for the convenience of the men ; it was for the convenience of the employer (*Elliott's Workmen's Compensation*, 9th ed. (1926), p. 94 ; *McKee* v. *Great Northern Railway Co.* (1) ; *Pearson* v. *Fremantle Harbour Trust* (2)). It was known to the employer that the route used by the deceased was the customary way to and from his work, and, despite the provisions of the regulation, it cannot now be said that it was not the proper way. Prohibition must be genuine and must be enforced. The regulation presupposes that employees must walk across the line if necessary. [Counsel referred to *Gane* v. *Norton Hill Colliery Co.* (3) ; *McCallum* v. *Northumbrian Shipping Co.* (4) ; *Elliott's Workmen's Compensation*, 9th ed., p. 40 ; *Anderson* v. *H. Hickman & Co.* (5) ; *St. Helen's Colliery Co. Ltd.* v. *Hewitson* (6) ; *Foster* v. *Edwin Penfold & Co.* (7) ; *Lancashire and Yorkshire Railway Co.* v. *Highley* (8) ; *Whittingham* v. *Commissioner of Railways (W.A.)* (9) ; *Howells* v. *Powell Duffryn Steam Coal Co.* (10).]

(1) (1908) 1 B.W.C.C. 165.
(2) (1929) 42 C.L.R. 320.
(3) (1909) 2 K.B. 539.
(4) (1932) 147 L.T. 361 ; 25 B.W.C.C. 284.
(5) (1928) 21 B.W.C.C. 369.
(6) (1924) A.C. 59.
(7) (1934) 27 B.W.C.C. 240.
(8) (1917) A.C. 352.
(9) (1931) 46 C.L.R. 22, at p. 31.
(10) (1926) 1 K.B. 472.

H. C. OF A. 1937.

HENDERSON v. COMMISSIONER OF RAILWAYS (W.A.).

Walker K.C. (Solicitor-General for Western Australia) and *Simpson*, for the respondent. The accident was not one arising out of or in the course of the employment. The accident occurred after working hours (*Smith* v. *South Normanton Colliery Co.* (1); *Philbin* v. *Hayes* (2); *Stephenson* v. *British Insulated Cables Ltd.* (3); *Sparey* v. *Bath Rural District Council* (4)). The deceased was not under a duty to his employer either to leave or remain on the employer's premises, because he was free to do as he pleased. The accident happened during the lunch hour, when there was a cessation of work, and the question to be considered was: When during that lunch hour did he lose his status as an employee and assume his status as a mere licensee on the employers' premises? He was not present all the time on the premises in the status of an employee. It is impossible to argue that, when he was eating his evening meal or sleeping in the camp, he was on duty; he was then merely a licensee on the premises of his employer (*Whittingham* v. *Commissioner of Railways (W.A.)* (5)). Assuming that when the accident happened to the deceased he was still owing a duty to his employer, that is, in passing from the place of work to his camp, then, if in the course of passing he used a forbidden route and assumed an added peril which was quite unnecessary, he then passed outside the scope of his employment, and there was serious and wilful misconduct on the part of the deceased (*Foster* v. *Edwin Penfold & Co.* (6); *Alderman* v. *Great Western Railway Co.* (7); *Knowles* v. *Southern Railway Co.* (8); *Stephenson* v. *British Insulated Cable Co.* (9); *Clarke* v. *Southern Railway Co.* (10)). There was not only a general regulation but a particular order given to the employee himself forbidding all employees to walk on the railway line. Therefore, he assumed an added peril to life and limb which even as an employee it was not necessary to assume. There were available to the employees and the public generally, two other perfectly safe and reasonable routes by which the deceased could have passed from the place of employ-

(1) (1903) 5 W.C.C. 14.
(2) (1918) 11 B.W.C.C. 85.
(3) (1930) 23 B.W.C.C. 549.
(4) (1931) 24 B.W.C.C. 414.
(5) (1931) 46 C.L.R., at p. 31.
(6) (1934) 27 B.W.C.C. 240.
(7) (1937) A.C. 454.
(8) (1937) A.C. 463.
(9) (1930) 23 B.W.C.C. 549.
(10) (1927) 20 B.W.C.C. 309.

