

authority can fairly be said to stand together.

I do not feel much pressed by the reasoning of Fletcher Moulton, L.J., although I can quite see that if there were an absolutely clean slate it might be possible to construe the statute somewhat differently.

I concur with your Lordship's motion that the appeal should be dismissed.

LORD ATKINSON—I concur, on the short ground that I think the language of this statute more or less ambiguous, and that it is questionable whether the determination of a contract by merely giving notice can be called a performance of the contract within the year. If not, its duration must be determined with regard to the other provisions it contains.

That being so, I entirely concur with what has been said by my noble and learned friend on the Woolsack, that where the language of a statute is ambiguous and you find that a particular construction has been put upon it by a number of authorities, extending over a great length of time, it would be unwise and wrong on our part to disturb that interpretation.

LORD SHAW—I agree.

Appeal dismissed.

Counsel for Appellant—Atkin, K.C.—J. H. M. Campbell, K.C.—Colefax. Agents—Michael Abrahams, Sons, & Company, Solicitors.

Counsel for Respondent—Dickens, K.C.—Danckwerts, K.C.—Bremner. Agents—Spyer & Sons, Solicitors.

HOUSE OF LORDS.

Monday, December 4, 1911.

(Before the Earl of Halsbury, Lords Atkinson, Shaw, and Mersey.)

KERRISON v. GLYN, MILLS, & COMPANY.

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

Error—Payment—Condictio indebiti—Banker—Payment to Account of Banker's Customer—Mistake of Fact.

A banker to whom money is paid to the credit of his customer's account at his customer's request, in mistake of fact, is not in a better position than his customer would be, and is not entitled to hold it if his customer would under the circumstances have been bound to refund it had it been paid to him direct.

The appellant was under a contract of "standing or renewable credit" with K. & Co., a New York firm of bankers, that they should from time to time honour the drafts of a certain mining company up to £500. After each such

occasion the appellant was to pay in the amount of such drafts to the respondents' London bank to the credit of K. & Co. The respondents were the agents in London of K. & Company. The appellant was not bound to pay in the stipulated amount until the mining company's drafts had actually been honoured by K. & Company, but he did so in anticipation of certain drafts. At the date of the payment K. & Co. had, unknown to the appellant, committed an act of bankruptcy and were no longer able to honour the corresponding drafts. The appellant sought repayment of the sum lodged by him in the respondents' bank, but they claimed to retain it as against the indebtedness of K. & Co. to them.

Held that the respondents were bound to repay the amount to the appellant, the amount having been paid by him before it was legally due and under a mistake of fact as to the solvency of K. & Co.

The appellant sought repayment of a certain sum paid by him to the respondents under circumstances stated *supra* in *rubric* and in the judgment of Lord Atkinson. Judgment by Hamilton, J., in favour of the appellant was reversed by the Court of Appeal (VAUGHAN WILLIAMS, FLETCHER MOULTON, and FARWELL, L.JJ.), and he appealed.

Their Lordships gave considered judgment as follows:—

LORD ATKINSON—The action out of which this appeal has risen was brought by the appellant to recover a sum of £500 lodged by him in the bank of the respondents on the 31st October 1907 to the credit of the account therein of a certain firm of bankers carrying on business in New York, called Kessler & Company, under a mistake of fact. The alleged mistake of fact was that Kessler & Company had before the lodgment, but without the knowledge of either the plaintiff or the defendants, committed an act of bankruptcy. The case was heard before Hamilton, J., sitting in the Commercial Court without a jury, upon the documents given in evidence, supplemented by two affidavits made by deponents in New York. The facts are really not in dispute, but much controversy has been raised as to the proper inference to be drawn from them touching the precise nature of the arrangement entered into between Kerrison, the plaintiff, and this New York banking company, in accordance with which the sum which it is sought to recover was lodged with the defendants on the occasion mentioned. Upon this point—a vital one in the case—Hamilton, J., and the Court of Appeal came to different and conflicting conclusions. One of the questions for decision in this appeal is, Which of those conclusions is right? It is therefore necessary to examine in detail the evidence upon which the conclusions respectively purport to be based. The plaintiff was owner, jointly with others, of a certain silver mining property at

Zacathecas in Mexico, of which he acted as managing partner in this country, one J. S. Pattinson being the local manager. The undertaking was known as the "Bote Mining Company," and for the purposes of its business a current account was kept with Kessler & Company in its name. The defendants are the agents of Kessler & Company in this country.

