HOUSE OF LORDS.

Monday, December 4, 1911.

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

HANAU *v.* EHRLICH.

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

Statute—Interpretation—Settled Construction—Question Reopened in House of Lords—Statute of Frauds 1676 (29 *Car. II, cap.* 3), *sec.* 4.

Where doubtful words in a statute have for a long period been decided in a particular sense, the House of Lords, although not bound by decision, will not disturb that interpretation, following the brocard *Interest reipublicæ ut sit finis litium.*

The Statute of Frauds, 1676 (29 Car. II, cap. 3), sec. 4, provides that "no action shall be brought whereby . . . to charge any person . . . upon any agreement that is not to be performed within the space of one year from the making thereof," unless the agreement . . . or some memorandum or note thereof shall be in writing and signed. . . ."

The plaintiff Hanau raised an action for damages for breach of contract. He averred a verbal contract entered into by the defendant Ehrlich to employ him as a managing director for a period of two years subject to six months' notice on either side. The defendant pleaded the Statute of Frauds.

It was well-settled law that, if a contract can by possibility be performed within the year the statute does not apply — *Peter* v. *Compton*, 1694, Skinner 353; *M'Gregor* v. *M'Gregor*, 1888, 21 Q.B.D. 424. It was, however, established by a long series of decisions, none of which had been considered by the House of Lords, that a contract is not taken out of the operation of the Statute of Frauds although by its terms it may be defeated or put an end to within the year.

Judgment for the defendant by Lawrence, J., was affirmed by the Court of Appeal (VAUGHAN-WILLIAMS, FLETCHER, MOULTON and BUCKLEY, L.JJ.)

The plaintiff appealed.

At the conclusion of the argument for the appellant their Lordships gave judgment as follows:—

LORD CHANCELLOR (LOREBURN) — The question here is one of the construction to be placed upon the Statute of Frauds, which, after the lapse of 200 years and more, seems still to be open to some question.

Mr Atkin, on behalf of the appellant, quoted authorities to show that the words of the Act deal only with agreements which cannot be performed by either party within a year. On the other hand, there is a chain of authorities since 1829, either approving or reaffirming the earlier decisions upon which the Court of Appeal relied, which undoubtedly support in a direct way the conclusion at which they have arrived. I think that these two series of decisions can both be reconciled, or rather, I ought to say, can both be applied by regarding the one as an exception to the other.

If you are to look at the words of this statute without any previous guidance at all, to my mind either construction is possible as a matter of language and pure interpretation of the meaning of language. But I agree with Vaughan-Williams, L.J., that it is not right, even for this House, to re-open points of construction upon ambiguous language which have been settled for a long period of years; and I advise your Lordships to decide this case upon that ground. To my mind, when doubtful words in a statute have for a long period been decided in a particular sense, we ought not to re-open the matter if we can help it. The doctrine *Interest reipublicæ ut sit finis litium* ought in such a case to apply.

LORD ALVERSTONE — I entirely agree with the motion made by the Lord Chancellor.

It seems to me that it is quite impossible in the present day to deal with this statute as though we were considering it for the first time. It has been said that the view taken by tbe Court of Appeal, which your Lordships are prepared to indorse, is not logical, having regard to certain exceptions founded upon *Peter* v. *Compton* (1694, Skinner 353). One has had to think over this point a good many times in the course of one's legal career, and it seems to me, and it has always seemed to me, that the two things can stand together. I put it in this way—The one class of cases says that if there is no mention of time, and the time is uncertain, the agreement is not within the statute. The other class of cases decides that if the time mentioned is more than one year, but there is power to determine, it is within the statute. I have never been able to see why that is not a perfectly good working construction for this statute.

But I entirely concur with the main reason given by the Lord Chancellor for refusing this appeal. This point was in terms decided in the year 1856, and decided with reference to this very identical contract—a contract of service for a certain number of years determinable on six months' notice—(*Dobson* v. *Collis*, 1856, 1 H. & N. 81).

I am sure that I am not exaggerating when I say that hundreds and thousands of such contracts have been made since, and that whenever they come before the courts, although they have not gone beyond Nisi Prius, the ruling has been that they are required to be in writing; and it would be, I think, a very serious thing for your Lordships to upset the course of decision when, as it seems to me, without inconsistency the two classes of

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