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 'clamper.' 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

the tub. It appeared that Barnes had not previously ridden in the tub, and that he had only been in the employment of the colliery company about three weeks. The evidence shows that it was quite a common practice for boys to ride in the tubs in order to get to their work, but it also appears that the use of the tubs for this purpose was forbidden, and that notices to this effect were placed at the pit bottom and in the lamp room. There is also a special rule of the colliery—rule 90—forbidding workmen to use the tubs. All the boys, including the deceased, knew that they ought not to ride in the tubs, and boys in fact never did ride in them if any deputy or official of the colliery could see them. They then walked."

The County Court Judge held that the accident arose out of and in the course of the employment, and awarded compensation. This judgment was reversed by the Court of Appeal (COZENS-HARDY, M.R., and FARWELL, L.J., *diss.* FLETCHER MOULTON, L.J.).

The dependant appealed.

Their Lordships gave considered judgment as follows:—

LORD CHANCELLOR (LOREBURN) — The more I see of these cases under the Workmen's Compensation Act, the more I feel that nearly all of them are in reality pure questions of fact, in regard to which the only function of a court is to interpose where there is no evidence to support a particular finding.

The question whether or not an injury by accident arose out of the employment is quite different from the question whether there has or has not been misconduct. An arbitrator has to ask himself, Was the injury by accident caused by something reasonably incidental to the employment, by some risk to which a workman, liable like other men to be careless and take short-cuts, might be exposed in doing what he had to do?

The difficulty is really in applying this to the particular case. You cannot say that this boy was employed to be prudent and cautious, and therefore deny him compensation if by reason of his want of prudence and caution he meets with an accidental injury. Nor can you deny him compensation on the ground only that he was injured through breaking rules. But if the thing which he does imprudently or disobediently is different in kind from anything which he was required or expected to do, and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment. I mean that I should say so if I were a judge of the fact, for it is purely a question of fact, and where the County Court Judge has decided it a court of law has no right to set the award aside unless it is satisfied that there was no evidence which could justify such a conclusion. It is like the case of a judge ruling that there is no case to go to the jury.

The Court of Appeal has by a majority come to the view—for such it is in effect—that there was no evidence, and your Lordships take the same view. I am not prepared to differ. It is not by comparing the facts of one case with the facts of other cases and reasoning by analogy from the comparison that a safe conclusion can be reached, but by considering each time the meaning of the Act.

LORD ATKINSON—I have had the advantage of reading the judgment of Lord Mersey, in which the facts are sufficiently set out, and I concur in it. The judgment of the Court of Appeal was, I think, right. The County Court Judge is, in such cases as this, the sole judge of fact, and where evidence is given before him upon which he could as a reasonable man find, as an issue of fact, his decision must be upheld; but where all the evidence given before him clearly shows that the injury causing the workman's death was the result of a risk not incidental to the workman's employment, then his finding that the injury did arise out of the employment binds nobody, because it is a finding made without any evidence to support it and cannot be allowed to stand. It is not very clear what were the grounds upon which the County Court Judge based his judgment. There is one item in his note going to show that the *ratio decidendi* was that because the deceased was bound according to the terms of his employment to proceed from the engine plane down the incline to No. 5 South Level he was riding in this tub for the objects of his employer, not for his own pleasure, and therefore that an accident arising from his travelling in the tub was an accident arising out of and in the course of his employment within the meaning of the statute. The note runs as follows—"Did not ride for his own pleasure but for object of his employers. Had to get down the incline. No reason to assume he knew of danger."

I quite agree that an employer should not be permitted to shield himself from liability by merely posting up a notice prohibiting some practice in his works when he has tacitly permitted the practice to be followed—winked, as it is called, at the disregard of his orders. But that is not the case here.