The plaintiff's father, one Roger Kerrison of Ipswich, was in 1903, when the correspondence opens, and for some years afterwards, as his son who succeeded him is now, the managing partner in this country of the mining company. The letter earliest in date given in evidence in the case is that of the 1st May 1903, from Kessler & Company to Roger Kerrison, to which the latter replied by a letter of the 5th of the same month. These two letters, which opened the negotiations between the parties, ran as follows—"Per steamship 'Campania.'—Mr Roger Kerrison, Ipswich, May 1903.—Dear Sir,—The National Park of this city has paid as for account of the Bote Mining Company 'of Zacathecas, Mexico, Roger Kerrison, Managing Owner,' the sum of \$7300. As we have no instructions from the mining company or yourself in regard to the disposal of this money, we await advice either from you or from them.—Yours very truly, KESSLER & Co."

"Gurneys Alexanders Bank, Ipswich, 5th May 1903.—Dear Sirs,—I now beg leave to confirm cable message sent to you on the 30th ult. from my banking firm's London house to open a credit of seven thousand three hundred dollars (\$7300) in favour of the Bote Mining Company, Zacathecas, Mexico, as instructed by my manager there, Mr J. S. Pattinson, and, on receiving further particulars from him will write you further on this subject, and am, dear Sirs, yours faithfully, ROGER KERRISON."

In this letter of the 5th May Roger Kerrison uses the words "open a credit of \$7300," but it is clear that he did not mean by those words that Kessler & Company should advance or pay any money of their own, properly so called, to the mining company, but should simply pay drafts or cheques of the mining company up to the amount of \$7300 then in their hands. There was no loan of any kind, in the proper sense of the term, to be made by Kessler & Company to the mining company of any sum of money whatever. The sum of \$7300 was as they state paid to them by the National Park Bank for account of the mining company.

On the 22nd May 1903 Roger Kerrison again wrote to Kessler & Company a letter in which a sum of £500 is for the first time mentioned. It runs as follows—"Dear Sirs,—Referring to your letter of the 1st May acknowledging my cable message of previous day, I have now heard from the manager of my mining company at Zacathecas, Mexico, Mr J. S. Pattinson, and he informs me that he desires to open an account with you, so as to enable him to get the best possible terms when paying

for certain stores, &c., required for the mines, and I should therefore feel obliged if you would honour his drafts up to the amount wired you, \$7300, and, as he also asks in a supplementary letter received this morning that I should allow him a standing credit with you for the equivalent of £500—say \$2500—I should be glad if you would allow him this further accommodation on my responsibility and account when and as required; and for your guidance I enclose you herewith specimen of Mr Pattinson's signature.—Thanking you in anticipation, I am, dear sirs, yours faithfully, ROGER KERRISON. P.S.—I should be glad of some suggestion from you as to how you would prefer to be recouped for any sum or sums which Mr Pattinson may draw upon you against the above-mentioned standing credit of £500.—Pp. R. K., C. B. Trollope.—Messrs Kessler & Company, Bankers, 54 Wall Street, New York."

Indorsed on this letter in pencil is the following—"On original credit \$7000 no charge because money is deposited with us. On £500 $\frac{1}{4}$ per cent., and amount to be deposited with Glyn when requested by us."

