assume that all requirements in respect of matters precedent and incidental to registration have been complied with—and confine yourselves to the construction of the document. I shall take care that the committee which is now sitting to inquire as to amendments desirable in the law relating to joint stock companies looks into this question and considers whether amendment is desirable both to strengthen the requirements as to definition of objects and to control in some proper way the finality of the registrar's certificate.

I turn to consider the transaction in question in this case and to see whether it falls within the company's objects upon a true construction of the memorandum of association, assuming, as I am bound to do, that this is a valid instrument.

The transaction was as follows —A company called the Anglo-Cuban Oil, Bitumen, and Asphalt Company, Limited, was in November 1910 being promoted by a company called the London and Mexico Exploitation Company, Limited. The Essequibo Company in November 1910 sub-underwrote 20,000 shares of 10s. each in the Anglo-Cuban Company for a commission of £600 in cash and £5000 in cash or shares upon one Chansay, who was the promoter, undertaking to purchase at par on or before the 30th November 1911 any shares which the Essequibo Company might have to take up. The Essequibo Company had to take up 17,200 shares. On the 29th November 1910 they applied for that number, and they were allotted to them. On the 6th September 1912 they transferred the shares to the London and Mexican Company. On the 12th November 1912 an order was made to wind up the Anglo-Cuban Company. The Essequibo Company have been put upon the B list of contributories. They by their liquidator (for they also are in liquidation) applied to vary the B list by excluding their name therefrom. The ground of that application was that the transaction was *ultra vires* the Anglo-Cuban Company. The only question open on this appeal is whether upon the construction of the memorandum of association the transaction was *ultra vires*.

The construction of the instrument does not admit of reasonable doubt, Clause 3, sub-clauses (8) and (12) are in terms so wide that an obligation in a contingent event to take up shares falls within them. The language of clause 3 (30) is such that I cannot say that such a transaction was *ultra vires* because it was not ancillary to or connected with or in furtherance of something which I find elsewhere in the company's memorandum to have been "its business." Upon the narrow question upon which alone it is unfortunately within the competence of this House to determine I think the decision below was right. It follows that this appeal must be dismissed, with costs.

Their Lordships dismissed the appeal, with expenses.

Counsel for the Appellant—F. Whinney—Morle. Agents—Sparks, Whitehouse, Russel, & Company, Solicitors.

Counsel for the Respondent—Hon. F. Russell, K.C.—Topham. Agents—Stanley, Evans, & Company, Solicitors.

HOUSE OF LORDS.

Monday, June 17, 1918.

(Before the Lord Chancellor (Finlay), Lords Atkinson and Wrenbury.)

PRICE *v.* GUEST, KEEN, & NETTLEFOLDS, LIMITED.

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

Master and Servant—Workmen's Compensation—Compensation—Computation—"Employment . . . during the Three Years next Preceding the Injury"—Onus of Proving Discontinuance of Employment—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Sched. I, secs.* 1 *and* 2.

On 10th March 1916 a workman who had been employed by the respondents for the preceding three years was killed by an accident in one of the respondents' collieries. The respondents disputed the method of computing the compensation due to his dependants. From 1st to 13th July 1915 the deceased workman worked "day by day." From 14th to 21st July owing to a strike he did not work. At the end of the strike he returned to work at increased wages. The dependants claimed that during the period of strike the deceased was not employed by the respondents and the compensation fell to be computed on the basis of his subsequent earnings. The respondents contended that his employment had been continuous.

Held (*dis.* L. C. Finlay) that the *onus* of proving the discontinuance of the employment was on the appellant, and there was no evidence to establish her contention.

Their Lordships' considered judgment (from which the Lord Chancellor dissented) sets out the facts.

LORD CHANCELLOR (FINLAY)—The question in this case is as to the measure of compensation payable under the Workmen's Compensation Act 1906 in respect of the death of a workman.

The relevant enactments are found in the first schedule to the Workmen's Compensation Act 1906 (1) (*a*) and (2) (*c*). Clause 1 of that schedule deals with the amount of compensation payable under the Act, and under (*a*) it provides what the compensation should be where death results from the injury. In cases in which the workman has left dependants wholly dependent upon his earnings, the compensation is to be "a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury," or £150, whichever of these sums is the larger, but in no case to exceed £300, "and if the period of the workman's employment by the said employer

has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be one hundred and fifty-six times his average weekly earnings during the period of his actual employment under the said employer."