ment to his camp. Because the deceased did not owe any duty to remain on the railway premises when the work ceased for lunch hour but remained of his own volition, his status of an employee ceased with the work and he became only a licensee, and all his obligations to his employer ceased also (*St. Helen's Colliery Co.* v. *Hewitson* (1)). When the deceased reached and passed on to the level crossing near the scene of his work he was on a public road by which he could have passed safely to a point in close proximity to his camp, and whilst on the level crossing itself he was on a thoroughfare over which the public generally has a right of way. By virtue of sec. 100 (2), (3), of the *Public Works Act* 1902-1933 (W.A.) the level crossing can only be regarded as part of the railway premises when a railway engine is either upon or within a quarter of a mile of such level crossing. There is nothing to show that when he was on the level crossing there was a railway engine within a quarter of a mile of the crossing; therefore it must be assumed that the deceased was not on the railway premises but on a public highway (*Sparey* v. *Bath Rural Council* (2)). Had he been struck by a motor car whilst on the level crossing such an accident would not have been an accident arising out of or in the course of his employment. When he passed from the level crossing on to the railway premises north of the crossing on his way to his camp, his return to the railway premises from the crossing was made in the capacity of a licensee. After working operations had ceased, and deceased had passed on to the level crossing, he was subject to the same risks as any other member of the public. His employment and every incident of his employment ceased for the remainder of the lunch hour. Therefore, when several minutes later and at a place a considerable distance further north of the level crossing the deceased was struck by the train and killed, he was not then doing anything in respect of which he owed a duty to his employer. [Counsel referred to *Dearman* v. *Dearman* (3); *Stephen* v. *Cooper* (4); *Bist* v. *London and South Western Railway Co.* (5); *George* v. *Glasgow Coal Co.* (6).]

Dunphy, in reply.

Cur. adv. vult.

(1) (1924) A.C. 59.
(2) (1931) 24 B.W.C.C. 414.
(3) (1908) 7 C.L.R. 549.
(4) (1929) 22 B.W.C.C. 339.
(5) (1907) 9 W.C.C. 19.
(6) (1909) 2 B.W.C.C. 125.

H. C. OF A. 1937.

HENDERSON v. COMMISSIONER OF RAILWAYS (W.A.).

Dec. 10.

The following written judgments were delivered :—

LATHAM C.J. The appellant is the widow of the late Robert Henderson, who was killed by being run over by a train at the railway station of Yarlook on 28th August 1935. She took proceedings before a magistrate for compensation under the *Workers' Compensation Act* 1912-1924, claiming that the deceased was killed by an accident which arose out of or in the course of his employment. The magistrate dismissed the claim, and on appeal to the Full Court of the Supreme Court his decision was upheld. An appeal is now brought to this court.

Sec. 6 of the Act entitles a worker or his dependent relatives to compensation if the worker is injured by an accident arising out of *or* in the course of his employment. Henderson was employed by the Commissioner of Railways as a ganger in charge of six men who were relief workers. In addition to supervising the gang he was required to keep time sheets recording their work and for that purpose to make entries in a book. His hours of work under the applicable award were 8 a.m. to 12 noon and 1 p.m. to 5 p.m. The work upon which the gang was engaged was connected with fencing near a level crossing some distance away from the southern end of the railway station. Henderson and the members of his gang were allowed to occupy tents upon railway land which was some distance away from the northern end of the railway station. His duties consisted in supervising the work of the gang, in working with the gang, and making the necessary records. He was at liberty to make these records at any place where he happened to be.

On the day of the accident the gang stopped work at 12 o'clock for lunch. Henderson walked along the side of the railway line to the station platform. In order to reach the camp he had to get to the other side of the line. There was an overhead bridge at the platform provided for this purpose. Instead of using this overhead bridge he walked along the station platform and down the ramp at the northern end. He then started to cross the line but was struck by a train and killed.

If the accident arose either out of or in the course of his employment his widow and children are entitled to compensation under the Western Australian Act. I propose first to consider whether the accident arose in the course of Henderson's employment.