To this letter Kessler & Company sent a reply dated the 3rd June 1903, the portions of which dealing with the matter in controversy ran as follows:—"Per steamship 'Deutschland.'—Roger Kerrison, Esq., Ipswich, 3rd June 1903.—Dear Sir,—Your favour of the 22nd ult. is received, and we note that you ask us to open a credit in favour of Mr J. S. Pattinson, which we presume is for account of the Bote Mining Company for £500. This we will do, and as soon as we have paid his draft or drafts we will advise you of the amount, with a request that you pay the equivalent to Messrs Glyn, Mills, Currie, & Company for credit of our account. For transactions of this nature our commission is one-eighth of one per cent. It is not quite clear to our mind whether you intend that when this credit is exhausted Mr Pattinson should have another credit of £500, what is usually called a revolving credit, the advance at any one time not to exceed £500. Kindly advise us on this point. For the amount you have already given us of \$7300 for his credit, as it has been lying here for some little time before his drafts were presented, we will make no charge for commission."

On the 15th June 1903 one C. B. Trollope wrote on behalf of Roger Kerrison to Kessler & Company a letter, of which the material parts ran as follows:—"Dear Sirs,—I am requested by Mr Kerrison to thank you for your letter of the 3rd inst., and in reply to inform you that a revolving credit of £500—say \$2500—in favour of Mr Pattinson as manager of the Bote Mining Company is exactly what Mr Kerrison meant by a standing or renewable credit, as we call them here, and he would be much obliged if you would open such a credit for him upon the terms you mention—that is, one-eighth of one per cent.—and on receiving advice from you of the amount of the drafts paid Mr Kerrison would at once credit

your account at Messrs Glyn & Company with the sterling equivalent. Mr Kerrison also begs leave to thank you for your consideration in honouring Mr Pattinson's drafts free of charge against the credit of \$7300 cabled to you on the 30th April last."

Stopping here, it is, in my view, too plain for argument that the arrangement embodied in this correspondence only amounted to this—that Kessler & Company were to pay the drafts or cheques of Pattinson, acting on behalf of the mining company, in the first instance out of their own money; that until such advances had been made Kerrison was not bound to lodge with the defendants any sum of money whatever to the credit of Kessler & Company, and that the amount which he at any time might be bound to lodge with them was the amount which Kessler & Company had advised him that they had, by honouring Pattinson's cheques or drafts, advanced to the mining company, and no more. The words "to be recouped" occurring in the postscript to the letter of the 22nd May, coupled with the words "and as soon as we have paid his draft or drafts we will advise you of the amount with a request that you will pay the equivalent," are, it would appear to me, conclusive as to the nature of the arrangement embodied in the correspondence up to this date, the 15th June 1903.

It does not appear to me that there is any substantial difference of view between Hamilton, J., and the Court of Appeal on this point. Where they do differ from him is as to the effect of the course of business, quite inconsistent with the above-mentioned arrangement, followed invariably from its conclusion down to the 31st October 1907. Hamilton, J., held that the arrangement embodied in the correspondence was not varied by this course of business, that it remained valid and binding, that the legal rights of the parties to it, and the true relation of each to the other, were to be determined by its terms, and that the departure in practice from its provisions was only made voluntarily by Roger Kerrison for his own convenience by way of anticipation. The Court of Appeal, on the other hand, held, as I understand their judgment, that the nature of the arrangement actually made was to be inferred from all the correspondence coupled with the course of business actually followed, and that it amounted in effect to this—that Kessler & Company were not to advance any of their own moneys, properly so called, to the mining company, but that before they cashed any of Pattinson's cheques or drafts as against this credit for £500, Kerrison was bound to lodge the full sum of £500 with Glyn, Mills, & Company, their bankers, to the credit of their account; so that the moment that Kessler & Company credited the mining company with £500 in their own books, and advised Kerrison of that fact, though not a single cheque had then been drawn by Pattinson against the credit, Kerrison became bound to pay them £500. No conceivable arrangement could be more inconsistent with the contents of the correspondence ending on the 15th June 1903.

