1925
*Oct. 13.
*Nov. 2.

JOHN WILLIAM MacKENZIE (PLAINTIFF) ..... APPELLANT;

AND

THE GRAND TRUNK PACIFIC RAILWAY COMPANY (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Workmen's Compensation Act, Saskatchewan—Injury to employee—Interpretation of words "arising out of and in the course of the employment."

The Workmen's Compensation Act of Saskatchewan (1910-11, c. 9, s. 4) confers the right of compensation in cases of a "personal injury by accident arising out of and in the course of the employment caused to a workman." The same language is used in the English Workman's Compensation Act, 1906, (6 Edw. VII, c. 58). The plaintiff in returning home from his labours followed a short cut across the defendant's railway tracks, which the employees were accustomed to take to save time. In so doing, he attempted to climb and pass between two adjoining cars of a train and was injured. Under the English authorities, the plaintiff could not recover, as although the accident arose "in the course of his employment" it did not arise "out of the employment." The Saskatchewan Act, however, by s.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1916] 54 Can. S.C.R. 461.

6 ss. (*c*) provides that the employer shall be liable to pay compensation whether or not "the workman contributed to or was the sole cause of the injury or death by reason of his own negligence or misconduct."

Held, that s. 6 did not enlarge the right given the plaintiff by section 4, as s. 6 deals solely with the exclusion, in cases within the statute, of what would be matters of defence to a claim for damages in an action at common law. Duff and Newcombe JJ. dissenting.

Per Duff and Newcombe JJ. dissenting.—The accident arose in the course of the plaintiff's employment and he was entitled to recover upon the true interpretation of the Saskatchewan Act.

APPEAL from the judgment of the Court of Appeal dismissing an appeal from the judgment of the Court of King's Bench which dismissed the plaintiff's action.

The facts are sufficiently set out in the head note and the reasons for judgment now reported.

Anderson K.C. for appellant.

Gregory K.C. for respondent.

ANGLIN C.J.C.—I have had the advantage of reading the opinion prepared by my brother Mignault. He states the facts and quotes the governing statutory provisions. If I add a few words to what he has written, it is merely in an effort to bring more into relief, if possible, what I consider to be the precise grounds of our decision.

Section 4 of the Workmen's Compensation Act of Saskatchewan, first enacted by c. 9 of the statutes of 1910-11, confers the right to compensation and defines the case in which it arises as that of

personal injury by accident arising out of and in the course of the employment caused to a workman.

The first paragraph of this section is a substantial reproduction of the first paragraph of the English Workmen's Compensation Act of 1906 (6 Edw. VII, c. 58). The words quoted are taken verbatim from it.

Apart from a question presently to be considered, no reason has been advanced why these words should not here be given the construction put upon them in the English courts. So construed, while the injury by accident caused to the plaintiff arose "in the course of his employment," it did not arise "out of the employment." What he was doing when it occurred was not reasonably incidental to his employment; in doing it he was not acting in the sphere of that employment. He was unnecessarily and unreasonably and without lawful excuse adding to it a peril which it

1925

MACKENZIE v. THE G.T.P. RY. CO.

Anglin C.J.C.

did not normally entail. *Lancashire and Yorkshire Ry. Co.* v. *Highley* (1); *St. Helens Colliery Co.* v. *Hewitson* (2). We are, I think, bound by these and other decisions of the highest courts in England (See *Willis's Workmen's Compensation,* 22nd ed., p. 42), as to the scope and effect of the words "arising out of the employment." *Catterall* v. *Sweetman* (3); *Trimble* v. *Hill* (4); *City Bank* v. *Barrow* (5); *Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (6); *Harding* v. *Commissioners of Stamps* (7). *Highley's Case* (1) is really indistinguishable. On this aspect of the case I cannot usefully add to the judgments in the Court of Appeal.