John William Greaves deposed not only that "there was a notice board at pit's bottom forbidding us, and at lamp room, and there is a special rule of the colliery, rule 90"—prohibiting, I presume, the riding in these tubs—but that all the clampers knew that they ought not to ride in the tubs; and again, that it was always the practice to ride if no deputy or official was about—if a deputy or official was about then the boys walked—and that one or two have been fined for riding. The evidence of this and the succeeding witness Arthur Bell is no doubt to the effect that boys were in the habit of riding in these tubs; but there is not a particle of evidence, not a suggestion, in the case to show that the managers or any officials of the mine ever

permitted or connived at the practice. The County Court Judge has not, either expressly or by implication, found that anything of the kind ever took place. The deceased had been in this employment for three weeks before his death. From a passage in Greaves' evidence it would appear that the deceased was during this time employed as a clamper. The County Court Judge has found that he had never ridden before. It is difficult to suggest what an employer could reasonably be required to do to enforce the rules prohibiting a certain practice which the employers omitted to do in this case to prevent the practice of riding in these tubs being indulged in. Wilful misconduct is out of the case since death ensued, and indeed its existence cannot in any case help to a decision as to whether an injury by accident arose out of or in the course of a workman's employment. So that whether the deceased knew of the danger he was running or did not know of it is irrelevant.

In these cases under the Workmen's Compensation Act a distinction must, I think, always be drawn between the doing of a thing recklessly or negligently which the workman is employed to do and the doing of a thing altogether outside and unconnected with his employment. A peril which arises from the negligent or reckless manner in which an employee does the work he is employed to do may well—and in most cases would rightly—be held to be a risk incidental to the employment. Not so in the other case. For example, if a master employs a servant to carry his—the master's—letters on foot across the fields on a beaten path, or on foot by road to a neighbouring post office, and the servant, having got the letters, goes to the stables, mounts his master's horse, and, proceeding to ride across country to the post office, is thrown and killed; or goes to his master's garage, takes out his motor car, and, proceeding to drive by road to the post office, comes into collision with something and is killed—it could not be held, I think, according to reason or law, that the injury to the servant arose out of his employment, though in one sense he was about to do ultimately the thing which he was employed to do, namely, to bring his master's letters to the post; but in such a case the servant puts himself into a place in which he was not employed to be, and had no right to be—the back of his master's horse or the seat of his master's motor car. He is doing a thing which he was not employed to do, and had no right to attempt to do, namely, to ride his master's horse across country or to drive his motor car. These are altogether outside the scope of his employment. He exposes himself to a risk to which he was not employed to expose himself—a risk unconnected with that employment, and one which neither of the parties to his contract of service could have ever reasonably contemplated as properly belonging or incidental to it. This is a case of that description. The unfortunate deceased in this case lost his life from the new and added peril to which by his own conduct he exposed himself—not to any peril which his contract of service, directly or indirectly, involved or at all obliged him to encounter. It was not therefore reasonably incidental to his employment. That is the crucial test which has been many times adopted. There was not therefore to my mind any evidence that the injury the deceased received arose out of his employment, and if the finding of the County Court Judge amounts to a finding that it did, it cannot, I think, be sustained.

LORD SHAW—I concur.

LORD MERSEY—The question in this case is whether the injury which caused the death of the deceased boy arose out of his employment within the meaning of sec. 1, sub-sec. 1, of the Workmen's Compensation Act 1906. Before this question can be answered it is necessary to ascertain with accuracy the facts of the case.

[*His Lordship stated the facts as quoted supra.*]

These being the facts, the Court of Appeal (Cozens-Hardy, M.R., and Farwell, L.J., Fletcher Moulton, L.J., dissenting), overruling the judgment of the learned County Court Judge, held that the accident could not be said to arise out of the deceased's employment. I think that the judgment of the majority of the Court of Appeal was right, and that there was no evidence on which the County Court Judge could reasonably find as he did. It was no doubt part of the duty of the deceased to find his way down the mine to the place where he was to work, but it was not in my opinion incidental to the performance of that duty that he should get into the tub. When riding in the tub he was not only violating the conditions of his employment, but was engaged in an act quite outside its scope, and I find it impossible to say that an accident which results from an act done in violation of the terms of the employment can in any proper sense be said to arise out of the employment. He was not doing a permitted act carelessly, but he was doing an act which he was prohibited from doing at all.