But it followed as a necessary consequence of this conclusion, as, indeed, the Court of Appeal appear to have held, that when the plaintiff on the 31st October 1907 lodged with the defendants the sum of £500 to be placed to the credit of Kessler & Company, he was simply in the position of a debtor who had paid to his creditor the debt which he owed in ignorance of the fact of the creditor's bankruptcy, and that this ignorance did not amount to such a mistake of fact as would entitle the debtor to have the money refunded to him. On the assumption that the plaintiff was, by lodging this sum of money, merely paying a debt which he owed, the Court of Appeal were, I think, clearly right in this latter conclusion.

The course of business followed is described in the affidavit of Mr McLean, the former manager of Kessler & Company, as follows—"When from time to time the Bote Mining Company had exhausted its credit Kessler & Company would give additional credit to the company in the equivalent of £500 less $\frac{1}{2}$ per cent. commission, by crediting the account of the company in their books. Upon making this credit in their books they would on the same day write to Mr Kerrison notifying him thereof, and requesting him to pay £500 to Glyn, Mills, & Company for their account, and on the same day they would also notify Glyn, Mills, & Company that Mr Kerrison would deposit £500 with them for the account of Kessler & Company, and on the same day Kessler & Company would write to the Bote Mining Company advising them that the sum of £500 at current exchange less $\frac{1}{2}$ per cent. commission had been placed to their credit, specifying the rate of exchange and the amount in dollars. When the Bote Mining Company required for some special payment an amount larger than £500, that was arranged for by cable, or by correspondence with Mr Kerrison. The Bote Mining Company from time to time made deposits of cheques or drafts which Kessler & Company collected and passed to their credit. The only commission or charge made by Kessler & Company, except petty disbursements, was the commission of $\frac{1}{2}$ per cent. deducted from the amounts remitted by Mr Kerrison, such deductions being made at the same time that the credit was given to the Bote Mining Company."

It was adopted apparently immediately after the 15th June 1903, when Roger Kerrison was in no way bound to adopt it, or to depart from the original arrangement made between Kessler & Company and himself, for on the 18th June 1903 they wrote him a letter to which Mr Trollope replied on the 29th of that month. These letters ran as follows—"Roger Kerrison, Esq., Ipswich, 18th June 1903—Dear Sir,—Confirming ours of the 3rd June, we this morning have a letter from the Bote Mining Company asking us to pay to the National Metal Company \$5789.64, which we have done. As this overdraws the previous credit of \$7300, we make use of the further credit which you opened with us for £500, and would thank you to pay

that amount on receipt of this letter to Messrs Glyn, Mills, Currie, & Company, London, for the credit of our account. Inclosed is copy of our reply to Mr Pattinson's letter, in order that you may be posted on how we are handling his account, which we trust will be satisfactory to you. —Yours very truly, KESSLER & Co."

"Gurneys Alexanders Bank, Ipswich, 29th June 1903.—Dear Sirs,—In the absence of Mr Kerrison I beg leave to acknowledge the receipt of your letter of the 18th inst. with copy of your letter to Mr Pattinson, and, in accordance with your instructions, have paid to Messrs Glyn, Mills, & Company for your account the sum of £500 sterling, and am, dear Sirs, your faithfully, C. B. TROLLOPE."

The dates of these two letters in themselves suggest an explanation of this immediate departure in business from the strict letter of the arrangement made. In the interval between the 18th and 30th June it was necessary to finance the mining company, and it may well be that Kerrison, knowing this, in order to avoid delay, and to save himself the trouble of making repeated lodgments on the receipt of repeated advices, anticipated a liability of which he had not been actually advised, but had every reason to think either had actually accrued, or most probably would soon accrue, and lodged the full sum of £500 at once to meet the present or future claims.

The occurrences of the latter part of October 1907 leading up to the lodgment on the 31st of that month of the sum now sued for support that conclusion. On the 21st October the account of the mining company with Kessler & Company was drawn down to \$100.45. On that day Kessler & Company wrote to the plaintiff a letter, the important part of which ran as follows:—"Will you please pay for our credit to Messrs Glyn, Mills, Currie, & Company £500 for account of the Bote Mining Company, which we credit to their account here at \$4.85 less one-eighth, viz., \$2421.97."