Clause 2 (*c*) gives the following definition:—"Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause."

The deceased was killed by accident in the course of his employment on the 10th March 1916, and his widow claimed compensation on the footing that the period of the deceased's employment by the same employer had been less than three years, in which case she would be entitled to the maximum compensation of £300. The employers contended that he had been in their employment during the three years next preceding the injury, so that the compensation was the amount of his earnings during the three years, namely, £259, 4s.

The case resolved itself into an inquiry whether there had been a break in the employment from the 14th to the 21st July 1915. If there had been such a break the employment would not have been continuous for the three years, and the larger amount of compensation would be payable.

The County Court Judge decided in favour of the claimant, giving her £300. His decision was overruled by the Court of Appeal, who held that there was in point of law no evidence on which the County Court Judge could find that there had been such a break in the employment, and reduced the amount of compensation to £259, 4s. Your Lordships are now asked to restore the award of the County Court Judge.

The deceased had been in the employment of the respondents as assistant repairer for three years continuously unless there was a break during the week the 14th to the 21st July 1915, as found by the County Court Judge. Up to the 30th June 1915 he was serving on the terms of the Conciliation Board agreement of the 8th April 1910, which by clause 26 was to continue until the 31st March 1915, and thenceforth until the expiration of three months' notice. On the 1st April 1915 the three months' notice was given to terminate this contract, and that notice expired on the 30th June 1915. The deceased, however, along with the other men, worked on "day by day" up to the 14th July. During the week the 14th to the 21st July there was what is called in the judge's notes a strike, and the deceased with most of the other men in the colliery did no work during that time. On the 22nd July they returned to work on a provisional agreement, and on the 2nd September 1915 a final agreement was arrived at regulating in a number of particulars the terms of employment. Its thirtieth clause provided that the agreement should continue in force from the 15th July till the expiration of six months after the expiration of the war, and thereafter until the expiry of three months' notice. The thirty-second clause provided for the signature of the contract by the owners and by each workman "as one of the terms of the engagement between the owners and the said workmen." This agreement was signed by owners and workmen, including the deceased, the men returned to work, and the deceased continued at work until his death.

The authorities lay down, and I think rightly, that a workman is not in the employment of the same owner for the three years within the meaning of the provisions of the schedule which I have quoted unless his employment is continuous. It need not be under the same contract of service. So long as there is no interval of time between the end of one contract of service and the beginning of another there would be continuous employment. Indeed, I think it follows from the authorities that if a dock labourer, who is engaged day by day, whose wages are paid at the close of each day, and who has no right to be employed on the following day, had been in fact employed on every working day of the three years by the same employer there would have been continuous service, and therefore he would have been in the employment of the same employer for the three years, so as to render applicable to his case the first scale mentioned in clause 1 (*a*) of the first schedule.

If there is continuous employment it is not necessary that there should be continuous work. If the contract or contracts subsist throughout the three years there may be intervals in the work. The man may be employed to work only for, say, two or three days a week. He may stop away from work with or without leave, and even unlawful absence would not interrupt the continuity of the employment unless the employer dismissed the workman for it.

As the absence of the deceased from work during the week the 14th to the 21st July 1915 was wilful and not due to illness or any other unavoidable cause, it is unnecessary for the purpose of the present case to consider the meaning of the words at the end of clause 2 (*c*) of the schedule—"interrupted by absence from work due to illness or any other unavoidable cause"—which have given rise to so much doubt and difficulty.

That the deceased was not working during the week the 14th to the 21st July 1915 is clear. The question on which the County Court Judge and the Court of Appeal differed was whether during that week there was a break in his employment as well as in his work. The question is one purely of fact, and the decision of the County Court Judge is conclusive on questions of fact, provided there was any evidence in point of law on which his conclusion of fact could be arrived at. The only ground on which the decision of the County Court Judge can be reversed is that there was no evidence on which, if the case had been tried by a jury, the Judge would have been justified in leaving the question to them.

At the conclusion of the hearing I was

under the impression that there was evidence on which the County Court Judge might arrive at the conclusion which he reached. As I understood that my colleagues on the hearing of this appeal were of opinion that there was none, I have most carefully reconsidered the case, and after doing so I remain of opinion that it is impossible to say that there was in point of law no evidence in support of the appellant's contention.

