their lawful right of sending their children to" the school in question "according to their free choice, liberty, and will"—nor do I think that there is evidence to sustain the other causes of action which have been suggested in the course of the argument both here and in the Court below.

LORD COLLINS—I am of the same opinion.

Appeal dismissed.

Counsel for Appellant—Vesey Knox, K.C. —Stebbing. Agent—H. Deane, Solicitor.

Counsel for Respondent—J. H. Campbell, K.C.—P. Gaussen (both of the Irish Bar). Agents—Jordan & Lavington, Solicitors.

HOUSE OF LORDS.

Thursday, April 25.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lords Macnaghten, James of Hereford, and Atkinson.)

BIST *v.* LONDON AND SOUTH-WESTERN RAILWAY COMPANY.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1. *sub-sec.* 2 (*c*)—*Serious and Wilful Misconduct.*

A railway company issued and posted the following notice:—"Enginemen and firemen must not leave the footplate of their engine when the latter is in motion." The enginedriver of a passenger train running at a fast speed left the footplate of his engine and climbed on to the tender for the purpose of getting coal for his engine and was struck by the arch of a bridge and killed. It was contended upon his behalf that in order to increase the pressure of steam in his engine, which had fallen below the normal, and make up for lost time, a better quality of coal was required than that which was immediately available in the well of the tender. The County Court judge found in fact that there was sufficient coal in the well of the tender, and that it had not been proved either that the low pressure of steam or the loss of time upon the journey had been caused by the inferiority of the coal in the tender's well. He held that the accident had been caused by the "serious and wilful misconduct" of the enginedriver, who knew of the rule.

Held that there was sufficient evidence to justify his conclusion.

This was an appeal from a judgment of the Court of Appeal (COLLINS, M.R., ROMER and MATHEW, L.JJ.), who had affirmed a decision of the County Court Judge of Hampshire, sitting at Basingstoke. The appellant was the widow of Alfred Edward Bist, an enginedriver in the employment of the respondent company, who was killed by an accident on the 4th March 1905.

The facts of the case sufficiently appear from the rubric and from the following findings of the County Court Judge:—That the deceased driver was killed by being struck by the arch of the Elvetham Road bridge; that the deceased was so struck while standing on the tender of his engine when the train was in motion and running at a fairly fast speed; that at the time the deceased went up on to the tender there was a sufficient supply of coal in the well of the tender for the purpose of firing the engine until, at all events, the train arrived at Basingstoke; that had it been necessary a supply of coal could probably have been obtained at Basingstoke of a better quality; that the deceased man was fully aware of the rule prohibiting enginemen from going upon the tender while the train is in motion; that it was not proved to his (the learned County Court Judge's) satisfaction that either the low pressure of steam or the loss of time on the journey was caused by any inferiority in the quality of the coal on the engine; and being of opinion that the facts constituted 'wilful misconduct' within the meaning of the Act, gave judgment for the respondents.

At the conclusion of the arguments their Lordships gave judgment as follows:—

LORD CHANCELLOR (LOREBURN)—Everything that could be said in support of this appeal has been said, and it is not without regret, which would, I am sure, in such circumstances be common to everyone, that I have come to the conclusion that it ought to be dismissed. I shall not say anything in regard to the construction of this Act, which has already been discussed in previous cases. The only question here is whether the facts which have been found admit of the interpretation which has been placed upon them by the learned Judge of the County Court when he came to the conclusion that they proved "serious and wilful misconduct." This unfortunate man broke a rule which certainly is a very important rule. There was evidence that he knew of its existence, and that he knowingly and wilfully acted in defiance of it. It was a rule to save life, and to prevent danger both to the public and to the servants of the company. I cannot say that there was no evidence to warrant the conclusion of the learned Judge. It is quite true that this Act is a remedial Act, and like all such Acts should be construed beneficially. Negligence will not suffice. I think that the duty of the Court is to insist that there shall be sufficient proof, and to scrutinise that proof, bearing in mind always that negligence will not suffice. But in this case I think that there was sufficient evidence, and therefore we are not entitled to disturb the decision of the County Court Judge and of the Court of Appeal.

