The same proposition, regarded from a somewhat different point of view, may be illustrated by using Lord Atkinson's words in *Barnes* v. *Nunnery Colliery Company*, 1912 A.C. at p. 50. Speaking of the servant, Lord Atkinson said—"He exposed himself to a risk he was not employed to expose himself to—a risk unconnected with that employment—and which neither of the parties to his contract of service could ever be reasonably supposed to have contemplated as properly belonging or incidental to it.' For the present case this has to be read "a risk to which he was by order expressly forbidden to expose himself, and a breach of which order would involve instant dismissal."

In my opinion the thing done, irrespective of misconduct, was outside the scope of his employment. It is comparable to the act of a miner employed to work in level A, which is safe, who goes to work in level B, which is dangerous, and there sustains personal injury. It was an act "different in kind from anything he was required or expected to do, and also is put outside the range of his service by a genuine prohibition" (the words are Lord Loreburn's words in *Barnes* v. *Nunnery Colliery Company*, at p. 47). The risk was "an added peril due to the conduct of the servant himself" (*per* Lord Dunedin, 1914 A.C. at p. 68). He was not doing a permitted act carelessly, but doing an act which he was prohibited from doing at all (see *per* Lord Mersey, 1912 A.C. at p. 51). It results, in my judgment, that the accident here did not arise out of and in the course of the employment.

For these reasons I think that the decision of the majority of the Court of Appeal was right, and that this appeal should be dismissed.

Appeal dismissed.

Counsel for the Appellant — Waddy — Scott. Agents — Pitman & Sons, for Chambers & Son, Sheffield, Solicitors.

Counsel for the Respondents — Rigby Swift, K.C.—Ellison. Agents—James B. Somerville, for F. G. and H. E. Smith, Bradford, Solicitors.

HOUSE OF LORDS.

Friday, January 28, 1916.

(Before Lord Chancellor (Buckmaster), Lords Atkinson, Shaw, Parker, and Sumner.)

CHURM *v.* DALTON MAIN COLLIERIES, LIMITED.

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

Master and Servant—Coal Mine—Wages—Coal Mines (Minimum Wage) Act 1912 (2 *Geo. V, cap.* 2), *sec.* 1 (1).

By contract in the respondents' colliery, fillers, *i.e.*, drawers, received their wages from the colliers with whom they worked. The respondents maintained that the appellant, a filler, was employed and paid by the collier with whom he worked and that they were not responsible for the fact that one week his wage was below the minimum.

Held that the obligation imposed by the Coal Mines (Minimum Wage) Act 1912 obtained irrespective of who actually paid the wages, and that in fact the appellant was employed by the respondents and entitled to demand from them the balance between the wage paid and the minimum rate.

he *facts* appear from their Lordships' considered judgment, which was delivered by

Lord Chancellor (Buckmaster)—The simple question in this case is whether the appellant Isaac Churm was, for the week ending the 23rd July 1913, in the employment of the respondents within the meaning of the Coal Mines (Minimum Wage) Act 1912. It arises in this way. The appellant, who is what is known as a "filler" in the Silverwood Colliery, received for his week's work ending the 23rd July 1913 a sum of £1, 1s. 9d., while according to the minimum wage rate for that mine at that time he was entitled to receive £1, 12s. 11d., and he accordingly sued the respondents for the balance. The respondents deny that they are responsible to make up the balance of the wage, but they admit—and, indeed, it would be difficult to avoid the admission—that the appellant is entitled to the minimum wage from some one. They say, however, that he must demand it from the collier at the stall with whom he worked. In other words, they contend that it is the collier by whom the appellant was employed within the meaning of the statute.

Now it appears that before any person enters to work in the respondents' mine he is required to sign three documents. One is called "the signing-on book," in which the name and occupation of the signatory is contained, together with a statement as to whether he is competent to work by himself under one of the general rules. The next is a document which entitles the colliery company to make deductions from wages due to any of the persons who sign the agreement in respect of rent and certain specified matters which are set out in the schedule. The third document contains the bye-laws of the respondent colliery, and is headed "Contract."

Isaac Churm, the appellant, signed all these documents, described himself as a filler, and stated that he was not fit to work alone. At the time when the appellant signed these documents there was another man admittedly employed by the respondents in the mine within the meaning of the Minimum Wage Act. He was a collier, and his name was John Fuller. He also had signed precisely the same documents as the appellant. In the mine it is the practice for the respondents to pay wages on the footing of so much per ton on the coal gotten and sent up the pit, and this sum is paid to the collier, and by him divided between himself and the filler according to various schemes

and arrangements, which may vary between the different stalls.

In the present instance the collier first deducted 1s. a-day for himself and then divided the balance equally, but there is no evidence that this was the result of any express agreement. It appears to have been a well-established method of division, and was in practice in Fuller's stall, to which the appellant was taken by the pony-driver, under direction of the mine manager, after the signature of the documents, and introduced with these words, "There is a filler here for you."

At the end of each week the colliery company make out a pay-note in respect of the work done at a particular stall during the week. That note is headed "Colliers' Pay-note," and is handed with the amount shown due to the collier. It is this practice and a certain clause in the contract containing the bye-laws, to which I will more particularly refer, which according to the respondents' contention prevent them from being liable for the minimum wage. Before, however, considering the contract it would be well to state what the respondents themselves admit as their relationship to the appellant. (1) They and they only engage him, (2) dismiss him, (3) direct where he works and move him from stall to stall, (4) grant him holidays, (5) pay the employer's contribution under the Insurance Act, (6) are responsible under the Workmen's Compensation Act for any damage which he may suffer, and (7) take proceedings against him under the Employers and Workmen Act of 1875.

It is difficult to think of a single one of the necessary elements for determining conditions of employment that are lacking in this category excepting the obligation which is in dispute, *i.e.*, the obligation of paying wage. If it were established that that obligation were absent—and the burden of displacing the implied duty arising from the circumstances would certainly be on the respondents—I should by no means be satisfied that the duty imposed by section 1 of the Minimum Wage Act had been displaced, for that section runs in these terms:—"It shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum wage settled under this Act."

Now there is a perfectly clear contract in this case for the employment of the appellant to work underground in a coal mine, and it is open to serious argument that there ought to be engrafted on to that contract the statutory obligation which the section imposes.

In this case, however, that question does not appear to me to arise, for the following reason:—Clause 2 of the contract between the parties expressly provides that all persons employed shall be entitled to and shall receive wages and payment according to the current rate of wages for the time being paid in the colliery; and it is that express obligation, apart from the implied obligation resulting from the performance of work under a contract of service, which binds the colliery company to provide payment for work done. There is nothing from beginning to end to distinguish the position of a collier and a filler in any of the written documents until the pay-sheet is reached—that is, until after the work is done—and the collier's right to wages arises from the same primary obligation as that of which the filler equally enjoys the benefit. In my opinion the true view of the matter is that the colliery company employed two men to work together to do a piece of work on terms that they (the colliery company) would provide the wage which the men would divide between themselves, and the fact that the money is actually handed to the collier and divided by him in accordance with practice does not prevent the filler from being entitled to wages from the company. This view would, I think, have been accepted by the Court of Appeal were it not for clause 13 of the same document, which is in these terms:—"All persons working under or for and paid by contractors or other persons shall be deemed to be the servants of the owners of the colliery to the extent only that they shall be bound to obey these bye-laws and the other rules of the colliery, but the owners of the colliery shall not be bound to see to the payment of or be liable for the wages due to such persons after they have paid the contractor or other persons for whom such persons work."