It was of course for the appellant as claimant to establish the proposition on which her claim to compensation on the scale which happened in the present case to be more beneficial to her must depend. The burden of proof was upon her, and if she failed to adduce any evidence in support of it the Court of Appeal were justified in setting the award aside. The award could not be interfered with merely on the ground that upon the balance of evidence a different conclusion ought to have been arrived at.

The contract on which the deceased had for a long time worked came to an end on the 30th June 1915, but he and the other workmen worked "day by day" up to the 14th July. Working "day by day" in my opinion denotes *prima facie* that there was no engagement of any sort beyond the day. It was not suggested that there was any usage requiring notice to determine such an employment, and indeed on what I think is the *prima facie* meaning of the term there is nothing on which notice could operate. If a man work merely "day by day" he is not bound to return to work on the morrow. We have no information as to whether the wages are under such a system paid each day or at the end of the week, and it does not appear to me that in either case such a circumstance can be decisive. No point appears to have been taken in the County Court as to the necessity of notice in order to terminate a "day to day" employment, and I think that Mr Tindal Atkinson was entitled to observe on behalf of the appellant that if this point had been raised it might have been met by evidence.

The County Court Judge found that there was a complete break in the employment from the 14th to the 21st July, and further on in his judgment he explains his meaning thus—"In further reply to the contention made on behalf of the respondents I say that during the seven days the men were away there was no engagement at all. The relationship of master and servant did not exist. It was open for the deceased and any other workman to enter into any employment they liked without any liability for breach of service, and the employers could decline to re-engage them without any corresponding liability. It did not matter what had taken place between the masters and the representatives of the workmen. Nothing was binding on this man until he signed the agreement on his return. When he returned to work the contract set forth the terms (which differed materially from the old contract) and the man signed it. From that time there was a new contract. I hold therefore that the period to be taken into consideration to be calculated begins from the date of the second engagement. I think the figures in that event have been agreed upon, and the award will be for £300."

His decision was reversed in the Court of Appeal, the Master of the Rolls observing—"We are left in the dark as to the conditions of the 'day to day' working. I think it is fair to assume that some reasonable notice on one side or the other was necessary to terminate the engagement, probably a day's notice. There is no evidence that any such notice was given." Surely if reasonable notice was necessary it was for the respondents to give some evidence of this, but there is none, and in my opinion the nature of the engagement "day by day" renders it *prima facie* improbable that any such notice could be necessary.

Warrington, L.J., says—"There was no evidence of any stipulation or of any custom dispensing with notice to terminate the contract involved in the 'day to day' working, and the Court in such a case is not entitled to assume that the contract is terminable without the reasonable notice which the general law requires. What would be reasonable notice is not for us to determine. It may be that in the case of 'day to day' contracts notice given on one day of the intention to determine the contract as from that day might be sufficient, but in this case there was no evidence of any notice at all having been given either by Price or by his employers."

Work "day by day," unexplained by any evidence as to usage, seems to me to import that there was a fresh engagement every day, and the general law as to reasonable notice cannot be treated as applicable to such a case.

The evidence is extremely meagre. The only witness was Mr John Davies, the miners' agent for Dowlais district. He said—"David Price was out of work from the 15th to the 21st July inclusive. He returned to work on a provisional agreement that was made between the coalowners and the representatives of the workmen." This statement appears to me to be consistent with the view that the deceased was out of employment from the 15th to the 21st and resumed it on the provisional agreement. The phrase "out of work," in the ordinary use of words, is more naturally used to denote a case in which a man is out of employment than the case of a man whose employment continues although he chooses to abstain from actually working under it; and the phrase "he returned to work on a provisional agreement" is apt to denote resumption of employment. There was no cross-examination of this witness, and there was no evidence to rebut the inference which might be drawn from the evidence that there was a break in the employment. If the witness had meant merely that the deceased struck work, and in fact did not work, he would, I think, have said so.

It is very difficult to see how the employers could have maintained any claim against the workman working "day by day" for absenting himself from work after the 14th July, and on the materials before us I

think that any such claim would have failed.

It was not contended for the employers that any wages had been either earned or paid for the week the 14th to the 21st July, and on the evidence the natural inference is that they were not. Some reliance was placed by the respondents on the provision in clause 30 of the agreement of the 2nd September 1915, that the agreement should continue in force from the 15th July 1915 until the expiration of six months after the termination of the war, and thereafter until the expiration of three months' notice. But this agreement is really not a contract of service but a statement of the terms which were to attach to service while it was in force. The deceased was not working during the week under question, and the terms could not apply to him in respect of that week.