But the crucial question on the present appeal is whether the construction placed by the English courts on the words quoted from s. 1 of the English Workmen's Compensation Act is rendered inapplicable to the same words in s. 4 of the Saskatchewan statute by the presence in the latter of clause (*c*) of s. 6, which has not a counterpart in the English Act. I am, with great respect, unable to appreciate the ground on which the appellant urges an affirmative answer.

I fully agree that the whole statute must be read together —s. 4 in the light of s. 6. But that does not imply that the application of the former section, which confers the right of claim and defines its basis, is to be enlarged by the latter, which deals solely with the exclusion, in cases within the statute, of what would be matters of defence to a claim for damages in an action at common law. That such is the nature and scope of s. 6 is manifest *ex facie.* Its introductory words are "such employer shall be liable to pay such compensation whether or not" i.e. notwithstanding that. "*Such* employer" and "*such* compensation" make it obvious that s. 6 is dealing with a liability imposed and a right conferred by an earlier provision of the statute. The only such provision is s. 4. Therefore s. 6 postulates a right of claim conferred by s. 4. Its purpose is to ensure, possibly *ex majore cautela,* that certain matters which would have

(1) [1917] A.C. 352, at pp. 359, 360-1, 365, 372, 374.
(2) [1924] A.C. 59.
(3) 1 Rob. Ecc. Rep. 304, at p. 318.
(4) [1879] 5 A.C. 342, at p. 344.
(5) [1880] 5 A.C. 664, at p. 663.
(6) [1908] A.C. 46, at p. 51.
(7) [1898] A.C. 769, at p. 774.

afforded the employer a defence had he been sued in tort at common law shall not avail against a claim for compensation within s. 4. In a case where the workman's negligence is the cause, sole or contributory, of the accident, if he fails to recover it will not be because of fault on his part —clause (*c*) of s. 6 provides against that—but because what he was doing, irrespective of any such fault, was a thing outside the scope of his employment,—something not necessarily incidental thereto. *Plumb* v. *Cobden Flour Mills Co.*, (1). Adapting Lord Atkinson's language in *Bourton* v. *Beauchamp* (2), negligence

> does not bring within the sphere of a workman's employment a work or an act which, apart from that (negligence) would have been outside it. The provision with regard to (negligence) has really no application until you first get the act, in the doing of which (negligence) has been committed, inside the scope of his employment.

That the office of clause (*c*) of s. 6 is not further to define the right conferred by s. 4, but to preclude a defence based on default of the plaintiff is, if possible, made still more clear from its collocation. Thus by clause (*a*) the defence of common employment is excluded; by clause (*b*) the possible coexistence of another statutory right under employers' liability legislation is rendered immaterial; by clause (*d*) the defence *volenti non fit injuria* is taken away. I cannot understand how a section whose obvious office is, unnecessarily it may be, to preclude certain matters being set up by way of defence can be used to modify, either by enlargement or restriction, the right, conferred by an antecedant section, which it postulates—how a claim not otherwise within the right-conferring section can be brought within it by a provision which assumes its existence and merely enacts that it shall not be defeated by certain matters ordinarily available as defences in actions of tort. Section 6 (*c*) does not confer on the workman a right to compensation where what he is doing when injured is not within s. 4, merely because the doing of it involved negligence.

DUFF J. (dissenting).—I concur with Newcombe J.

MIGNAULT J.—The question on this appeal is whether the appellant is entitled to recover compensation from the respondent under the Saskatchewan Workmen's Compensation Act (R.S.S., 1920, c. 210) for injuries suffered by him

(1) [1914] A.C. 62, at p. 69.

(2) [1920] A.C. 1001, at pp. 1018-19.

1925

MACKENZIE v. THE G. T. P. RY. CO.

Mignault J.

in March, 1923. The action, as brought, was an ordinary action based on negligence, but at the trial the appellant withdrew his demand under the common law, and asked the court to assess compensation under the Workmen's Compensation Act, as permitted by section 8 of the Act. The question we have to decide is whether he has made out a case for relief under the statute.