But that letter did not reach the plaintiff till the 30th October, nine days later, and in this interval the Bote Mining Company had drawn four drafts on Kessler & Company to the amount in the aggregate of \$1091.65. It happened that these drafts were not presented before the 30th October and they were not paid. Something of the same kind seems to have occurred in August in the same year—that is to say, in the interval between the posting of the letter of advice and its arrival at its destination, drafts of the mining company had been cashed by Kessler & Company, involving an obligation on Kerrison to pay. It would appear to me that it was a most natural thing for Kerrison to lodge the entire sum of £500 with Kessler & Company's bankers to discharge any liability which might have accrued in the interval above mentioned, and by anticipation to provide for that which might thereafter accrue. I do not think that it is a just or fair inference from the adoption

of this course of business that the plaintiff's father Roger Kerrison or the plaintiff himself ever abandoned their rights under the arrangement embodied in the correspondence terminating on the 15th June 1903, or that this agreement was in any sense varied. Accordingly I am of opinion that the conclusion at which Hamilton, J., arrived on this issue of fact was right, and with all respect for the members of the Court of Appeal, that their conclusion on that issue was erroneous. Kerrison at the time when he paid the money had not been advised that Kessler & Company had made any advances of their own money to the Bote Mining Company in respect of which he was bound to recoup them. He lodged the money in the belief that Kessler & Company were a living commercial entity able to carry on their business as theretofore, that they were in a position to honour, and would honour, the drafts of the Bote Mining Company up to the sum which he in anticipation sent to recoup them for their repeated advances. Kessler & Company had in fact ceased to be in that position. If not commercially dead they were at least in a state of suspended animation, utterly incapable of carrying on business, making advances, or doing the very things which he lodged this money to their credit to enable them to do.

I cannot doubt that on general principles he would be entitled to recover back money paid in ignorance of these vital matters, as money paid in mistake of fact. It is urged, however, that although he gave notice to the defendants on the 31st October of Kessler & Co.'s act of bankruptcy, asked them to stop payment of his cheque, and to refund him his money, he is precluded from recovering it from them in this suit because, as they were Kessler & Company's bankers, though not his, the relation between a banker and his own customer is that of creditor and debtor. It was admitted, as I understood, that if money be sent direct from one person to another in payment in advance for some service to be rendered by that other, in the belief that he is alive, when in fact he is dead, it could be recovered by the sender from the person, whether agent or legal personal representative of the deceased, into whose hands it came. The fact that the deceased was largely indebted to such agent, and that the latter would as between himself and the legal personal representative of the deceased be entitled to set off *pro tanto* the money received as against the debt due to him, could not possibly prejudice the rights of the person transmitting the money. He would obviously have the same rights against an agent to whom the deceased owed money as he would have against an agent of the deceased to whom nothing was owing, and this would be so even though the deceased had authorised the agent to apply the money when received to the discharge *pro tanto* of the sum due to him.

Here, undoubtedly, the defendants were the agents designated by Kessler & Com-

pany to receive the money from Kerrison. Kerrison is not shown to have known anything as to how the account between the defendants and Kessler & Company stood. It may well be that money lodged by a customer with his banker is, as between themselves, considered to be a loan to the banker, who may thenceforth deal with the money as his own, but the lodgment of this £500 was not a loan from Kerrison to the defendants. That is clear. It was the mode selected by Kessler & Company themselves by which each of these different sums of £500 should from time to time be paid to them. If it had been transmitted direct by post, neither Kessler & Company nor their assignees in bankruptcy could, I think, on Hamilton's, J., decision as to the nature of the arrangement entered into, have retained it. It would be against good morals to permit them to do so. The defendants cannot, I think, have a better right to hold the money than Kessler & Company would have had. The cases cited deal with the respective rights of banker and customer *inter se*, and with those rights alone. They do not touch the question whether a banker to whom money is paid to the credit of his customer's account at that customer's request, in mistake of fact, is in a better position than his customer would be, and is entitled to hold it, though his customer, had it been paid to him direct, would under the circumstances have been bound to refund it. That was the principle contended for by the respondents before your Lordships. No authority was cited in support of it. It seems to me to be contrary to reason and justice, and in the absence of binding authority upon the point I refuse to accept it as the law. I am therefore of opinion, on the whole case, that the decision of the Court of Appeal was wrong and should be reversed, and the decision of Hamilton, J., restored, and that this appeal should be allowed with costs.