The construction of this clause is not easy, for it appears to be a combination of provisions relating to different classes of people. The first words down to "other persons" cover, though they extend far beyond, the case of people who are in no true sense in the employment of the colliery company, but who have entered the mine for the purpose of performing work, as, for example, the installation of electric light, under contract with the colliery company. Such people would be bound to obey the bye-laws that affect the conditions of working underground, and we were informed that they are consequently required to sign the contract in which the bye-laws are contained. And with regard to people of this class—that is, people who are not in fact servants of the colliery company—the clause goes on to provide quite properly that such signature shall not render them servants of the colliery company except to the extent that they are bound to obey the bye-laws. It is obvious that there are cases in the contract which could not apply to such people. Clause 4, which provides for notice before leaving work; clause 5, which requires attendance on each day that the pit is open; clause 6, which requires permission from the proper official for absence from work at the time for commencement, and many other clauses of the same character, can clearly have no application to persons who are brought into the mine to perform work other than mining work as part of the staff of an independent contractor.

But it is quite possible that a collier may be included in the somewhat generous ambit of the phrase "or other persons," though it appears to me difficult to make that

meaning agree with the subsequent words, but if they were, the latter part of the clause merely negatives the obligation of the owners to be liable for the payment of wages after they have been paid by the Colliery Company. In other words, it recognises the obligation up to the time when such payment is made, and if that be so the conditions of the section would be satisfied. Even if the employment referred to must be interpreted as being an employment at wages, the subsequent provision that after payment the company would not be liable, would, if it interfered with the operation of the statute, become void. If there be no primary obligation on the part of the Colliery Company to pay the filler wages, I cannot see where their obligation to pay the collier arises, for there is no distinction between the two classes of people in the written documents; and again, if no wages were ever due from the Colliery Company to the filler, the second contract, which provides for deductions, would in the ordinary course of working appear to be meaningless.

In my opinion the obligation to pay wages is not merely implied, it is expressly imposed by clause 2 of the contract to which I have referred, and is not negatived by any subsequent provision.

Several cases were quoted by the respondents as authority for their view, the two most important being the case of *Richards* v. *Wrexham and Acton Collieries, Limited*, 1914, 2 K.B. 497, and *Hooley* v. *Butterley Colliery Company, Limited*, 113 L.T.R. 906. The former of these two cases is the nearest, but upon examination it will be found to afford little assistance. The question for decision there was the liability for payment of a wage that was the excess between the minimum wage and the wage that had in fact been earned. The filler was there paid through the collier a daily wage, and the learned County Court Judge before whom the case was heard in the first instance found as a fact that the contract for this payment existed between the filler and the collier. No such fact and no corresponding fact has been found by the learned Judge in this case, nor, indeed, is there any evidence which could support such a finding.

Further, the clauses in the governing contracts were different to those in the present instance, and in certain places referred to a miner engaging a filler and to a filler "employed by" a miner. No such words and no similar provisions are to be found in the present case. I do not think that the Court of Appeal need have considered themselves bound by the decisions, nor is it necessary to consider the soundness of the authority for the purpose of this decision. The latter case is, I believe, the subject of an appeal to this House, and on hearing the details of the contract and the conditions of service will be the subject of full investigation and argument, and it is not desirable to say any more about it at present than that the facts and documents are clearly not identical with those in the present case, and can give no guidance in arriving at a conclusion on this appeal.

For the reasons I have given I think this appeal should be allowed, the judgment of the Court of Appeal should be reversed, the judgment of Bailhache, J., should be restored, and the respondents should pay the costs here and below.

LORD ATKINSON—In this case two questions emerge for the consideration of the House — First, whether the construction of the first section of the Coal Mines (Minimum Wage) Act 1912, adopted by the Court of Appeal, is its true construction; and, second, whether, even if it be so, the appellant, having regard to the established fact in this case, is entitled to the declaration he claims, namely, that he, under his contract of employment with the respondents, made on or about the 21st May 1913, is entitled to be paid by them wages at not less than the minimum rate. The Court of Appeal, following their decision in the case of *Richards* v. *Wrexham and Acton Collieries, Limited*, (1914), 2 K.B. 497, held that the contract of an employer with a workman underground in a coal mine in which it is to be an implied term that the employer shall pay to that workman wages at not less than the minimum rate settled by the Act must be a contract to pay wages, so that however completely the contract may establish the relation of master and servant, or employer and employee, between the owner of a colliery and his workman underground, the latter is, as against the colliery owner, excluded from the benefit of the Act unless the obligation to pay the workman wages is imposed by this contract upon the colliery owner, or, in effect, that all the statute does is to fix a minimum for the wages contracted by an employer to be paid to his workman. It is not disputed that the statute does not say so expressly. The section has already been read.

By section 5 a workman is, with certain exceptions immaterial in this case, defined to be any person employed in a coal mine below ground, and it was not disputed that the plaintiff was a workman within the meaning of that definition. In the *Wrexham* case, as it has been styled for the sake of brevity, Vaughan Williams, L.J., dissented from the decisions of his colleagues, Buckley, L.J. (as he then was) and Kennedy, L.J. He held that under section 1 of the above-mentioned statute the contract therein referred to in which this term is to be implied is, to use his own words, "by statutory implication a contract between the colliery proprietor who has to pay, and the workman (including here the filler) employed underground in the mine"; and he proceeds to say—"I think that the basis of the further provisions of section 1 is that if a dispute shall arise as to the right, *exempli gratia*, of the workman to be paid during any interruption of work due to an emergency, the dispute shall be settled as between the colliery proprietor on the one part and the workman on the other, and that this again shows that the whole contract is to be regarded as a contract between the filler and the company."