The facts found by the learned trial judge can be stated in his own words:—

> The plaintiff was employed as a mechanic at the roundhouse of the defendant at Melville for some months prior to March 22, 1923. At midnight on March 22 he finished his shift and proceeded to his home by the road which he and his fellow workers had followed during the whole time of his engagement and which had been followed by the workmen for years; that is to say, he proceeded from the shop where he was employed to the office where he "clocked out" and thence across the defendant's railway tracks of which there were several, toward his home northwest of of the tracks. There was another way by which he could have gone home which was much longer and which went around one end of the defendant's yard, emerging into a Government road allowance and which necessitated the crossing of only the company's main or lead track. But the evidence is that no workmen went that way and none of the witnesses called on either side could recall of ever having seen a workman go in that direction. On one of the tracks in the yard, which had to be crossed if this path were followed, the plaintiff and another workman found a freight train standing. The plaintiff endeavoured to climb and pass through between two adjoining cars. As he was about to do so the train moved, presumably without any signal, and the plaintiff was permanently injured in one of his feet.

The learned trial judge refused compensation on the ground that, assuming that the appellant, with the implied consent of the respondent, had the privilege of going home after his work by the path he followed on the night of the accident, he was nevertheless limited to a reasonable user of that way, and his attempt to climb and pass between two cars in a train which he knew was liable to move, and would undoubtedly move in a very few minutes, was not a reasonable user by him of the privilege permitted by the respondent.

The appellant having appealed to the Court of Appeal of Saskatchewan, that court allowed him to adduce additional evidence to show, if such were the fact, that the workmen were in the habit, with the acquiescence of their employers, of crossing the respondent's railway in the way he did, by passing between the cars if the line was blocked by a standing train. Evidence was led by both parties on

this issue, and, by the final judgment on the appeal, this evidence was considered inconclusive, and it was held that the appellant was not entitled to compensation, Mr. Justice Lamont dissenting. The appeal is from that judgment.

The learned judges of the court below have exhaustively discussed the questions raised by this appeal and have reviewed all the English cases bearing upon the right to compensation in circumstances similar to those found by the learned trial judge. It is obvious, however, that decisions where there is a mere similarity of circumstances are an insecure guide, and moreover the provisions of the Saskatchewan statute must be carefully considered, for if they differ from those of the English Workmen's Compensation Act, decisions under the latter Act, even if the facts are identical, and they rarely are, cannot assist us in determining whether this appellant is entitled to compensation.

The two sections of the Saskatchewan statute which must be examined are sections 4 and 6. The first deals with the right to compensation; the second excludes certain defences which at common law would be available to the employer in an action based on negligence. I will give these two sections in full.

4. (1) If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall be liable to compensation in accordance with the provisions of this Act; Provided that the employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least one week from earning wages at the work at which he was employed.

(2) Any contract whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall, for the purposes of this Act, be void and of no effect.

6. Such employer shall be liable to pay such compensation whether or not:

(*a*) the injury or death resulted from the negligence of any person engaged in a common employment with the injured employee; or

(*b*) the injury or death was caused by the negligence of the employer or of any person in his service, or by reason of any defect in the condition or arrangement of the ways, works, machinery, plant, building or premises connected with, intended for or used in the business of the employer; or

(*c*) the workman contributed to or was the sole cause of the injury or death by reason of his own negligence or misconduct; or

(*d*) the injury or death resulted from a risk arising out of or incidental to the nature of the employment and which the workman expressly or impliedly assumed.

We are here concerned with paragraph 1 of section 4 and paragraph (*c*) of section 6. Reading them together, as they

1925

MACKENZIE v. THE G.T.P. RY. CO.

Mignault J.

should be read, the Saskatchewan statute provides for compensation to workmen for personal injury by "accident arising out of and in the course of the employment," and the employer is liable to pay "such compensation" whether or not the workman contributed to or was the sole cause of the injury or death by reason of his own negligence or misconduct.