EARL OF HALSBURY—I am of the same opinion. It seems to me impossible to contend that this was not what the language

of the statute intends to make the test of such a thing. I can hardly imagine anything more serious than the breaking of such a rule as was broken in this case. It is a rule which is intended, as the Lord Chancellor has pointed out, for the protection both of the servants of the company themselves and of the public; and if one thinks what might be the result of the breach of such a rule, both to the man who breaks it and the public, I can hardly imagine what would be serious misconduct if this was not. Misconduct both serious and wilful is involved in doing that which would undoubtedly expose to danger both the man himself and those who, in a certain sense, are under his charge. Under the circumstances I could not, if I had myself been the County Court Judge, have done otherwise than find that it was serious misconduct and wilful. But it is impossible not also to observe that this is not strictly the question before us. We have no right to interfere with the finding of the County Court Judge upon a matter of fact. We can say, because then it becomes a matter of law, where there is no evidence upon which a reasonable man could find such and such facts as would give him jurisdiction, that it was a thing which he had no right to find, because he had not the materials upon which to find it. But no one can say that that observation is applicable to this case. I myself should have found in the same way, but it is not necessary to go to that length, because here the sole question before us, the only thing that could be argued as a question of law, is whether there was evidence to be submitted to a jury. It is manifest that there was evidence here and we have no power to interfere with the decision.

LORD MACNAGHTEN—I also am of opinion that the appeal must be dismissed.

LORD JAMES OF HEREFORD—I am not disposed to differ from the opinion expressed by my noble and learned friends, but I arrive at the conclusion that the judgment is correct with considerable doubt, and certainly with very great regret. I may say at once that if I had occupied the position of the learned Judge, or if this case had been submitted to a jury, and I had been one of the jury, I should not have found the finding which the learned Judge has placed on the record. I think, of course, that we ought in determining the meaning of the words "serious and wilful" to follow the judgment that was given by this House in the case of *Johnson* v. *Marshall*, and I think, too, that we clearly expound the intention which the Legislature had in framing the statute if we hold that that which is "serious and wilful misconduct" must be clearly established against the plaintiff who seeks damages. Also it appears to me that the word "wilful" must not only mean a mere intentional breach of a rule, but it must also mean wilful with the intention of being guilty of misconduct. An instance was given, in the course of the argument, of a breach of this rule by an enginedriver leaving the footplate for the purpose of seeing what is the matter with his engine. Of course he is breaking the rule, and in one sense breaking the rule is misconduct; but he does not break it for the purpose of being guilty of misconduct in such a case; he breaks it for the purpose of doing what he conceives to be best for his employer. If there may be such a case of a breach of the rule, where the person through whose act the cause of action arises has done an intentional act, we must, before we give effect to the words "serious and wilful misconduct," see what was in the man's mind at the time that he did so break the rule. In this case when we look at the effect which is to be given to the word "serious" as controlling it, I do not think that we can find that it is "serious" in consequence of the unfortunate man being killed. He did not contemplate that for a moment. Therefore the case comes to this, Was it wilful misconduct in the mind of the man when he left the engine to go to the tender for the purpose of obtaining the coal? Was it his intention to commit an act of misconduct? He could not, I think, have contemplated any injury to anybody else but himself by leaving the engine and taking this coal from the tender; he could not have contemplated any injury to the public, to any passenger, or to the man who was working with him. I think that he forgot the existence of the bridge, and therefore did not contemplate any injury to himself. For these reasons I am inclined at present to think that if I had had the responsibility cast upon me of giving the primary decision in the matter I should not have concurred with the learned County Court Judge, but, as has been observed, that is not the question which we have to determine here. The learned judge had to direct himself as if he was directing a jury, and I must confess that I think that this matter was open to two views, and that two constructions could be put upon the man's conduct. The learned Judge took a view contrary to that which I have suggested that he might have taken, and chose so to direct himself. I do not see that it is within our province to differ from him to the extent of saying that the judgment must be set aside.

LORD ATKINSON—On what is, I think, the only question of law before your Lordships' House—namely, whether there was evidence before the learned County Court Judge to justify him reasonably in coming to the conclusion that he did come to—I am of opinion that the judgment of the Court of Appeal was right. I do not attempt to define what "serious and wilful misconduct" really is, nor to express any opinion which I might be unable to retract on further consideration, but it would appear to me, I confess, that if a man breaks a rule, knowing at the time that he is breaking it, and is not compelled to break it by some superior power which he cannot resist, that he is guilty of a wilful breach of it.

Appeal dismissed.

Counsel for the Appellant—Rufus Isaacs, K.C.—E. Browne. Agents—Pattinson & Brewer, Solicitors.

Counsel for the Respondents—Acland, K.C.—J. A. Simon. Agent—W. Bishop, Solicitor.