I confess I see great difficulty in accepting the construction of the section adopted by the Court of Appeal in the *Wrexham* case. At the time that statute was passed the Workmen's Compensation Act of 1906 was in full force and effect. Its first section provides that "if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman his employer shall, subject as thereafter mentioned, be liable to pay compensation in accordance with the First Schedule to the Act." That is the dominating provision giving a right to compensation, the schedule only providing the mode in which the amount of that compensation is to be ascertained—*Lyson* v. *Andrews, Knowles, & Son, Limited*, 1901 A.C. 79. When one turns to the schedule one finds that in case of the death of a workman whose dependants are wholly dependent upon his earnings the amount of the compensation is to be a sum equal to his earnings in the employment of the same employer during the three years preceding the injury, or the sum of £150, whichever be the larger. If total or partial incapacity results from the injury the compensation is a weekly sum during incapacity not exceeding his average weekly earnings during the preceding twelve months, if he has been so long employed, but if not, then for any less period during which he shall have been in the employment of the same employer. Rule 2 (*b*) of the schedule provides for the case of a workman entering into concurrent contracts of service for two or more employers, and provides that his average weekly earnings are to be computed as if his earnings under all such employments were earnings in the employment of the employer for whom he was working at the time of the accident. Rule 2 (*c*) provides that "employment of 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 other unavoidable cause." It has been many times laid down in this House that what the workman is, under this statute, to be compensated for is not the pain and suffering inflicted upon him by the accident, but the loss of his capacity to earn remuneration for his labour. From the above-mentioned provisions of the schedule as well as from many others it is, I think, clear that the amount of the compensation is to be measured by the workman's earnings, and that those earnings are, where not otherwise expressly provided, the earnings he obtains from the particular employer upon whom the burden of compensating him is, by the first section of the statute, thrown. I find no provision in the schedule contemplating the case of an employer who has a workman in his employment to whom he pays nothing.

It is, I think, almost impossible to suppose that the Legislature could ever have intended that in the case of two workmen such as a collier and a filler, engaged by piece-work on the joint enterprise of excavating coals in a designated stall in a coal mine, and transporting that coal to a place from whence it can be lifted to the surface and weighed, that one of them should be liable to compensate the other for injuries sustained by accident in their joint work; and if not, how is the Act to be applied to the case of that one of the two to whom the coalowner has neither paid nor contracted to pay anything in the nature of wages? If the burden of compensating a workman be not thus thrown on his fellow workman, it is difficult to see how the amount of the compensation, even if the colliery owner be liable, can be measured. This is not the only difficulty which occurs to me, but I need not pursue the subject further, since in my view the facts of the present case are so radically different from those of the *Wrexham* case in all material respects that the former can well be disposed of without pronouncing a definite opinion as to whether the construction of the first section of the statute of 1912, adopted by the Court of Appeal, be its true construction or the contrary.

During the argument of the case before this House I put to Sir Robert Finlay, who appeared for the respondents, this question—If A should employ two workmen, B and C, to do jointly certain work by the piece at a certain rate per a certain measure, the remuneration to be paid weekly and be divided between them in such shares as X should appoint, would the contract between A and each of these workmen not be a contract to pay wages within the meaning of the Minimum Wage Act? He, as I understood him, answered in the affirmative. I then asked him, Would it in such a case make any difference if the weekly sums received should be divided between them as they themselves should arrange? I understood him to reply in the negative. I may have misunderstood him; if so, I apologise, but however that may be, I am myself confidently of opinion that, in the absence of all special provision as to the relation between the two workmen so employed, it would make no difference whatever.

In my view the present case is precisely a case of the latter description. The collier and the filler stand to each other as two fellow labourers, joint adventurers in one enterprise, that of hewing coals in a certain stall in the defendants' mine and transporting them to the particular place from which they are to be lifted to the surface and weighed. The remuneration stated in the price list, 13s. 4d. per ten tons, covers all these operations, and in performing them each workman worked with the other—not for the other but for the benefit of himself and the other. Neither do I think the filler worked under the collier, since neither in the written documents nor in the parole evidence do I find any sufficient proof that there was any subordination of the one to the other, or anything to show that the collier was put in a position of authority over the filler, or to indicate that he stood to the filler in the relation of master to servant or employer to employed. It is quite true that the collier received from the

respondents the weekly remuneration due for the work done in the stall, and that the workmen divided that sum between them in certain shares.

The collier was not, as in the *Wrexham* case, bound to pay, and did not in fact pay, to the filler a fixed wage out of the sum he himself received, irrespective of its amount, thus taking upon himself all the risk. The receipt of the gross remuneration loses all its significance when it is remembered that where two colliers and two fillers work in one and the same stall one collier receives the entire remuneration due for the joint work done and divides it amongst the four. And yet it is not suggested that the collier who received the gross sum is the master or employer of the other collier who did not. He was, it was contended, the mere agent, not the master of the latter. It may well be that the work of the hewer of coals is a higher class of labour than that of the filler, but I altogether fail to see how the mere receipt of the money earned by the joint labour of them all in such a case, followed by the division of it among them, is *per se* any proof of the existence of the relation of employer and employed in the one case more than in the other.

It is not disputed in this case that in this colliery the defendants hired the filler, and that they and only they had the power to dismiss him; that they selected the stall in which he was to work, could put him to work there, transfer him from thence to another stall or to other work for a time long or short, and again restore him to his original place of labour, and that while he was absent from the stall originally selected the defendants paid the filler a fixed daily wage. If he was absent for a week they paid the wage directly to him, but if he was absent for a shorter period his right to this daily wage was, as it were, carried to the credit of his original stall and entered in the weekly pay-note (made out in the number of the stall, not in the name of any workman or workmen) as part of the joint earnings. If the collier was dissatisfied with his filler, his only resource was to complain of him to one of the officials of the mine, who removed him or not as he (the official) deemed prudent. This point is so important that one may be excused for quoting some extracts from the evidence of Fuller the collier. He was asked, If he shared his wages with the plaintiff in the way that the total amount of the pay-note was made out to the number of the stall, and that he (the witness) took a shilling per day out of that total for every day he had worked, and then he and the plaintiff divided the balance equally in accordance with the number of shifts each had worked? And he answered Yes. He was then asked how did he first get Churm as a filler—whether he selected him or the colliery sent him to him—and he replied—"I did not know he was coming to work with me until after I got to work in the place. The pony-driver brought him in and said 'There is a filler here for you.'"

He further said that the filler pays his own contribution under the Insurance Act; that the colliery and not he himself made the proper deductions for any fines to which the plaintiff was liable; that he had no power to dismiss the plaintiff; that he could not of himself send the filler to any working place other than his own; that all the money due is paid to the collier on one pay ticket; that sometimes both he and the filler fill the coals. Then he was asked, Supposing that another prop was wanted for the roof to make it safe, and he told the filler to put the prop there, he would have to do it, would he not? And he answered, "No, I'd have to do it myself." Frederick Hall, one of plaintiff's witnesses, proved that at this colliery out of every 9s. earned the collier by mutual arrangement takes 5s. and the filler 4s. And that where the filler has a house to live in belonging to the colliery the rent is deducted from the total wages. He was then asked to describe the butty system, and said it was a system where one man takes a contract to work a stall and employs the men under him. That evidence is practically uncontradicted. Indeed Mr Blenkensop, the manager of this colliery, examined for the respondents, stated that he did not know of a fixed daily wage being paid in any particular case in this pit. Such is the practice of the colliery. As far as it goes it in my opinion negatives the suggestion that the filler is in any sense the employee of the collier, or that he is paid any wages at the cost of the collier, or in that sense paid them by the collier. The fair conclusion, I think, is that the remuneration for the work done is paid by the defendants, through the agency of the collier, to all the employees working in each particular stall.