If the accident had happened at the place where the gang was working and while Henderson was crossing the line to give instructions

to the gang, or otherwise in the course of his duties of supervision or other work, the accident would have arisen in the course of his employment. The evidence shows, however, that the men, including Henderson, had knocked off for lunch, and it supports the conclusion that Henderson was simply going away to get his lunch. It has been urged that he may have intended to make some clerical entries at the camp, and that, therefore, in going to his camp, he was acting in the course of his employment because in effect he was travelling on his employer's premises between two places at each of which he had duties to perform. There is no evidence, however, to show that he was bound to perform any duties at the camp or even to live at the camp or that he was going to the camp for the purpose of doing anything connected with his employment. It is true that he had to prepare the time sheets &c., but he was at liberty to do this at the place where he was working or at any place where he happened to be. If he happened to live at a boarding house and in going to the boarding house for lunch had been knocked over by a motor car, it could not have been said that the accident arose in the course of his employment even if he had selected the boarding house because it was near his work and his men. One witness stated his opinion that Henderson must live with the gang to carry out his job efficiently, and another stated that it was for the benefit of his employer as well as of Henderson himself that he should camp on the job. A similar observation might be made, as an expression of opinion, about any person who worked with others. But even if the opinion be well founded, it cannot affect the character or extend the scope of Henderson's employment.

There are many authorities dealing with the questions which arise when a workman is entering or leaving his employer's premises before or after his work, and it is well settled that a worker may be acting in the course of his employment when he is approaching or leaving his work, i.e., before or after he actually engages himself in the things which he is employed to do. It has been urged that in this case Henderson was actually on his employer's premises when the accident happened, and that the accident happened owing to a risk associated with those premises. He was a railway employee, he was on a railway when he was killed, and he was killed by a railway train. In my opinion it would be quite unreasonable to hold that in the case of railway employees all the railway platforms and railway lines owned by the railway authority are to be

H. C. OF A. 1937.

HENDERSON v. COMMISSIONER OF RAILWAYS (W.A.).

Latham C.J.

regarded as part of the employer's premises for the purpose of determining whether or not an employee has left his employer's premises so as no longer to be acting in the course of his employment. As was said in *Benson* v. *Lancashire and Yorkshire Railway Co.* (1), "a railway extends a long way." A man employed at one place in a railway system cannot be said to be, in a relevant sense, upon his employer's premises at every time when he is anywhere on lands of the railway. In the Court of Appeal, in *Smith* v. *South Normanton Colliery Co. Ltd.* (2), *Collins* M.R. said:—"While the workman is leaving the place where he is employed, I think that, for the purposes of this Act, his employment would still continue. But though his employment may continue for an interval after he has actually ceased working, yet there must come a time when he can no longer be said to be engaged in his employment in such a way that an accident happening to him can be said to have arisen out of and in the course of his employment. There must be a line beyond which the liability of the employer cannot continue, and the question where that line is to be drawn in each case is a question of fact." In the present case Henderson had reached the railway platform, and he was proceeding from the railway platform to the place where he normally had his lunch. In so proceeding he was in the same position as any member of the general public. He was not engaged in doing anything in the exercise of his functions as a person employed by the defendant (*Pearson* v. *Fremantle Harbor Trust* (3)). These considerations support the view that the accident did not arise in the course of his employment.

It has, however, been urged that, as the members of the gang, including Henderson, often crossed the railway line at the place where Henderson met with his accident, it ought to be held that Henderson was leaving the place of his employment by a permitted road, and that, therefore, the accident arose out of his employment as in the case of *Gane* v. *Norton Hill Ltd.* (4). In that case, however, there was a finding of fact that the only way by which men left colliery premises was the way on which the worker was travelling when the accident happened, that the way was used with the knowledge of the defendant company, and that the company never suggested that the men should not use that way. In *Lancashire and Yorkshire Railway Co.* v. *Highley* (5) *Gane's Case* (4) was severely

(1) (1904) 1 K.B. 242.
(2) (1902) 5 W.C.C. 14.
(3) (1929) 42 C.L.R., at pp. 327, 330.
(4) (1909) 2 K.B. 539.
(5) (1917) A.C. 352.