HOUSE OF LORDS.

Monday, July 29.

(Before the Lord Chancellor, Lords Macnaghten, James of Hereford, Robertson, and Atkinson.)

PALACE SHIPPING COMPANY, LIMITED *v.* CAINE AND OTHERS.

Ship—Seaman—Wages—Articles of Agreement—Breach—Refusal to Sail with Contraband of War—Merchant Shipping Act 1894 (57 *and* 58 *Vict. c.* 60), *secs.* 134, 187, 188, 225.

Seamen in December 1904 signed articles agreeing to serve on a three years' voyage commencing at Glasgow and proceeding to Hong-Kong and any other ports within certain specified degrees of latitude. The vessel arrived at Hong-Kong with a cargo of coals in February 1905 at a time when war had been going on between Russia and Japan for more than a twelvemonth. At Hong-Kong the seamen were ordered by the master to take the vessel to Sasebo, a port within the specified degrees, and a naval base of Japan. Coal had been declared contraband of war by both belligerents, and the vessel would accordingly be liable to be captured or (according to Russian practice) be sunk upon the voyage. The seamen refused to proceed, and were sentenced to ten weeks' imprisonment by the port magistrate, and no wages were paid to them.

In an action by the seamen against the owners of the vessel, *held* (*affirming* a judgment of the Court of Appeal) (1) that the seaman were justified in refusing to proceed to Sasebo, as the voyage was a voyage of a character not contemplated by the articles according to their fair meaning; (2) that they were entitled to a decree for the amount of their wages from December 1904 until the date of the judgment of the Court of Appeal; (3) (*diss.* Lord Atkinson) that in the special circumstances of the case they were entitled to a further sum under the head of "maintenance" or "damages."

This was an appeal from an order of the Court of Appeal (the MASTER OF THE ROLLS now LORD COLLINS, and LORDS JUSTICES COZENS-HARDY and FARWELL) dated December 21, 1906, which varied a decision of Mr JUSTICE LAWRANCE.

The facts are stated in the Lord Chancellor's judgment.

At delivering judgment—

LORD CHANCELLOR—This is an action brought by nine seamen against the defendant company, as owners of the s.s. "Franklyn," for malicious prosecution, wages, and maintenance, and damages. The men agreed by their articles to serve on a "voyage of not exceeding three years' duration to any ports or places within the limits of 75 degrees north and 60 degrees south latitude, commencing at Glasgow, proceeding thence to Hong-Kong *via* Barry and or any other ports within the above limits, trading in any rotation, and to end at such port in the United Kingdom or Continent of Europe (within home trade limits) as may be required by the master."

They sailed from Cardiff with a cargo of coals, and reached Hong-Kong on 20th February 1905. War had been raging between Russia and Japan for more than a twelvemonth. At Hong-Kong the men were told for the first time that the "Franklyn" was to proceed with her cargo of coal to Sasebo, a naval base of Japan. Coal had been declared contraband of war by both belligerents, and accordingly a vessel carrying coal to Sasebo was liable to be captured, if the Russians could capture her, and to be sent to a Russian port for adjudication. More than that, under the practice adopted by Russia in that war, she ran the risk of being sunk instead of being taken into port. The right to sink a neutral ship in such circumstances was wholly denied by Great Britain, but it is none the less true that Russia claimed, and in some cases exercised, her supposed right.

If, therefore, the men had gone on with the ship to Sasebo, they ran the risk of losing their employment and their kit, of being cast adrift in a Russian port during war, and of their ship being destroyed on the high seas, and themselves exposed to whatever danger that might involve.

The master claimed that the men were bound to go on to Sasebo. The men refused, but offered to go if the captain would make good their wages and clothes till the time they arrived in the United Kingdom in the event of the ship being taken or sunk. The master said his owners would not allow him to do that, and no better evidence can be given to prove that in their opinion there was some real danger.

Upon this the master threatened the men that if they refused to proceed he would take them before the harbourmaster, who is also port magistrate.

That was done, the men still refusing to sail for Sasebo, the harbourmaster sentenced them to ten weeks' imprisonment, and they were imprisoned accordingly with circumstances of much hardship and indignity. The wages they had already earned were not paid to them but into the shipping office, and applied, it would seem, to defray the cost of maintaining the men in prison. At all events, no part of it was paid to the men. After serving their sentence they were sent home as distressed seamen, and reached London on 15th July 1905. In August they brought this action.