EARL OF HALSBURY—I am entirely of the same opinion, and I only wish to say that I do not understand myself to be differing on any question of law either from Hamilton, J., or from the Court of Appeal, because I think that it was simply due to a misapprehension of the facts with which they were dealing that the Court of Appeal differed from Hamilton, J. At all events I am of opinion that the course of dealing and the facts as found by Hamilton, J., were correct, and I think that the Court of Appeal went wrong, if they went wrong at all, simply upon the question of fact.

LORD SHAW—I am of opinion that the narrative of the facts in the case stated by Hamilton, J., and the conclusions in law reached by that learned Judge, are correct, and I agree with the full judgment of Lord Atkinson, which I have had the pleasure of reading.

On the 31st October the appellant Mr Kerrison paid £500 to Messrs Glyn, Mills, Currie, & Company, the London corre-

spondents and bankers of the firm of Kessler & Company, New York. The object of the payment was to cover accommodation or advances to be made by Messrs Kessler to a Mexican firm called the Bote Mining Company. On that date, the 31st October, Messrs Kessler & Company stood completely disabled from making such advances or giving such accommodation, and could not honestly have taken the money for the purpose, for the reason that on the previous day they had filed a deed of assignment in favour of their creditors and had closed their doors. The money was paid, however, in London under the mistake in fact, which was material, and was indeed the only reason for payment, that Kessler & Company could perform their obligations. In my opinion it is of no materiality whether this payment under mistake to Messrs Kessler was made either directly or indirectly either to them personally or to any agency of theirs in New York or in London.

The case is only of importance on account of an able attempt by the respondents' counsel to distinguish the position of a banker from the position of any other recipient of money acting as factor or agent, and to attach the authority of this House to such a distinction as applicable to a case like the present. It was for this purpose that the dictum of Lord Cottenham, L.C., in *Foley v. Hill*, 1848, 2 H.L. Cas. 28, was so strongly founded on. That dictum is not capable of the application suggested. In the first place, it was pronounced, and indeed the case turned, on a point of procedure, or rather in regard to the respective jurisdictions of a court of law and a court of equity. This was expressly referred to by the Lord Chancellor when he described the argument—"Although it is not disputed that the transactions between the parties gave the legal right, it is said a court of equity, nevertheless, has concurrent jurisdiction." In the second place, when the general language founded upon, to the effect that "money when paid into a bank ceases altogether to be the money of the principal," and so forth, was used, it was plain that the language was employed solely in regard to the relation between a banker and his own customer. And in the third place, it was not meant to be applied, and did not apply, to, or cover the case of, money paid, whether by a customer or not, under a mistake in fact.

I agree with the opinion that money so paid can be successfully redemanded, and I do not think that it would be correct, either in law or in business, to permit the recipient, though a banker, to impound money which his principal could not have honestly or legally retained. This rule applies generally, even although the recipient, whether banker or agent, was, as here, ignorant at the time of receipt of the disability of the principal to do the thing for which, and for which alone, the money was deposited, or was himself under a mistaken impression on that subject.