There were two circumstances on which the respondents relied in argument at the bar of your Lordships' House.

The first was that the men left their tools in the mine during the week the 14th to the 21st July, and this, it was urged, showed that they considered their employment had not terminated. All that it shows is that the men thought it very possible or probable that they would resume their employment. Negotiations were, as Mr Davies proves, going on between the representatives of the owners and those of the men, and the "strike" was no doubt a move in the game in the hope of bringing the masters to terms. The men hoped and believed that terms would be arrived at, and in this hope, in which they were not disappointed, they left their tools in the collieries to be used when their employment should begin anew. Leaving the tools is just as consistent with this view as with the view that the men considered their employment as still subsisting.

The other point relied on by the respondents was that in the particulars of claims under head 6 the claimant put her claim as "over £2 per week from the 15th July 1915." This, of course, does not amount to an estoppel. It was a matter fit to be considered by the Judge in favour of the respondents' view, but it is not conclusive. Indeed, it seems to me to be very far from conclusive, and to have really no bearing on the question whether there was any evidence in point of law to support the claimant's contention.

Upon the whole, in my opinion this appeal ought to succeed and the decision of the County Court Judge should be restored.

LORD ATKINSON—I regret I am unable to concur with the judgment which has just been delivered by my noble friend on the Woolsack. In this case the claimant's husband met with his death on the 10th March 1916 while in the employment of the respondents. The respondents are quite ready and willing to pay to the claimant under the first part of par. 1 (*a*) (i) of the rules in the first schedule to the Act of 1906 a sum equal to the full amount of her husband's earnings during the three years preceding his death. It turns out that she would in this particular case obtain something more if the amount were measured under the second part of that paragraph, and accordingly she claims under it. To entitle her to succeed she must establish satisfactorily that her husband was not in the respondents' employment for the three years immediately preceding the day of his death. In this case, like every other, the plaintiff or the person standing in the position of a plaintiff must prove his or her case, although from the way in which the case was conducted before the County Court Judge one might not think so. Now how does she propose to do that. She proposes to show that there was a break in the employment from the 14th till the 22nd July 1915. He was serving his employer under the terms of an agreement dated the 8th April 1910, styled the Conciliation Board Agreement, which was to continue operative till the 31st March 1915, and thenceforward until terminated by a three months' notice. On the 1st April 1915 the necessary notice was given to terminate the contract on the 30th June 1915. Though the deceased's contract of service thus terminated on the 30th June 1915 he did not cease to work on that day. On the contrary, he continued to work for the respondents as theretofore up to and inclusive of the 14th July 1915, and then ceased to work till the 22nd July 1915, when he recommenced to work under what is styled a provisional agreement. Now one would suppose that the necessity of ascertaining the details as to the terms and conditions under which the deceased continued to work from the 30th June 1915 till the 14th July 1915 would be obvious to anyone—such as what took place between him and the respondents, whether his wages were paid daily as he left work or at the end of the week, under what circumstances he ceased to work on the 14th and returned to work on the 22nd, and what were the terms of the provisional agreement. None of these vital details were proved, and one is left to grope through the arguments and admissions of counsel to ascertain the facts which ought to have appeared plain and clear on the face of the County Court Judge's notes. The final agreement of the 2nd September 1915, which was copied into the contract book of each colliery, and was in this case signed by the deceased amongst others, was given in evidence. From its thirtieth paragraph it appears that it was to continue in force from the 15th July 1915 (the very first day on which the deceased ceased to work) till the termination of the war, &c. The agreement secures to the respondents' workmen, including the plaintiff, an increase of wages, and yet one is left in ignorance, as far as the notes are concerned, whether the deceased's wages for the seven days he did not work were or were not paid, or, if paid, at which rate. The case seems to have been conducted on the assumption that a workman can terminate a contract of service simply by breaking it, by absenting himself—downing tools, as I believe it is styled. That is not so. No one party to a contract can in the absence of a special provision terminate it. He may by repudiating it or by doing

something in breach of it furnish a justification to the other party to the contract to terminate it, but that is a wholly different thing. I find it therefore impossible to determine whether or not the contract of service existing between the deceased and the respondents was terminated between the 14th and the 22nd July 1915. In some cases, such as that of dock labourers, the man is I believe employed for the day and paid off at night. There is a new contract of service entered into each morning, but a continuous and unbroken succession of such contracts as these for three years might form the basis of an employment for three years. The rules do not require that one contract of service should cover the whole period of three years. It is the employment which is to cover that period in order to bring the case within the first limb of the above rule. I do not refer to the other necessities of the employment, as they do not touch the case.