It is true that the learned County Court Judge states, in the note of his judgment, that there was no reason to assume that the boy knew of the danger which he was running. This may be true; there is no evidence one way or other on the point; but it is immaterial. He knew that he was forbidden to ride in the tub, and that, in my opinion, is enough. The learned Judge also finds that the boy was not riding for his own pleasure, but for the object of his employers. For my part I think that he was riding for his own pleasure; but this again is immaterial, and for the same reason. It is, no doubt, true that one object which he had in view in getting into the tub was to reach his work, but the intention existing in his mind cannot, in my opinion, convert the forbidden act into a part of his employment. It is not as if the case had been one of emergency, where the

boy might have had a discretion to use the perhaps speedier, although the forbidden, means of reaching his destination. Nor is it as if the rule forbidding the act was notoriously disobeyed or not enforced. It was disobeyed, no doubt, but it was disobeyed surreptitiously and unknown to the employers. The act was, in my view, expressly prohibited, and there were no circumstances which could in any way justify the boy in disregarding the prohibition. The case falls within the authority of *Brice* v. *Edward Lloyd Limited*, [1909] 2 K.B. 804, and is governed by it. It is not like that of *Robertson* v. *Allan Brothers & Company* (1908 L.J., K.B. 1072, 98 Law Times R. 821). In the latter case the Master of the Rolls pointed out that the violation of the rule against the use of the skid for reaching the vessel was "winked at" by the employer—in other words, that it was not a prohibition at all.

For these reasons I think that the appeal ought to be dismissed.

Appeal dismissed.

Counsel for Appellant—Waddy, K.C.—V. M. Coutts Trotter. Agents—H. G. Campion & Company, Solicitors.

Counsel for Respondents—Scott Fox, K.C.—T. E. Ellison. Agents—Bell, Brodrick, & Gray, Solicitors.

HOUSE OF LORDS.

Monday, January 29, 1912.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lords Macnaghten and Atkinson, with Nautical Assessors.)

OWNERS OF "FRANCES" *v.* OWNERS OF "HIGHLAND LOCH."

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

Reparation — Ship—Collision — Launch—Choice of Two Risks.

The s.s. "Highland Loch," of 4675 tons register, was built and about to be launched at a shipbuilding yard upon the river Mersey. The ketch "Frances," of 71 tons, was anchored in the river opposite and near the line of the intended launch. She had dragged anchor and got foul of some moorings in the river. All the usual notices of the intended launch were given by the shipbuilders, who also sent warnings to the master of the "Frances" more than two hours before the launch. They requested him to move the "Frances" from her position and offered to tow her to a safe position. They continued to give warning and make the offer until immediately before the launch, which was delayed for a quarter of an hour; the master of the "Frances," however, could not heave his anchor, and refused to slip his cable unless the shipbuilders would undertake liability for a new anchor. At the launching the "Highland Loch" collided with the "Frances" and caused injury, in respect of which the owners of the "Frances" sued the shipbuilders. The building supports of the "Highland Loch" had been in course of removal for hours before the launch, and it was proved to the satisfaction of the Court that further postponement of the launch would have involved considerable danger to the ship and to the workmen engaged in the building-yard.

Held that the master of the "Frances" acted unreasonably in refusing to slip his cable and move her; that the owners of the "Highland Loch" were thereby placed in a position in which they had to take one of two risks; that in deciding to proceed with the launch they took the lesser risk and acted properly; and that the "Frances" was accordingly alone to blame.

A collision took place between the s.s. "Highland Loch" and the ketch "Frances" under the circumstances stated *supra in rubric.* The owners of the "Frances" raised an action to recover damages for this consequent injury and loss, and obtained decree in their favour. This was reversed by the Court of Appeal (VAUGHAN WILLIAMS, FARWELL and KENNEDY, L.JJ., with Nautical Assessors).

The owners of the "Frances" appealed.

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

LORD CHANCELLOR (LOREBURN)—I think that there are no nice questions of law in the case, nor any questions of law at all. It is purely a question of fact. It is very clear to me that the ketch was to blame and acted unreasonably. It is unnecessary to dwell upon that, because all the learned Judges in the Courts below have agreed upon that subject. I should say that a vessel, if she could get out of the way fairly, finding herself in this position, and acting as this ketch did, offers a typical illustration of unreasonableness. Then you have to see whether the defendants were at fault. I cannot see where negligence or breach of duty on their part arises in the circumstances. It is an exceptional state of things when a launch is to take place, because temporary and exclusive use is required for a short time of the water by those who have to launch the vessel. Others must do what is reasonable to facilitate that lawful and exceptional use of the water, and the owners of the ship to be launched must do the same. I have been watching to see what grounds were alleged of neglect of duty on the part of the owners of the launch. So far as I can see these are the things suggested—that they ought to have taken precautions to see that the mooring chains should not be a source of obstruction at the bottom of the river. That suggestion was made by the junior counsel for the appellants, but I find