LORD MERSEY—It is not necessary to recapitulate the facts of this case. They are sufficiently set out in the opinion of Lord Atkinson. Nor is it necessary for me to say more as to the conclusions to be drawn from the facts. The case is in reality very simple. Mr Kerrison paid £500 into the defendants' bank in order that Kessler & Company might be provided with funds to meet the drafts of the mining company when presented for payment in New York. He paid the money in the mistaken belief that Kessler & Company were in a position to apply his money to the purpose for which it was intended. Kessler & Company were not in fact in a position to do this. They had, at the date of the payment, assigned all their property to trustees for the benefit of their creditors; they had put up their shutters and were no longer in a position to do business of any kind. If Kerrison had known these facts, undoubtedly he would not have paid the money, and if the money had been tendered by him directly to Kessler & Company instead of to their bankers it would have been wrong for them to have taken it. I am quite unable to understand how it can be said that Kerrison was merely paying a debt which he owed to Kessler & Company. He owed nothing to them, and it is contrary to all notions of business to say that Kessler & Company by the mere entry in their own books of account of a sum of money to the credit of the mining company could make Kerrison their debtor. The facts bring the case directly within the terms of the judgment of Lord Loreburn, L.C., in *Kleinwort v. Dunlop*, 1907, 23 Times L.R. 696, where he says — "It is indisputable that if money is paid under a mistake of fact, and is redemanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid in whatever character it was received." An attempt was made to take this case out of this plain and simple rule of law by saying that the defendants, being Kessler & Company's bankers, had, by the receipt of the money, become debtors of Kessler & Company, and could not therefore be called upon to repay the plaintiff. This is, in my opinion, a fallacy. No doubt when a banker receives money, either from his customer or from a third person on account of his customer, he becomes his customer's debtor for the amount so received. But this does not entitle the banker to retain money which in common honesty ought not to be kept. If, indeed, the banker has paid over the money to his customer, or has altered his position in relation to his customer to his own detriment, on the faith of the payment, the banker may refuse to repay the amount and may leave the person who has paid him to enforce his remedy against the customer. But the circumstances here are that Messrs Glyn, Mills, & Company had in no way altered their position when they were asked to refund the money. They held money which they ought not to retain, because it had been paid to them

under a mistake of fact, and, in the words of the Lord Chancellor, it does not matter in what character it was received by them. I think that the judgment of Hamilton, J., was right, and ought to be restored.

Judgment appealed against reversed.

Counsel for Appellant—Sir R. B. Finlay, K.C.—Rowlatt. Agents—Gribble, Oddie, Sinclair, Rowlatt, & Johnson, Solicitors.

Counsel for Respondents—Bailhache, K.C.—Alan Macpherson. Agents—Murray, Hutchins, Stirling, & Company, Solicitors.

HOUSE OF LORDS.

Monday, December 11, 1911.

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

BARNES v. NUNNERY COLLIERY COMPANY, LIMITED.

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

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1)—"Accident Arising Out of the Employment"—Prohibited Act.

Where an act committed imprudently or disobediently by a workman is different in kind from anything which he is required or expected to do, and is also put outside the range of his service by a genuine prohibition, an accident which he thereby suffers does not arise out of his employment.

The dependant of a deceased workman claimed compensation from his employers. The circumstances of the workman's death are narrated in the judgment of Lord Mersey as follows — "William Francis Barnes, a boy of seventeen, was employed at the Nunnery Colliery as a 'clamber.' In the early morning of the 2nd May last he and three other boys, Greaves, Bell, and Thackeray, were starting for the end of a level, known as 5 South Level, where they were to work. This place, which was some distance from the spot where they were gathered together, ought in the proper course of work to have been approached on foot. But there existed near to the footway an endless rope carrying tubs to the lower part of the mine. This rope was about to start. It had thirty-eight empty tubs attached to it, and was in charge of Greaves, who sat in the front tub. At the moment of starting, the other three, of whom Barnes was one, got into the tub in which Greaves was seated in order that they might ride to their work instead of walking. The train was then started by Greaves. After it had travelled about half a mile Barnes's head came in contact with the roof of the mine, with the result that he was killed. The others, who had probably travelled in this way before, avoided the danger by stooping in