criticized and it was pointed out that, if it were upheld, it could be upheld only upon the finding of fact to which I have referred. There is no evidence to support such a finding of fact in the present case. In the first place, as I have already said, Henderson should be regarded as having left his employer's premises when he reached the railway platform. In the second place, there is no evidence that any person to whom Henderson or the members of his gang were responsible was aware that the practice of crossing the line at this point existed. In the third place, a regulation had been made under the *Government Railways Act* 1904-1926, sec. 3, prohibiting the employees from walking on the railway line except in the execution of their duty. It was proved that a copy of the regulations had been supplied to Henderson and that he had duly acknowledged receipt thereof—possibly unnecessarily, for under sec. 36 of the *Interpretation Act* 1918 the regulation has the force of law. The phrase in the regulation, "execution of his duty", cannot be wider than (if, indeed, it is as wide as) the phrase "in the course of his employment." However this may be, if, as I have said, Henderson was not acting in the course of his employment when he crossed the line, it cannot be said that he was acting in the execution of his duty when he was crossing the line. Accordingly he was breaking an express prohibition. An employer cannot protect himself against liability under the Act by prohibiting certain actions and then winking at breaches of the prohibition. But in the present case there is no evidence that the employer was aware of the breaches or winked at any such breaches. Further, the regulation in question has the force of law, and it is not within the power of the Commissioner to make it ineffective in any respect by disregarding breaches of it. An employer who makes rules for his factory but allows his employees to ignore them in practice may quite well be held to have consented to the course of conduct which is inconsistent with the pretended rules, so that the result follows that an employee may be acting in the course of his employment even though he is at the time breaking one of the so-called rules. But this principle cannot be applied in the case of a regulation which has statutory effect. A statutory prohibition must be taken to be a genuine prohibition.

A worker might be employed for a purpose which directly involved a breach of the law. For example, a driver of a vehicle might be ordered by his employer to exceed a speed limit. If an accident happened to the driver in the course of his carrying out such

H. C. OF A. 1937.

HENDERSON v. COMMISSIONER OF RAILWAYS (W.A.).

Latham C.J.

instructions, whatever other answers there might be to his claim, his employer could not be heard to say that the accident did not arise in the course of the worker's employment. But the case is, I think, quite different when a worker is employed to do lawful acts subject to regulations which have the force of law. He cannot be said to be acting in the course of his employment when he breaks such a regulation. On this ground, therefore, as well as for the other reasons stated, I am of opinion that it should be held that Henderson was not acting in the course of his employment when he crossed the line.

The question whether the accident arose out of his employment is, it is true, a distinct question, but in the present case, if it cannot be held that the accident happened in the course of his employment, it appears to me to be impossible to hold that it arose out of his employment. The risk of being run over by a train, when he had left the place on railway premises where he was working, at a time when he was going home for lunch, was not a danger which arose in any way out of the fact that he was employed as a ganger.

In the view which I take of the case it is not necessary to consider the argument for the defendant that Henderson was guilty of serious and wilful misconduct and that therefore compensation should be disallowed under sec. 6 (2) (*c*) of the Act.

In my opinion the appeal should be dismissed.

Dixon J. This appeal is brought by the widow of a railway ganger who was struck by a railway engine as he attempted to cross the track at the end of the Yarloop railway station in Western Australia. He died from the injuries he sustained, and his widow claimed workers' compensation but unsuccessfully. The *Workers' Compensation Act* 1912-1924 of Western Australia makes some important departures from its British prototype. In the first place, the accident need not arise both out of and in the course of the employment. The conditions are not cumulative but alternative. The local legislature has adopted a variant of the famous text and has made it read as follows : " If in any employment personal injury by accident arising out of or in the course of the employment, or whilst the worker is acting under the employer's instructions, is caused to a worker, his employer shall subject as hereinafter mentioned be liable to pay compensation in accordance with the First Schedule." In the second place, the determination of liability is entrusted

not to an arbitrator whose findings of fact are final, but to a Local Court from which an appeal upon law and fact lies to the Supreme Court. Both Local Court and Supreme Court found that the accident by which the appellant's husband died arose neither out of nor in the course of his employment. He was a man of sixty-two years and deaf. He was in charge of a gang of five or six men, apparently relief workers. His gang, after working at Yarloop for some time, had gone to another station on the same line and then had returned to Yarloop. There they were in process of fencing the railway yard. At the north end they pitched a camp on some slightly higher ground lying about eighty yards further on than the end of the platform and on the opposite side of the metals.

The industrial agreement governing railway construction, made between the Government and the union of which the deceased was a member, contains a number of provisions relating to such a camp. The employees are to be paid at ordinary rates for the time taken in pitching, striking and removing camp, except on completion of the works for which they are employed. When men in the performance of their work have to camp out, the Government must supply sufficient tent accommodation on each job properly to house the men employed. If there are more than ten men who apply for what is called a "ranch," that is, a place and means of dining in common, the camp must be provided with tarpaulins, trestles, boards, tables, forms and cooking and eating utensils. The Government must pay for the time occupied in erecting a "ranch." Further, employees must be paid at ordinary rates for the time occupied in walking at a pace of three miles an hour to work from camp and, if the camp is more than two miles away from the place of work, for the time occupied in returning from work to camp.