Again, if a workman should contract with his employer to perform certain services he will continue to be in the employment of his employer though he may not actually perform those services. Physical conditions may render the performance of them impossible, as, for instance, if a ploughman be hired to plough land, and snow falls and frost intervenes which renders ploughing impossible. The servant discharges his duty while his contract lasts if he is ready and willing to do that which his contract of service binds him to do. If he refuses to render these services, or is unable to render them, that may, and under most circumstances would, furnish just cause for his dismissal, but does not by itself terminate his contract of service. Illness, for instance, might be of such a temporary character that, though disabling the workman from performing his service while it lasted, would not justify his dismissal, or it might be of such a permanent character that it would justify it.

Paragraph 2 of the above-mentioned rules purports to give a definition of employment by the same employer. As it stands it is rather absurd. It leaves untouched the case of voluntary absence. The employment may be interrupted by that kind of absence, either by the permission of the master, as, for instance, if the servant gets a holiday, or against the will of the master, and the employment would be continuous as long as the master does not in the latter case dismiss the servant. I cannot but think that some slip has occurred in the drafting of this rule. I think the intention must have been to provide that the employment should be taken to be continuous notwithstanding that it was in fact interrupted by absence due to illness or some other unavoidable cause. It seems to me absurd to provide that if a master should keep a servant in his house during his illness, continue to pay him his wages, and then dismiss him from his service, that illness is to be treated as an interruption of his employment, while, though disabled from performing his duty, he might be willing to perform his duty if he was able. Fortunately, however, we have not to construe this paragraph of the rule in the present case. One of the many strange things about this strange case is that in the particulars which the claimant is bound to deliver the earnings of the deceased in the employment of the employer by whom he was immediately employed are stated to be £2 per week from the 15th July 1915, thus covering the seven days when he did not work. I do not think the claimant is estopped by this statement, but it gives some clue to the view which the parties took of the result of the arrangements which had been made. In my opinion the claimant, upon whom is the burden of proof, has failed to discharge this burden and show that there was such an interruption in the employment of her husband during the three years preceding his death as enables her to bring her claim under the second part of paragraph 1 (*a*) (i.).

For these reasons I therefore think that the judgment appealed from was right and should be affirmed and this appeal be dismissed with costs here and below.

LORD WRENBURY—Many a statute has been the fruitful parent of litigation. But I know of none that is comparable in this respect with the Workmen's Compensation Act. The present case is another example of the capacity of that Act to raise disputable questions.

The Act of 1897 in Sched. 1, art. 1 (*a*) (i), had provided compensation in case of death, and had provided means of fixing its amount in each of two alternatives, or what were no doubt meant to be alternatives. They were not true alternatives. The first is expressed thus—"A sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of £150, whichever of these sums is the larger, but not exceeding in any case £300," with a certain deduction. The second is—"If the period of the workman's employment by the said employer has been less than the said three years." The former seems to contemplate continuous earning during the three years, while the latter is satisfied by a continuous contract of employment during the three years. As matter of construction these ought to be read if possible as true alternatives. To achieve that result I will read each as contemplating a continuous contract of employment at a continuous wage. The idea underlying the provisions seems to be this. If a man has been earning without interruption during three years his compensation is to be equal to the aggregate sum earned. But if for six weeks or six months during the time he has not earned wages the aggregate sum would be so much the smaller. He is not to suffer for this. If the aggregate is less than a three years' aggregate he comes under the second alternative, and gets 156 times his average weekly earnings during the period of his actual employment.

If the employment be (say) such as that of a miner who is paid once a week for such number of hours, or shifts, or days, or for such amount of piecework as he

does during the week, there will have been a continuous employment at a continuous wage, and none the less because he does not work such a larger number of hours or days, or to such a larger extent as he might have done had he chosen.

The clause, it is true, does not speak of continuous earning or of continuous employment, but in fact and as matter of decision the true construction involves continuity. Continuity, however, does not necessarily involve the absence of intervals. A man who during three years is employed for an eight-hour day, or for five days in each week, or for a less number of days in each week, is continuously employed for three years if his employment for those respective periodic times continues without interruption for three years. *Hathaway* v. *Argus Company* (1901, 1 Q.B. 96) was a case of that kind.