Paragraph 1 of section 4 is taken almost verbatim from section 1 of the English Workmen's Compensation Act, 1906, and the words "accident arising out of and in the course of the employment" are textually those of the English statute. Paragraph (*c*) of section 6 is not in the English Act, nor in any other Workmen's Compensation Act that I have been able to discover, and counsel for the appellant informed us that this paragraph was drafted by the Attorney General of the province and not taken from any other statute. The English Workmen's Compensation Act, as amended in 1923, has a section (section 7) providing that an accident resulting in the death or serious and permanent disablement of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the workman for the purposes of and in connection with his employer's trade or business. Paragraph (*c*) of section 6 of the Saskatchewan statute was of course enacted before the English amendment of 1923, and no useful purpose would be served by comparing the two provisions, both intended further to protect the workman. It may be added that the Saskatchewan Workmen's Compensation Act has not reproduced the enactment of the English Act concerning the "serious and wilful misconduct" of the workman (section 1, subsection 2, paragraph (*c*), which, in England, and in several of the Canadian provinces, is a limitation upon the employer's liability.

To determine what is the right of action which the statute confers on the injured workman, it is clear that we must look at paragraph 1 of section 4 of the Saskatchewan statute. It is "such compensation," that is to say the compen-

sation granted by that paragraph, that the employer, under section 6, paragraph (*c*), is liable to pay whether or not the workman contributed to or was the sole cause of the injury or death by reason of his own negligence or misconduct. On the one hand therefore, the accident must arise out of and in the course of the employment, and on the other the employer is liable to pay the compensation although the workman contributed to or even was the sole cause of the injury or death by reason of his own negligence or misconduct.

It was stated by Lord Finlay, L.C., in *Davidson* v. *M'Robb* (1), that "arising out of the employment" signifies arising out of the work which the man was employed to do and what is incident to it—in other words, out of his service, and that "arising in the course of the employment" must mean in the course of the work which the man is employed to do and what is incident to it—in other words, in the course of his service. It does not mean during the currency of the time of engagement.

In a later case, *St. Helens Colliery Co.* v. *Hewitson* (2), Lord Atkinson, at pp. 75-76 said that the words "arising out of" suggest the idea of cause and effect, the injury by accident being the effect and the employment, i.e., the discharge of the duties of the workman's service, the cause of that effect.

At first reading of paragraph 1 of section 4 and paragraph (*c*) of section 6, it may seem difficult to appreciate how an injury or death by accident, of which the workman was the sole cause by reason of his negligence or misconduct, can be said to be the effect of another cause, the employment, so as to arise out of the employment. But without entering into any metaphysical discussion of cause (remote, proximate or determining) and effect, and giving to the language of the statute the meaning which no doubt the legislature of Saskatchewan placed on it, there is no necessary inconsistency between an injury by accident arising out of the employment, as explained or defined by Lords Finlay and Atkinson, and an injury by accident of which the workman was the sole cause by reason of his own negligence or misconduct. Excluding a deliberate in-

(1) [1918] A.C. 304, at p. 314. (2) [1924] A.C. 59.

1925

MACKENZIE v. THE G.T.P. RY. CO.

Mignault J.

jury inflicted by the workman on himself, which could not be described as an accident, a workman may by his negligence or misconduct be the sole cause of his injury by accident, for instance by negligently placing his hand in contact with rapidly moving machinery, or by using his hands when a regulation directed the use of another instrument, and yet the accident may, none the less, arise out of the employment, that is to say out of the work which the man was employed to do. In that way, it may be said, perhaps rather loosely, that the employment or the work the man was employed to do, for instance the man's proximity to the machinery, was the cause of the injury inflicted, although without the man's negligence or misconduct there would have been no injury. It is not a question here of discussing the strict accuracy of the language of the statute when it speaks of the workman being the sole cause of an injury which, to give right to compensation, must arise out of the employment. It is our duty to place on this language a reasonable construction as applied to the every day conditions of the industrial world. This being understood, for the legislature certainly contemplated here an accident arising out of the employment and not foreign thereto, there is no real inconsistency or contradiction between the two enactments. Negligence or misconduct of the workman, which, within the meaning of paragraph (*c*), is the sole cause of the injury, is excluded as a defence for the employer only when the latter is liable for the injury under section 4 as arising out of and in the course of the employment. So the statute necessarily supposes that liability exists under section 4, when it states that the employer shall be liable to pay the compensation granted by that section whether or not the workman contributed to or was the sole cause of the injury by reason of his own negligence or misconduct.