As the ganger, the deceased directed the work of the gang but subject to the supervision of an inspector who visited the place two or three times a week. In the ordinary course the selection of the camp site would, it is said, fall to the ganger but the inspector would advise him where to pitch the camp. A ganger is paid a fixed wage and receives nothing for overtime. Besides working himself, he is responsible for the work of the gang, keeps the records of the time for which each man is entitled to pay, obtains and checks the tools, arranges and gives the railway concession passes, receives complaints and takes charge generally of the gang. It does not appear to be a term of a ganger's employment that he shall live with his men

H. C. OF A. 1937.

HENDERSON v. COMMISSIONER OF RAILWAYS (W.A.).

Dixon J.

at their camp. Without any breach of duty, the deceased might have found board and lodging in the township. But, as the inspector said in the course of his evidence, "camping on the job is for the benefit of both parties" and, according to another witness, it is the custom of the ganger to camp with the men and he must live with them in order to carry out the job efficiently.

On the day of the accident, the gang were at work fencing south of the railway platform. The stationmaster's residence stood between them and the platform. The place of actual work was about 350 yards from the southern end of the platform and about 500 yards from the camp. They were fencing near a level crossing and were working on each side of the track. Just before noon they ceased work for lunch, and began to return to the camp, where they had their meals. The deceased walked alongside the line, behind the stationmaster's house and up the ramp on to the platform. He walked the length of the platform and down the ramp at the northern end and then turned to cross the rails so as to reach the side where the camp was pitched. A train was just arriving, five minutes ahead of time. Apparently the deceased did not expect it and he did not hear it. He was knocked down by the engine and died next day from the injuries he sustained.

The ground upon which the magistrate of the Local Court held that the accident arose neither out of nor in the course of the deceased's employment was that he was not obliged to live at the camp or to have his lunch there and that lunch time did not form part of his hours of duty.

The reason of the Full Court for the same conclusion was that an overhead bridge from the railway station gave a proper means of crossing the line and that when the deceased reached the platform, open as it was to the public and giving access to the bridge, he had left the site of his work and in leaving the platform to cross the rails he was not doing anything in the course of his employment.

There was in fact an overhead bridge the stairs to which were situated just outside the platform. On the other side, the stairs were placed just outside the railway fence. The deceased might have used these and then got through or over the fence and so reached the camp. In the same way, he might have gained the camp after using the level crossing to go over the line. On the other hand, his work took him much on to the line and he had frequent occasion to visit the platform and the goods shed opposite

the platform. His correspondence came to and was sent from the platform, the key of the goods shed was held there and his material was kept in the goods shed, to reach which he crossed the pit. In the course of his work he had crossed the line many times a day to go from the men fencing on one side to those fencing on the other. It was, therefore, not unnatural for him and his men to go by a route crossing the line. But his deafness formed a special objection to his presence on the track. On that account he had never been furnished with a trolley. Further, he had been instructed that he must not use the main or running line in distributing material, such as sleepers, from a moving truck.

Among the regulations made under the *Government Railways Act* is one which says that employees must not walk upon the line except when it is necessary for them to do so in the execution of their duty.

The ground given by the learned magistrate for his decision is, I think, insufficient to support it. An accident may arise both out of and in the course of an employment, notwithstanding that it occurs during an interval in the hours of the actual performance of work or " duty ", and although under the terms of the contract of employment the workman is not positively obliged to be upon the employer's premises during the interval. For these factors are not necessarily inconsistent with the existence of a sufficiently proximate causal connection between the employment and the accident to satisfy the condition expressed by the words " arising out of " ; and they do not exclude the possibility that the presence of the workman at the place of the accident is so consequential upon or incidental or ancillary to the employment that in being there he is doing something in virtue, or in pursuance, of his employment.

The reason given by the Full Court for the conclusion that the accident did not arise out of or in the course of the employment appears to me to depend upon the view that before the accident the deceased entirely left the sphere of his duty and, independently of his employment, was finding his way over part of his employer's premises to the place where for his own benefit he was allowed to camp. In my opinion such a view makes too marked a contrast between the deceased's actual work with the gang and his use of the facilities of the camp. It treats the employment as entirely restricted to working with and supervising the gang when at work and the camp as something no different from the workman's own dwelling or other place of residence.

H. C. OF A. 1937.

HENDERSON v. COMMISSIONER OF RAILWAYS (W.A.).

Dixon J.