It was found, no doubt, that the provisions above described left something to be desired in the matter of certainty, and presumably the new provisions in the Act of 1906 were intended to assist the matter. That Act introduced the clause No. 2 which is found in Schedule 1 of that Act. This starts away with the word "earnings" and "average weekly earnings," emphasising what I think had appeared already, that continuous earnings and not subsisting contract of employment was the dominant idea, and was the thing which the new provision was going to explain. Of the many difficulties which this clause (2) created the only one that has any bearing upon the present case is (*c*). It purports to define the meaning of employment by the same employer. It says nothing about earnings, and is addressed exclusively, it would seem, to the existence of a contract of service. Its concluding words seem to say that if continuity is interrupted by absence from work due to illness or any other unavoidable cause there is not continuous employment, and the first alternative is excluded. The language is satisfied even if the man's wages were paid in full during his absence from work. Inferentially, if continuity is interrupted by another cause, say voluntary absence from work, there is continuous employment, and the first alternative is not excluded. Neither of these will work with the intention above suggested, viz., that the first alternative is to apply if there are continuous wages during the three years. But, happily for the decision of the present case it is not necessary to ascertain what the last words of clause (*c*) mean. Upon the best consideration I can give to the statute it seems to me that if for three years there has been a continuing contract of employment under which the workman had the opportunity of continuously earning wages when and as his services were required or were given, the first alternative applies.

Taking this view of the meaning of the statute I turn to the facts of this case.

The widow here applies for compensation. The *onus* is on her to prove the facts establishing her right to compensation under such alternative as she asserts to be applicable. She delivered particulars, and by the sixth particular she claimed that the period of employment had been less than three years, and that the earnings had been over £2 a-week from the 15th July 1915. The employer in answer to that particular asserted that the employment had been for three years. He did not traverse the widow's statement as to earnings from the 15th July if the widow was right that the employment had been for less than three years. The County Court Judge found as a fact that for the period beginning with the 30th June 1915 there was a contract, and further found that it "came to an end" on the 14th July. He further found as a fact that "during the seven days the men were away" (namely, from the 15th July to the 22nd July) "there was no engagement at all." There was, I think, no evidence to support these findings. The evidence is exceedingly meagre. To avoid sending the matter back to the County Court Judge to arrive at a better finding of the facts the parties agreed upon certain facts before the Court of Appeal. It was agreed that no notice was given by the workman on the 14th July, that the men simply refrained from going to work on the 15th July, and that they did not even take their tools from the pit, and that at the end of the week they resumed work. It had been proved that Price returned to work on the provisional agreement, and it was agreed that the conditional agreement contained terms which were subsequently confirmed and put into writing in the agreement of the 2nd September. That agreement provided (art. 30) that—"This agreement shall continue in force from the 15th July 1915 until," &c. Article 32 provided that a copy of the agreement should be placed in a contract book at the colliery, which should be signed by each workman as one of the terms of his engagement. Price signed that book. There is evidence therefore of continuous employment, and there is no evidence to support a finding that there was a breach of continuity of employment. The widow by the particulars asserted that there was employment "from the 15th July," the date of the suggested discontinuance, and the other facts establish a continuous state of things under which the workman had his employment open to him if he chose to avail himself of it, and would have been entitled to his wage if he had worked. It is, then, not material that he did not work. There was interruption of work, but no interruption of employment.

It was for the workman to prove that there had not been continuous employment for three years. The County Court Judge found that he had proved it. But there was no evidence to support his finding. The decision of the Court of Appeal in my judgment was right, and this appeal must be dismissed, with costs.

Their Lordships dismissed the appeal, with expenses.

Counsel for the Appellant (the claimant) — Tindal Atkinson, K.C. — Llewelyn

Williams, K.C.—Villiers Meagre—Van den Berg. Agents—Warren & Warren, for Edward Roberts & Lewis, Dowlais, Solicitors.

Counsel for the Respondents—Compston, K.C.—D. R. Thomas. Agents—Ullithorne, Currey, & Company, for D. W. Jones & Company, Merthyr Tydfil, Solicitors.

HOUSE OF LORDS.

Friday, June 21, 1918.

(Before the Lord Chancellor (Finlay), Viscount Haldane, Lords Shaw and Parmoor.)

LONDON JOINT STOCK BANK, LIMITED *v.* MACMILLAN & ARTHUR.

(On Appeal from the Court of Appeal in England.)