Now I turn to the written documents. Both collier and filler in this case have signed the same books. They both represented themselves as competent to work alone. Both agreed to be bound by the several statutes mentioned in the first book, and by the general and special rules, regulations, and bye-laws established in the colliery. The first of these rules provides that every person employed in or about the colliery previously to entering shall sign the contract of service. It is contended, rightly I think, that it is absolutely necessary for the protection of life and property, and the maintenance of discipline in a colliery, that everyone working in a mine, whether an employee of the colliery owners or not, should be bound to observe these rules and regulations. That may well be. The second rule is to the effect that all persons employed shall be entitled to and shall receive wages and payment according to the current rate of wages for the time being paid in the colliery. As regards piece-work, that can scarcely mean more, I think, than this, that payment for piece-work shall be at the current rate for such piece-work in the colliery. If the collier be the person directly liable to the filler for his wages, this rule must mean either that the collier must always pay to the filler joined to him in piece-work a fixed wage equal to current rate, which is

entirely inconsistent with piece-work done at the risk of both collier and filler, or that the colliery owner guarantees that the share received both by the collier and filler shall be equal to that rate. Whatever be its precise meaning, however, neither it nor the signed books suggest in any way that the filler is the servant of or is subordinate to or is employed or paid by the collier. They are quite as consistent with the respective positions of the workmen being reversed.

There remains rule 13, upon which much reliance has been placed. The difficulty in construing it arises from the fact that the defendants have endeavoured to deal in the same rule with two entirely different classes of persons, namely, the servants of independent contractors, over whom it is necessary for the maintenance of discipline in the mine that the defendants should have power and authority to enforce obedience to the rules and regulations; and workmen working under the control of other workmen who have been in the habit of receiving from the colliery owners the wages of these latter and paying those wages over to them. And the protection the rule was meant to afford to the colliery owners was this, that having paid the wages once, they would be discharged from all liability, and could not be bound to see to the application of the sum paid. That was a quite intelligible and prudent object; but it is, in my view, clear that this rule operates upon relations theretofore existing and does not create new relations.

It does not convert into a contractor one who was not theretofore a contractor. Nor does it put a workman in the position of one working under or for another workman, or being paid by another workman, who was not already in that position. As, in my view, the plaintiff was not a person working under or for or paid by the collier Fuller, rule 13 has not, I think, any application to this case. I think the plaintiff was, on the contrary, the servant of the colliery owners, receiving as wages from them such share of the gross remuneration for their joint labour as Fuller and he should arrange. Since that fell short of the minimum wage I think the plaintiff is entitled to the declaration he claims. If the gross sum were sufficient, if equally divided, to pay the minimum wage to each of the workmen, then it no doubt would be hard upon the colliery owners that they should, by reason of the fact that one of their workmen absorbed the lion's share, be liable to pay the deficit to the other, but if the gross sum is insufficient, if equally divided, to pay the minimum wage to each workman, then it makes little difference whether the owners have to pay the small deficit to each or on an unequal division a sum equal to both small deficits to one. In my opinion the decision appealed from was erroneous and should be reversed, and the appeal allowed, with costs here and below.

LORD SHAW—I concur. The importance of the question is acknowledged. In the working of a mine there are many obstacles to be encountered and many dangers to be avoided if mineral is to be got and life and limb are to be safe. By reason of these obstacles, or for the avoidance of these dangers, the work may be inevitably retarded and the output reduced. Men duly in attendance at the beginning of their shift may have to wait for hours ere they are allowed to begin work, the oversman or fireman having, in compliance with the law, withdrawn them from the faces where gas has been emitted, and having kept them off duty until the risk of asphyxiation or explosion is at an end. Similarly in the case of falls from the roof or the need of extra propping. As hour after hour slips by, the workman, who is paid by piece-work, sees the chance of remuneration lessen or disappear. There may be obstacles to the getting of coal, or much trouble in the texture of the seam. The man may labour severely for the removal of these, but the output of coal be small, and all ordinary measure of wages to labour be lost. All this may occur without fault on either side, and it may yet be highly expedient to maintain the system of payment by piece-work.

How to avoid the resultant insecurity—a risk which imperils subsistence to the workmen employed underground? There can, in my mind, be no doubt that this was the problem to which the Minimum Wage Act was addressed. If the judgment of Bailhache, J., be right, the Act has solved it in a certain way prescribed; if the judgment of the Court of Appeal be right, the settlement attempted is rendered nugatory or partial or fails.

Section 1 of the statute prescribes—"It shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum rate settled under this Act. . . . And any agreement for the payment of wages in so far as it is in contravention of this provision shall be void."

My respect for the learned Judges of the Court of Appeal has led me to seek with especial care for the foundation of their construction of this statute. That foundation is, I think, discovered in the question put by Buckley, L.J.—"Whether the plaintiff in this action was employed by the defendant Colliery Company at wages? It is not disputed that certain contractual relations subsisted between the plaintiff and the defendants. But what is to be searched for is this—Did these terms include an obligation as between the defendants and the plaintiff that the defendants would pay the plaintiff wages?"

The same language is held by Swinfen Eady, L.J., in the subsequent case of *Hooley* v. *Butterley Colliery, Limited*, 113 L.T.R., at p. 908—"The first question is whether there was any evidence before the County Court Judge upon which he would find that the defendants had agreed to pay the plaintiff for his service."

This, then, is the proposition—Unless the mineowner, who has certain "contractual relations" with a workman be also his—that individual workman's—paymaster, to

that person as employer the Act cannot apply. This is major premiss—If it be correct, and broad enough, all the rest of these judgments is perfectly logical; the superstructure stands. I am humbly of opinion that the proposition is incorrect and much too narrow.

I find no warrant in the statute for construing its language—its use of the word "employer"—in any artificial or narrow or particular sense. The word, on the contrary, should be construed in its natural, its broad, and its general sense. There may be many modes of management, arrangements for remuneration, schemes of control, of men working in and about a mine. These men may fall into many classes, and the relations of each of the men so employed may be that of servant to the mineowner as employer.

The case of a piece-work contract is a good instance. It is carried out by one, two, or three colliers, co-operating with whom are one, two, or three trammers or fillers. The scheme of remuneration of these men, working as one team, may be a slump remuneration to the team, leaving the distribution of this to the men themselves, subject to regulations framed under the Act. Why should this rule out the mineowner from being the employer of any of the team but one? For every other purpose than the particular method in which remuneration reaches him each man is and acts as a servant to the one employer, the mineowner, who alone engages him, alone dismisses him, and alone controls, stops, or transfers his work, and alone directs its nature and its place. I am of opinion that the language used in the statute has done nothing thus to narrow or to sterilise the protection and the benefit it purported to confer.