Applying now the statute as construed to the circumstances of this case, we have to consider the finding of the learned trial judge that the appellant, having finished his shift and "clocked out" at the office, proceeded across the track by the usual road followed by the workmen to go to his home northwest of the tracks. He found the lead track occupied by a standing freight train which had been there some time, and instead of waiting for the train to move,

1925

MACKENZIE v. THE G.T.P. RY. CO.

Mignault J.

or going round it, and not being able to see whether there was or was not an engine on the train, he endeavoured to climb between two adjoining cars. At that moment the train started to move and the appellant's foot was crushed in the couplings.

I am inclined to think that when he crossed the tracks in the usual way to go to his home after finishing his work, the appellant was acting in the course of his employment, that is to say in the course of the work which he was employed to do and what was incident to it. It was his duty when his work was done not to loiter on the premises but to leave them without delay, and he was entitled to go by the accustomed road. Had he taken the other and longer road mentioned by the learned trial judge, and which nobody followed, he would still have had to cross the main tracks of the respondent, for his home was on the other side of the railway. He could not leave his work without passing over some tracks.

The crucial question however is whether the injury sustained by the appellant, when he endeavoured to pass between the two cars, arose "out of his employment," and here we must not lose sight of paragraph (*c*) of section 6. But, as I have said, to establish liability against the employer, the accident must have arisen out of the employment, and then the negligence or misconduct of the workman is immaterial. That there was negligence or misconduct of this appellant is obvious. This, however, would not disentitle him to recover compensation if he could show that the accident arose out of the employment.

In my opinion this accident did not arise out of the employment of the appellant. It certainly did not arise out of the work which he was employed to do, or anything incidental thereto. Granting that the appellant could return to his home by crossing the railway where he did, nothing in any way connected with his work required or allowed him to climb between two cars to get to the other side of the railway track, when he could have gone around the train, or have waited until it moved away. He assumed a risk which did not arise out of and was not incidental to the nature of his employment and which is not within the contemplation of paragraph (*c*) of section 6, or paragraph (*d*) of the same section.

1925

MACKENZIE v. THE G.T.P. RY. CO.

Mignault J.

The learned trial judge thought that the decision of the English Court of Appeal in *Gane* v. *Norton Hill Colliery Co.* (1), had been overruled by the House of Lords, otherwise he would have accepted it as entitling the plaintiff to succeed.

In that case, the workman had completed his work and was injured while crawling under the buffers of a train which blocked the road that the workmen always followed to leave their place of work, and the finding of fact was that this was the usual way and manner the workmen left the works to the knowledge of the company. The Court of Appeal granted compensation.

The *Gane Case* (1) was not overruled by the House of Lords, but on the contrary the decision was approved as applicable to the facts found by the trial judge. In *Lancashire and Yorkshire Ry. Co.* v. *Highley* (2), Lord Findlay, L.C., said that it proceeded entirely upon the finding that passage across a line of railway by going under the trucks which were upon it was recognized and authorized by the company. And, in the same case, Lord Atkinson (at pp. 336-369) discusses the *Gane Case* (1) at length and approves of the decision of the Court of Appeal on the finding that the workmen were authorized 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 authorized to get through the line of tracks by passing under the buffers. He added (pp. 368-369) that if the Court of Appeal

> meant to decide that, wherever permission or authority is given by an employer to his workman merely to cross a line of railway, that necessarily impliedly authorizes 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.