Mandate—Bank—Negligence—Customer—Cheque—Authority to Customer's Clerk to Fill in Words—Alteration of Amount—Duty of Customer to Take Precautions against Forgery.

The duty which a customer owes to a bank is to draw cheques with reasonable care to prevent forgery, and if, owing to neglect of this duty, forgery takes place, the customer is liable for the loss. If a customer signs a cheque in blank and leaves it to an agent to fill up, he is bound by the instrument as filled up by the agent.

Young v. *Grote*, 1827, 4 Bing. 253, *approved and followed; Scholfield* v. *Earl of Londesborough*, 1896 A.C. 514, *distinguished;* Decision of the Court of Appeal, 1917, 2 K.B. 439, *reversed; Colonial Bank of Australasia* v. *Marshall*, 1906 A.C. 559, *considered.*

Appeal by the bank from an order of the Court of Appeal, reported 1917 2 K.B. 439, which affirmed a judgment of Sankey, J., reported 1917 1 K.B. 363, who tried the action in the Commercial List without a jury.

The facts are set out in their Lordships' considered judgment.

Lord Chancellor (Finlay)—This is a case raising an important question of commercial law as to the relations between banker and customer. It has been argued with conspicuous ability by all the counsel engaged on the appeal.

The plaintiffs in the action (now respondents), Messrs Macmillan & Arthur, are a firm of general merchants in the city. The defendants (appellants) carry on business as bankers, and the plaintiffs kept their account at one of their branches. The action was brought by the plaintiffs to have it declared that the defendants are not entitled to debit the plaintiffs with a cheque for £120 which had been paid by the defendants to one Klantschi, by whom it had been fraudulently filled up for £120 instead of £2. The bank resist the claim on the grounds that the plaintiffs had drawn the cheque so negligently as to lead to the fraud, and that the plaintiffs had entrusted the cheque signed by them to Klantschi authorising him to fill it up.

Sankey, J., before whom the case was tried, gave judgment for the plaintiffs, and his judgment was confirmed by the Court of Appeal (Swinfen Eady, L.J., Scrutton, L.J., and Bray, J.) The bank now appeal to your Lordships' House.

The case was treated in the Courts below as turning upon the question whether the case of *Young* v. *Grote*, 1827, 4 Bing. 253, so often cited and so much discussed, is now good law. Both Courts below held that that case is no longer of authority, and that the bank could not rely upon it as a defence.

The facts of the case lie in small compass, and may best be stated in the language of Sankey, J.—"The facts are as follows—The plaintiffs had in their employment a confidential clerk of the name of Klantschi. He had been with them for some years, and they had no reason to distrust him. They left to him the keeping of their books and the filling in of cheques for signature. On the morning of the 9th February 1915 one of the plaintiff partners, Mr Arthur, was going out to lunch about midday. He had his hat on and was leaving the office when the clerk came up to him and said he wanted £2 for petty cash, and produced a cheque for signature. The clerk had repeatedly presented cheques for signature to get petty cash, but usually for £3, and Mr Arthur asked him why it was not £3 on this occasion. The clerk replied that £2 would be sufficient. Mr Arthur thereupon signed the cheque, which I shall discuss more in detail later on. On the next day the clerk did not come to business. Mr Arthur took the opportunity to look through the clerk's books, and found matters which so excited his suspicion that he consulted his solicitor, and on the 11th February both he and the solicitor went to the bank. They there found that the clerk had presented a cheque for £120, which had been paid to him. The clerk was a thief and absconded with the money. His books were subsequently examined, and in the result a number of discrepancies were found. . . . I recollect that Mr Arthur was in a great hurry when he signed the cheque, and I find the fact to be that when he signed it there were no words at all in the space left for words—that space was a blank. There were the figures '2 0 0' in the space left for figures. The clerk having obtained Mr Arthur's signature to the cheque in this condition, properly dated and payable 'to ourselves,' added the words 'one hundred and twenty pounds' in the space left for words, and the figures '1' and '0' on either side of the figure '2.'"

The following is a copy of the cheque, a facsimile of which is before your Lordships:—

"No. 0059745. London, Feb. 9, 1915.
"The London Joint Stock Bank, Limited, Charterhouse Street Branch, 89 Charterhouse Street, E.C.
"Pay to Ourselves or Bearer
One hundred and twenty Pounds.
"£120 0 0. Macmillan & Arthur."

The only fact which it is necessary to add to the learned Judge's statement is that as