And with regard to the one member of the team through whose hands the payment made is distributed to the other members, that member does not and dare not presume to do or to order any one of those things just enumerated, which are each and all typical master acts and orders, and in my opinion it would be flying in the face of facts to treat him as the employer of the other members of the team. He is not their master; he is their fellow-workman. I do not think that this Act of Parliament is inconsistent with this either in its letter or its spirit.

It needs no explanation from this House that such a construction as that reached by the Court of Appeal, which for the purposes of the Minimum Wage Act holds that the relation of employer and servant does not exist between the mineowner and the filler, is the negation of what is recognised in the business and organisation both of labour and of capital. Under this statute rules are made binding the mineowner on the one hand and those employed in and about the mine on the other, and representatives are appointed to voice the feelings and adjust the relations of both. Colliers and fillers for all such purposes are all alike, servants working underground, and all under one and the same employer. And so rules are framed, by a general consent, based on a broad and practical recognition of facts as they are. Under other statutes all the men and all alike are insured, all the men and all alike have rights to compensation by the colliery owner, and it is admitted that to apply these statutes to the appellant—a filler—is a correct procedure. Why, then, if the respondents are employers, and the appellant an employee for all these purposes, should the relation be ruled out for the purposes of section 1 of the Minimum Wage Act? There is no prescription which enjoins this; there is no definition which limits "employer" in this sense. I think that the abandonment of the broad and general and ordinary sense of the term is in such circumstances not warranted by law.

But I desire to examine the proposition of the Court of Appeal in another sense. I think, as I have said, that it is too narrow. But I am also respectfully of opinion that it is in itself indefensible as a representation of the actual enactment.

There is no challenge of the main facts of the case, and there is no denial in the judgments of the Courts below that, in the language of Buckley, L.J., "certain contractual relations existed between the plaintiff and the defendants." What were those contractual relations, except those of master and servant, employer and workman. I do not need and I should not presume to add to the terse and compendious statement of the facts contained in that passage of the judgment of Bailhache, J., which reads thus—"If this were not a colliery case, all the usual tests for ascertaining in whose employment a particular workman is would lead one to one result, and one result only, namely, that the filler in this case is in the employ of the Colliery Company. It is the Colliery Company who engage him; it is the Colliery Company with whom he makes a contract, which is in writing; it is the Colliery Company who can take him from one piece of work and put him to another; they exercise full control over him; and it is the Colliery Company who dismiss him. All those tests are tests which are applied in other cases, and when they are all answered in one way they lead to the conclusion, and the only conclusion, that one would otherwise come to, that the Colliery Company are the employers of the fillers in this case."

This being the state of the facts, what says the statute? It adds another term to this contract — "It shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages not less than the minimum." In my opinion this gives to the workman an absolute right, and imposes upon the employer an absolute obligation. The statute does not say that the implied term is only to enter a contract if the employer has already under it become bound to pay some wages, or to pay individual wages to each individual workman. It would be a strange answer to this absolute obligation to pay a minimum wage to his servant that the employer should say—"This statute

cannot apply to me, because I have done better than give him less than the minimum wage; I have bargained to give him no wages at all." One man—it may be not a few men—might be wishful of gaining practical experience of working underground in a coal mine, and very willing to sign on and bind themselves under the ordinary contracts and rules, taking for a time their learning as their pay. This practice would introduce confusion and class trouble, and might be a source of danger, and the law does not allow it. Upon everyone who assumes the position of employer the implied term of contract to give a minimum wage is imposed, and it is no answer to the law to say "I get my labour free."

Nor is it any answer to say—"I shall pay the sapper or head of the piece-work team a slump or overhead rate; to the one alone who receives the slump earnings do I stand employer under this Act; to the others working in the mine, bound by the colliery rules, signed on, and in every respect subject to colliery discipline and orders—to those others I owe no duty under the Act; for its purposes they are not my servants and I am not their employer."

Such a construction appears to me to be a defeat, and to sanction a defiance, of this Act of Parliament. It is a refreshment to observe that in the working of the colliery nothing so impracticable ever seems to have been contemplated. On the contrary, all the arrangements were made on the footing that the filler had the status of a servant of the owner as employer.

The contract by the appellant, the filler, and by the respondents, the colliery owners, humbly appears to me final on this topic. Section 2 provides as follows—"All persons employed shall be entitled to and shall receive wages and payment according to the current rate of wages for the time being paid at the colliery." (1) "All persons employed" is not restricted to all persons employed who are direct and individual recipients of wages from the owners. (2) The language is general that all persons so employed "shall be entitled to and receive wages and payment." (3) As in the case of the Minimum Wage Act itself, it starts with the fact of employment apart from wages, and then gives the right to wages and payment on the basis of that fact. (4) By whom are the wages and payment to be disbursed? The answer is plain from the terms of the contract under which "the owners of the said colliery hereby undertake to fulfil and perform the same." (5) Finally, what do the concluding words mean? "According to the current rate of wages for the time being paid at the colliery." Did that current rate apply to fillers as well as to colliers? It did. It is admitted that his minimum wage was fixed in accordance with statute by Sir Edward Clarke at 5s. 9d. per day. Taking the rule as a whole, or as analytically as may be, it does not appear to me to give any countenance to the proposition that the filler does not stand to the owner in the relation of employed to employer. And from the other provisions of the rules and the contract and the very items of the pay-sheet, especially those as to deductions, it appears to me clearly that he was not only employed but employed for wages. Then to these circumstances comes the Act of Parliament, and into his contract with the employer must be read the implied term of a minimum wage unless the statute is to be disobeyed.

But much reliance is placed upon rule 13 as to "contractors and other persons." It is an elementary principle of interpretation applicable to statutes, to contracts, or to rules or schedules that if possible all sections should be taken together and should stand together, and it is the *dernier ressort* of construction that one section should be held destructive of the other. Repugnancy is never presumed—the presumption is all the other way.

In the present case no real difficulty of the kind arises. I myself might have some doubt as to whether "contractors or other persons" applies to classes of workmen like colliers and fillers working in and paid as a team or party. Contractors—whom one would denominate outside contractors—are well enough known. They may drive fresh shafts, they may fit up electric lighting apparatus, they may do many things, bringing and paying their own workmen. Some day, no doubt, there may be difficulty in bringing such workmen within the compass of rules, many of which are manifestly made, as to time, attendance, &c., for men within the sphere of the mine as a coal producer. But the appellant was not employed, in my view, by a person of that class.

It is said that a collier not employing or even fetching a filler, but working alongside of him and distributing the slump earnings, is within the class of contractor aimed at. To test the argument let this be granted. The immediate consequence is to bring the filler within a clause that "he shall be deemed to be" a servant of the owner to the extent only that he would be bound to obey the bye-laws and rules. The filler was actually and already a servant under the whole category of tests stated by Bailhache, J., and, as pointed out, a servant under a contract which bound the owner to pay wages.