Cases of this description are never easy. The general principle governing the ascertainment of the " course of employment " appears now to be settled. It is not merely a question of the existence and continuance of a relationship. To be in the course of the employment, the acts of the workman must be part of his service to the employer. But the difficulty lies in the application of this conception. For the service consists in more than the actual performance of the work which the workman is employed to do. It includes the doing of whatever is incidental to the performance of the work. General expressions of this kind have not proved very helpful. A number of them, taken from leading authorities, will be found in the judgment of this court in *Pearson* v. *Fremantle Harbour Trust* (1). Where the accident arises shortly before the beginning of actual work or shortly after its cessation, or in an interval when labour is suspended, and it occurs at or near the scene of operations, the question whether it arises in the course of the employment will depend on the nature and terms of the employment, on the circumstances in which work is done and on what, as a result, the workman is reasonably required, expected or authorized to do in order to carry out his actual duties. That the workman is liable to the control of the employer is of some importance. That he has not yet assumed the same relation to his employer's premises and work as an ordinary member of the public is another matter of weight (See, per Lord *Wrenbury*, *St. Helen's Colliery Co. Ltd.* v. *Hewitson* (2); per Lord *Buckmaster*, *Sparey* v. *Bath Rural District Council* (3), and per Lord *Atkin* (4); and cp. *Northumbrian Shipping Co.* v. *McCullum* (5) and *Foster* v. *Edwin Penfold & Co.* (6)).

In my opinion the accident to the deceased in the present case did arise in the course of his employment. In the first place, I have no doubt that he was liable to the control of the Commissioner of Railways during the time when the accident happened. The payment to him of a fixed wage without overtime, the nature of his incidental duties, the provision by the commissioner of a camp for the gang, the movements of the gang up and down the line, often living in places remote both from supplies and supervision, all these circumstances point to the fact that he had a more general respon-

(1) (1929) 42 C.L.R. 320.
(2) (1924) A.C. 59, at p. 92.
(3) (1931) 146 L.T. 285, at p. 286; 48 T.L.R. 87, at p. 88.
(4) (1931) 146 L.T., at p. 287; 48 T.L.R., at p. 89.
(5) (1932) 101 L.J. K.B. 664; 147 L.T. 361.
(6) (1934) 27 B.W.C.C. 240.

sibility to the commissioner than that of directing the actual physical work of fencing and the like.

In the next place, the camp was authorized, its use was customary, its position was sanctioned and the provision of a camp is regulated by the terms of employment. For the most part, a camp is a necessity because the gang's work lies in places where otherwise they could not be got to their work. It happened that they had come to a township, but this accident cannot, I think, make the use of a camp less incidental to the general employment. It follows, in my opinion, that, in going to and from the camp pitched at the side of the railway line to the place of actual work, the deceased was acting in the course of his employment. The case is, therefore, narrowed to the question whether, in taking the particular route he adopted and in passing over the rails, he went outside the course of his employment. It may have been something he ought not to have done, but I am unable to think that it was an act beyond the course of his employment. The cases of added risk decided under the British Act and similar legislation are of little assistance because the double condition must there be satisfied. The reasoning employed in many of them leaves it uncertain whether, in super-inducing a risk not forming part of the employment, the workman has gone outside the course of, or merely encountered a risk arising outside, his employment. But *Highley's Case* (1) and the treatment of the matter in *Stephen* v. *Cooper* (2) seem to make it clear that the true ground of decision in such cases is that the accident does not arise out of, although arising in the course of, the employment (Cf. *Pearson's Case* (3)).

In the present case the statutory regulation may mean that the deceased ought not to have crossed the line, but I should be inclined to understand it, not as referring to a crossing of the line to go to or from one place to another for an authorized purpose, but as forbidding the use of the line as a path. I do not think, however, that disobedience of the rule places a man outside the course of his employment. Indeed, it may be said that the rule is addressed to those acting in the course of their employment. The deceased's deafness and the rule might be used in combination on a question of added risk, but, in my opinion, they do not affect the ground upon which I think the appellant is entitled to succeed, namely, that the accident arose in the course of the deceased's employment.

(1) (1917) A.C. 352. (2) (1929) A.C. 570.
(3) (1929) 42 C.L.R., at p. 331.

H. C. OF A. 1937. HENDERSON v. COMMISSIONER OF RAILWAYS (W.A.). Dixon J.

The defence of serious and wilful misconduct is open in Western Australia in cases of death, and it was raised, but I am clearly of opinion that the facts do not support it.