It was to give the appellant the opportunity to establish, if he could, a state of facts similar to those found in the *Gane Case* (1) that the Court of Appeal in this case allowed him to adduce additional evidence. I agree with the majority of that court that he has failed to show that the railway employees were authorized by their employers to pass between cars liable to move which blocked their egress. Unless facts sufficiently establishing such an au-

(1) 78 L.J.K.B. 921. (2) [1917] A.C. 352, at p. 358.

thorization are proved, the appellant cannot rely on the *Gane Case* (1) as explained by the House of Lords.

The argument which the appellant bases on the *Gane Case* (1) and like cases shows the danger of relying on decisions merely because of an assumed similarity in the facts. To use the language of Lord Haldane, *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.* (2), there are few more fertile sources of fallacy.

And the argument founded on subsection (*c*) of section 6 of the Saskatchewan Act really seeks to find a cause of action in a provision the object of which is merely to exclude certain defences to an action based on section 4. If the appellant cannot bring his case within the latter section, my opinion is that he has no right of action.

I would dismiss the appeal.

NEWCOMBE J. (dissenting).—If the plaintiff, when proceeding to his home on the night of his injury, had found the railway tracks unencumbered by cars, but nevertheless, using due care in the crossing, had met with an accident, causing him personal injury, I apprehend that it could not reasonably be said, consistently with the true interpretation of the statute or the decisions, that the accident did not arise out of and in the course of his employment; and the statutory consequence would have been that his employer would have been liable to pay him the compensation for which the Act provides.

To say that it was an extremely hazardous and uncontemplated proceeding on the plaintiff's part to attempt to pass between the cars of the train, which occupied the crossing, when he knew that the train was about to start, or when he did not know whether it would move or not while he was between the cars, is merely to express in other words a cause of liability which is directly within the statutory condition enacted by s. 6 (*c*) which declares that the employer shall be liable whether or not " the workman contributed to or was the sole cause of the injury * * * by reason of his own negligence or misconduct". The real defence which the railway company urges is the workman's negligence, and, upon my reading of the Act, that is to be excluded as a consideration affecting the question whether

(1) 78 L.J.K.B. 921.

(2) [1914] A.C. 25, at p. 40.

1925

MACKENZIE v. THE G.T.P. RY. CO.

Newcombe J.

the accident arose out of and in the course of the workman's employment.

If it be said that when the workman attempted to pass between the cars he added a peril or risk of accident to which, in the language of the English Decisions, his employer had given no sanction, or to which the workman was not required or authorized to expose himself by reason of anything connected with his employment, or which was foreign to the ordinary perils of his employment, the answer is that the peril or risk arose by reason of his own negligence or misconduct, a cause notwithstanding which the statute provides that the employer shall be liable.

I have no doubt that it was contemplated and known by the railway authorities having charge of the service at the station where the injury took place, that the workmen employed at the round house, who lived on the further side of the tracks, would cross and did cross these tracks by the direct route which the plaintiff was endeavouring to pursue when he met with his unfortunate accident, and that this course of going and coming was consequent upon the employment at the round house of workmen who resided on the other side of the railway yard, and therefore incident to or arising out of and in the course of that employment.

Effect must be given to s. 6 (*c*), which is one of the provisions of the Workmen's Compensation Act of Alberta distinguishing it from that of the United Kingdom, and it serves, I think, in accordance with the obvious legislative intent, to make inapplicable many of the numerous and instructive decisions which have been pronounced in the exposition of the latter Act.

For the reason which I have thus briefly stated, I would allow this appeal.

RINFRET J.—I am of opinion that the appeal should be dismissed for the reasons stated by my lord the Chief Justice and by Mr. Justice Mignault.

Appeal dismissed with costs.

Solicitors for the appellant: *Anderson, Bayne & Bigelow.*
Solicitor for the respondent: *C. E. Gregory.*