The object of section 13 is to my mind entirely plain from its concluding words—"But the owners of the colliery shall not be bound to see to the payment of or be liable for the wages due to such persons after they have paid the contractor or other person for whom such persons work." Its true object was, while conserving so far as might be the discipline of the Act, to relieve the employer from any obligation of double payment of wages. Slump payment—payment for a job as such, or to a team as such—is recognised, and the sensible provision is made that the separate wages cannot be recovered if the slump has been paid. The men are entirely protected; rules for distribution, carefully elaborated after arbitration, are adopted; and this is equally so whether the collier, the actual and direct payee, be treated as an outside contractor or not. The only question that remains to ask is—Was this filler paid his minimum wage?

It is admitted that he was not. It is further admitted that the actual earnings were distributed according to the rules, and that there was not enough money, so to speak, to go round. The appellant was only paid £1, 2s. 3d. instead of the minimum wage of £1, 12s. 11d. In terms of the Act the respondents must pay that balance.

It follows from this judgment that the reasoning upon *Hooley's* case, already referred to, cannot be upheld. With regard to the *Wrexham* case, I would point out that the terms of employment were there different from the present, and especially also that the action proceeded upon the footing that the minimum wage had in fact been paid. But the observations of the majority of the Court of Appeal in that case will necessarily be deprived of binding authority by the judgment now pronounced in this House.

LORD PARKER—I agree. The first section of the Coal Mines (Minimum Wage) Act 1912 provides that "it shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum rate settled under the Act and applicable to that workman," and any agreement for the payment of wages, in so far as it is in contravention of this provision, is to be void. It was held in the *Wrexham* case that this section did not apply unless the contract for employment underground were a contract for employment at a wage payable by the employer. I have some doubt whether this decision is correct. If it be correct the section would not apply in the perfectly possible case of a person employed by A at a wage which, under arrangements between A and B, was payable by B. I do not, however, think that your Lordships need consider this point on the present occasion.

No one in the present case disputes that the appellant was employed underground in the Silverwood Colliery. He is a filler working underground in loading up coal got by the collier employed in that particular stall to which he was assigned. Again, it is not disputed that he was employed at a wage. The only questions are by whom he was so employed, and who was responsible for the payment of his wages. In considering those questions I invite your Lordships' attention in the first place to the documentary evidence.

On the 21st May 1913 the appellant signed his name in the signing-on book of the respondent company, the owners of the colliery. Each person who signs this book expressly admits that he has received, *inter alia*, a copy of the general and special rules, regulations, and bye-laws in force at the colliery, and undertakes to obey, fulfil, and agree to them, and the respondent company, by its manager, undertakes to fulfil and perform the same on its part. The appellant on the same day signed another book kept by the respondent company called the contract signature book. This book contains an agreement between the respondent company and the persons signing it to the effect that the company is empowered but not bound to make advances, or supply to such person any of the articles, matters, and things, or to perform any work, or make any payment specified or set out opposite the name of such person thereunder written, and to deduct from any wages from time to time due to such person the amount of such advances, and the value of any such articles, matters, and things, or work, or the amount of such payments, together with the rent (if any) of any house or land occupied by such person. Opposite the signature of the appellant in this book, under the heading of "Things to be supplied," there is a list containing amongst other things coal, lamps, tools, and subscriptions to various accident or hospital funds. The *prima facie* inference from this document is not only that the appellant is to be entitled to a wage, but that the wage is payable by the respondent company. Otherwise deductions by the respondent company from the wage in respect of things supplied, work done, or subscriptions paid would be impossible. In order to see whether this inference is correct we must go to the bye-laws which both parties have undertaken to fulfil and perform. These bye-laws, with one exception, are consistent with their being intended to relate only to persons employed by the respondent company. The first provides that every person employed in the colliery is to sign this contract of service, which *prima facie* must refer to a contract with the respondent company. The second provides that all persons employed shall be entitled to and shall receive wages and payment at the current rate of wages for the time being paid at the colliery. This is a clear contract that the appellant shall receive wages, and there is nothing so far to rebut the inference that the wages which are to be paid are payable by the respondent company.

By the third bye-law the respondents are to provide all persons employed with work while such persons are in their employment. In this again all persons employed are contemplated as being in the employment of the respondent company. The fourth bye-law provides for the termination of the employment by notice on either side, which clearly contemplates a termination by the respondent company. Bye-laws Nos. 5 to 10 inclusive impose various obligations on persons employed. Bye-law No. 11 provides for keeping various classes of coal separate, and bye-law No. 12 provides for deductions in the case of any breach of the preceding bye-law, the amount of such deductions to be determined as therein mentioned. The deductions here referred to must be deductions from wages, and the inference again is that the person to pay the wages is the respondent company. The fourteenth bye-law provides that wages shall be payable weekly on Saturday, accounts being made up to the previous Wednesday. Notice of any error is to be given to the respondent company within the period therein specified. In default of such notice neither party—

which must mean neither the employed nor the respondent company—can reopen the account. This bye-law again contemplates that the wages of the employed are payable by the respondents. Bye-laws 15 to 18 inclusive contain nothing to suggest that they relate to any persons not employed by the respondent company. The only bye-law inconsistent with the bye-laws relating solely to persons employed by the respondent company, or with the wages payable to such persons being payable by the respondents, is bye-law No. 13, on which great stress was laid in argument.

This thirteenth bye-law does certainly create some difficulty. It provides that all persons working under or for and paid by contractors or other persons shall be deemed to be the servants of the owners of the colliery to the extent only that they shall be bound to obey the bye-laws and the other rules of the colliery, but the owners of the colliery shall not be bound to see to the payment of or be liable for the wages due to such persons after they have paid the contractor or other person for whom such persons work. The first part of this clause appears to be directed to making persons who are in no sense employed by the respondents the servants of the respondents for certain purposes, and there is evidence that contractors' servants are called on to sign the signing-on book. A person working under or for and paid by a contractor might by so signing become bound by such bye-laws as bye-law No. 7, which is directed against quarrelling or making any disturbance in the mine or smoking in working hours, but it is difficult to suppose that the intention was to make such persons bound by such bye-laws as No. 4, as to being discharged from work by notice, or bye-law 12, as to deductions from wages, or bye-law 14, as to settled accounts.

The second part of bye-law 13 is, however, not so easy to explain. It might be suggested, of course, that it is inserted *per cautelam*, for fear the first part of the clause should impose any obligation to pay wages on the company, but the suggestion is not very satisfactory, for the clause is framed on the footing that the respondents will be bound to see to the payment of the wages due from the contractor unless or until such contractor shall have been paid by them. In other words, it proceeds on the footing that if the respondents contract for a shaft at the price of £1000, payable when the work is completed, they will have to see to the payment of the contractor's employees pending completion. It would be extravagant, however, to suppose that this was meant. I cannot help thinking that the bye-law is framed to meet two points, namely, (1) to make persons not employed by the company bound to obey certain of the bye-laws, and (2) to prevent persons employed by the company from demanding their proper wage after such wage had already been paid to some ganger or foreman on their behalf. If so, it has failed in its object by faulty draftmanship. However this may be, I do not think that bye-law 13 is sufficient to displace the inference arising from the documents that the appellant was employed by respondent company for wages payable by the respondent company, though for the amount of the wages one has to go to the price list, which contains the current wages for the time being paid at the colliery.