In my opinion the appeal should be allowed with costs, the order of the Supreme Court should be discharged and in lieu thereof it should be ordered that the order of the Local Court should be set aside and the matter remitted to the Local Court for the assessment of compensation and otherwise to be dealt with according to law. The respondent commissioner should pay the costs in the Supreme Court and in the Local Court.

McTIERNAN J. The appellant's husband was employed by the Commissioner of Railways as a ganger in charge of a number of employees who were engaged in fencing round the station at Yarloop, Western Australia. He directed the men as to where, when and how they should work, checked the tools, kept the time sheets and issued railway passes. Though he had "specified hours of work and worked under the award—8 to 12 and 1 to 5," he had occasionally to work overtime. His work necessitated a certain amount of correspondence, and he sometimes did it at lunch time. He could be called on duty at any time; for example, an inspector could interview him at lunch time. He lived with the rest of the gang at a camp provided for them by the respondent under the terms of the relevant industrial award. He was not bound to do so, but, as one witness said, "he must live with his men to carry out his job efficiently," and the permanent-way inspector said: "Camping on the job is for the benefit of both parties." On the day of the accident which caused his death the gang were conducting fencing operations in two groups, one on each side of the line. In the course of supervision the deceased "would cross the line ten or twenty times." About noon he ceased work and while crossing the track to get to the camp was knocked down by a train. He died on the following day.

An employer's liability to pay compensation under the *Workers' Compensation Act* 1912-1924 (W.A.) is not subject to the double condition usual in such legislation that personal injury should be caused to the worker by accident arising out of and in the course of his employment. Sec. 6 (1) of that Act prescribes alternative conditions, and the liability arises, subject to the defences allowed by the Act, if the injury is caused by accident arising either out of the employment or in the course of the employment or whilst the worker is acting under the employer's instructions.

Both the special magistrate who heard the application for compensation and the Supreme Court of Western Australia held that the death of the appellant's husband was not caused by an injury arising either out of or in the course of his employment.

It is true that at the time of the accident the deceased had discontinued the actual work of supervising and assisting in the fencing and that he was under no positive duty to go to the camp during the lunch hour, but it does not follow that he was no longer in the course of his employment. As Lord *Dunedin* said in *Charles R. Davidson & Co.* v. *M'Robb* (1), "in my view 'in the course of employment' is a different thing from 'during the period of employment.' It connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master." Are the circumstances in this case such that it can be said that the worker was engaged at the time of the accident in doing something which was an adjunct to or an incident of his service to his master ? In my opinion they are. The scope of the deceased's employment was not limited to assisting in and supervising the work of fencing. His duties were more general in character. Though not bound to live at the camp, the fact that he did so operated for the benefit of the respondent. The camp itself was provided by the respondent and its site was approved. I am of opinion therefore that passage to and from the camp to the scene of his labours near the station was incidental to his service and that at the time of the accident the deceased was in the course of his employment.

For the respondent it was contended that, in failing to take a safe crossing by an overhead bridge on the railway platform, the deceased, who was deaf and had been warned not to go on the track, had exposed himself to an added peril. But I cannot agree that his action in crossing the line took him outside the course of his employment, for he was still doing something incidental to his service. Even if his injury did not arise out of his employment it could still arise in the course of his employment.

It was further objected that a statutory regulation prohibited employees from walking upon the line except when it was necessary for them to do so in the execution of their duty. I do not think

(1) (1918) A.C. 304, at p. 321.

H. C. OF A. 1937.

HENDERSON v. COMMISSIONER OF RAILWAYS (W.A.).

McTiernan J.

that his breach of this regulation interrupted his service or altered the fact that in making his way to the camp he was doing something which was a part of his service to the respondent. I agree with the observation of my brother *Dixon* that it may be said that the regulation is addressed to men acting in the course of their employment.

The final objection that the deceased was guilty of serious and wilful misconduct cannot be supported.

In my opinion the appeal should be allowed.

Appeal allowed with costs. Matter remitted to Local Court to determine amount of compensation and otherwise to act in the premises according to law. Costs of appeal to the Supreme Court and of proceedings in Local Court to be paid by the respondent to the appellant.

Solicitors for the appellant, *O'Dwyer, Durack & Dunphy.*

Solicitor for the respondent, *A. A. Wolff* K.C., Crown Solicitor for Western Australia.