If this price list be examined it will be found that it provides that both colliers are to be paid together by piece-work—that is to say, for getting and filling best coal, per score of ten tons, 13s. 4d.—but there is no provision how the amount is apportioned between collier and filler, or to whom it is to be paid. It is clear, however, that it is to be paid by the respondents, who are also to provide every collier or filler who is a householder with a ton of house coal per month.

The collier with whom the appellant worked during the week for which he is now claiming to be entitled to a minimum wage under the Act had signed, as indeed all colliers employed by the respondents do sign, contracts in the same terms as those signed by the appellant. There is nothing on the face of the documents to distinguish in any way the position of collier from the position of filler, and everything which I have already said with respect to the relationship between the respondent and the appellant is therefore equally applicable to the relationship between the respondent and the collier with whom the appellant was working during the week in question. The result is, I think, that the joint wage payable to collier and filler for getting and filling the coal was, at any rate so far as the documents are concerned, payable by the respondents to their joint receipt, the apportionment being left to mutual agreement between them. It remains, however, to be considered how far, if at all, this result is displaced or modified by the customary course of dealing between the respondents and their employees at this particular mine.

It appears that in the Silverwood Colliery colliers and fillers work in sets consisting of one collier and one filler. There may, however, be more than one set working in any one stall. Each stall has its particular number, and on every pay-day a pay-note for the whole stall is made out by the respondents and expressed to be payable to the collier or one of the colliers engaged in that stall. In this pay-note a stall is credited (1) with the price of the total amount of piecework done in the stall during the week, and (2) with the day wage of any collier or filler taken by the respondents from the stall for other work during the week. On the other hand the stall is debited with all deductions which the respondents claim to make under the particular contracts with each and every person engaged in the stall. For example, the rent payable by any person occupying one of the respondents' cottages, the 4d. per man payable under the Insurance Act, the price of tools supplied or repaired, or subscriptions paid. The note thus made out would show a balance which the collier to whom it was handed could obtain from the com-

pany's pay office. This balance would be divided between the persons engaged in the stall in such proportions as might be agreed, each giving credit for the deductions made on his account.

There seems to have been an equal division between the sets of more than one engaged in the stall, but as between collier and filler forming a single set the filler's share was somewhat less than the collier's. Thus the collier would get, roughly speaking, 5s. to the filler's 4s. for every day of work, though the exact proportions might be varied by mutual agreement. Under these circumstances, although the collier's hand was the hand which actually paid the wages of the filler, such wages were in truth and in fact always paid by the respondent company. Beyond the payment by the collier to the filler I cannot find anything in the evidence pointing to the relationship between collier and filler being that of employer and employee. Indeed the evidence points to a contrary conclusion, for had the collier been the real employer of the filler one would have expected the respondents not only to deduct the 4d. payable for insurance by collier and filler respectively, but also the 3d. payable under the Insurance Act by the collier as employer of the filler, and no such deduction was ever made. Indeed, the respondents admitted very candidly that in all respects other than the payment of wages they were the employers of the filler, and that the collier was, if such employer, only so to the extent of being bound to pay the wages. I cannot therefore see that there is anything in the customary practice prevailing at the Silverwood Colliery to displace or alter the inference arising from the documents, that the respondents are the appellant's employers for wages.

The respondents contended that the collier was in the present case responsible for the appellant's minimum wage. But how in any real meaning of the words could it be said that the filler was employed underground in the Silverwood Mine by the collier? The collier did not engage him, nor could he dismiss him, nor had he any control over his work. There was nothing which he had the right to order him to do, nor could he object to his carrying out any order given by the respondents. Such contract (if any) as existed between them was confined to a division of the moneys paid by the respondents for their joint wage. I cannot think that this would be sufficient to bring the collier within section 1 of the Coal Mines (Minimum Wage) Act 1912.

I think it is worth while calling attention to the following point—Suppose both filler and collier entitled to a minimum wage under the Act, and that their joint earnings are insufficient to provide it, the respondents admit their liability to provide the deficiency. Suppose, on the other hand, as in the present case, the collier has disentitled himself to his minimum, then, if the respondents' contention be correct, they not only escape the obligation of making provision for the minimum wage of the collier, but throw upon him the obligation of providing the minimum wage of the filler. It would be an anomaly if the collier were subject to this double penalty.

I should like to add that all that I have said relates only to the facts in this particular case. It is easy to imagine cases in which the collier might really be in the position of a contractor with the company, engaging and providing his own fillers, and paying them such wages as might be agreed. In such a case it might be impossible to conclude that the filler was in any sence whatever employed by the colliery owner, and consequently the collier might be the person liable under section 1 of the Act. Both the *Wrexham* case and the recent case of *Hooley* v. *The Butterfly Colliery Company* may possibly be justified on this ground, but it would serve no useful purpose to examine the facts of those cases in detail.

I think this appeal should be allowed.

LORD SUMNER—The terms of the appellant's employment by the respondent colliery (for admittedly he was in their employment) are to be collected partly from the conduct of the parties concerned—namely, the colliery officials, the collier Fuller, and the filler Churm, and partly from the colliery by-laws. No point has been taken that such evidence was inadmissible or that the contract was to be collected from the written and printed documents alone. The first is matter of testimony, the second of construction. If the colliery company have to pay wages to Churm, or more precisely if they are his debtors for his wages, the appeal succeeds. This the respondents recognise, for they would then in any view of the Coal Mines (Minimum Wage) Act 1912 be employers of Churm within section 1 (1).

The Judge at the trial found that Fuller was not Churm's debtor for his wages, and the balance of the evidence supports him. In practice, it seems, the collier and filler agree to share the sum handed over by the colliery company to the collier, which they have jointly earned according to the price list for coal gotten and brought forward. I do not suppose that the colliery officials are ignorant of the proportions in which the sum is usually shared, but they are not parties to the division. There was no evidence that if the collier does not receive enough to pay the filler's agreed share he has to make up the amount out of his own pocket. There was evidence that a filler had prosecuted a collier who received from the colliery company the whole wages of the set and ran away with the money, but this was done at the instance of the colliery company, and, as Bailhache, J., pointed out, is consistent with the view that the filler had made the collier his agent to receive his wages from the colliery company, along with the wages of himself and possibly of others. It is not consistent with the view that what money the collier got from the company was to be his own, and that he was then to be merely a civil debtor to his filler for an agreed remuneration or wage. It is true that experienced colliery

managers testified that in practice, at this and other Yorkshire pits, the filler looks to the collier for his wages and not to the company, but I think this represents not so much what is actually done as the witnesses' view of the legal effect of what is actually done. The learned Judge did not accept it, nor am I prepared to say that on the particular evidence given in this case he was wrong. So much for the evidence of conduct and course of business.

The other elements from which the bargain has to be ascertained are written documents. Their construction is matter of law. Really they are by-laws 2 and 13. The contracts evidenced by the signing-on book are contracts severally entered into between each signatory employee and the colliery company, to which the other signatory employees are strangers. There is not one multipartite agreement arising between all the employees *inter se* as well as with their employer. The contracts are several. This being so, the promise of the owners of the colliery, expressed in the signing-on book, that they will perform the by-laws must, as applied to by-law 2, be either a promise to pay Churm wages according to the current rate as their own primary liability, or a promise by way of secondary liability that the collier, whoever he may be, shall so pay wages to Churm. I think it cannot be the latter. The language of by-law 2 is still adapted to a guarantee. By-law 13 is inconsistent with a guarantee, for it is an attempt to provide that the colliery company, as between itself and Churm, shall have nothing at all to do with wages—whether that attempt is successful or not is a question. Finally, no one has suggested a guarantee, and the whole course of business negatives it. From this it follows that by-law 2 introduces a contract in writing, by which the employers, the colliery company, are debtors for his wages to the filler Churm, though their amount is indeterminate and is to be determined *aliunde*. So far the colliery company would be employers who are under a contractual liability to pay wages to the workman, and within the Coal Mines (Minimum Wage) Act 1912. Is there anything to rebut this? It is the critical point of the case.

I think that in the Court of Appeal there was some difference of view between Buckley, L.J. and the other members of the Court at this point. The two latter simply followed the decision in *Richards* v. *Wrexham and Acton Collieries*, 1912, 2 K.B. 497, and other decisions of the Court of Appeal. They considered *Richards*' case to be on all fours with the present case. I do not think so. The foundation of that case is the fact that in actual practice the collier owed the filler his wages. He recognised his debt and paid it out of his own pocket, whether the money he had received from the colliery company was sufficient to cover it or not. Further, the filler got a day wage from the collier, whereas here collier and filler share in their own fashion a piece-rate wage, the joint product of their joint work. Thus in the *Wrexham* case the Court of Appeal started with the fact of an employer who was under a contractual obligation to pay wages to the filler and was not the colliery company, and the question was whether the colliery company nevertheless were employers within the section for other reasons. I agree with my noble friend Lord Parker of Waddington that the correctness of the *Wrexham* case does not now arise for consideration. Here, as I take the facts proven at the trial to be, the case is the converse. The Colliery Company, and no one else, are the employers at wages in actual practice, and the question is, are they nevertheless not employers at wages within the section for other reasons. *Hooley* v. *Butterley Colliery Company*, 113 L.T.R. 906, is also distinguishable. There was no evidence of any express agreement as to the obligation to pay wages, and the Court held that the contractual relations between the parties had been reduced into and were solely to be found in the written documents, but while the bye-laws there contained an exoneration similar to the present bye-law 13, they contained nothing equivalent to the initial promise of wages contained in the present bye-law 2. It is for present purposes simply a decision that documents similar to yet differing from those now before your Lordships did not on their true construction contain any promise by the Colliery Company to pay. Similarly in *Higginson* v. *Blackwell Colliery Company*, 112 L.T.R. 442, the rules incorporated into the contract contained in the signing-on book were held not to embody any obligation upon the Colliery Company to pay wages to the plaintiff dayman, and on the parole evidence the County Court Judge had found that no contract by the company to pay him wages had been proved. This case is therefore distinguishable also. Though this system of employment conforms to a common type, there are variations between the practice in one colliery and another, and even in the case of the same colliery the effect of the evidence given at one trial may differ essentially from that given at another. Sometimes too much is taken for granted at the trial, and in the case of a familiar course of business detailed evidence about it is dispensed with. Still in the result each of these decisions must be considered strictly in the light of the circumstances proved or admitted in the case.

On the other hand, in Buckley's, L.J., view the case made below was that the collier and filler between them fixed behind the company's back what the company were to pay to and for the filler, and this he rejected. If these were the facts I should agree, but I think that the true view of the practice as given in evidence on this occasion is that the Colliery Company, by arrangement with both men, placed in the hands of one the price of their joint work and so made an end of it. The Coal Mines (Minimum Wage) Act 1912 was passed long after practices of this kind had become established. Its effect on the established practice, whatever that practice may be proved to be, is another matter. There is of course nothing either

in law or in business to prevent a master from being liable to two wage-earners who work together and from paying an aggregate wage, which they are to divide between themselves as they may agree.

If bye-law 2 makes the colliery company employers of the filler at wages and debtors to him for wages, though for an amount to be fixed, so far as he is concerned, in a special way, the remaining question is whether bye-law 13 is adequate to negative this position.

On the evidence in the present case it is clear that if the filler has no contract with the Colliery Company for wages as such he has none with anybody. When the collier has received the money from the Colliery Company possibly the filler might recover his agreed share as money had and received to his use, and it may be that this has been found sufficient. At anyrate this circumstance is not conclusive.

In law, however, the matter turns on bye-law 13, and I do not think it adequate to abate the promise to pay wages contained in bye-law 2. Possibly a differently worded bye-law might achieve this object. Whether or not the collier is a "contractor" appears to depend on the question whether the filler is employed by him—a case contemplated by the Coal Mines (Weighing of Minerals) Act 1905, sec. 2 (2)—but in any case I think he is within "other persons," and that fillers are persons "working under and paid by" other persons. I am not prepared to make a distinction between "working under" and "working with." The filler is proved to be sufficiently "under" the collier for the purpose of this bye-law. The *ejusdem generis* rule does not apply. There is no genus of which "contractors" are one species and "other persons" another. When, however, the terms of the bye-law are examined I think the matter becomes clear. The first part is negative or restrictive and the second affirmative. Why should the owners of the colliery negative the possibility of their being bound to see to the payment of wages due to Churm not from themselves but from the collier? How could such a case arise? The expression is "see to the payment of," not simply "pay," and "after they have paid the other person for" (which includes "under") "whom such persons work."

Applied to this case and the proved practice this plainly means that after they have paid Fuller the owners have not to see to the payment of anything by Fuller to Churm—in other words, payment to Fuller of the sum due to Churm discharges the company from their debt to Churm, and it does so none the less if at the same time they pay Fuller what they owe him all in one payment. If upon this the company were to raise a plea of payment they would fail to prove any discharge of their debt to Churm. They made a gross payment, but they leave it in doubt whether it was payment in full of the wages legally due to Churm, and a short payment to Fuller (which we may be sure that in fact it was not), or whether the wages short paid were Churm's. On the facts as they leave them they are not shown to have ever paid to anyone the full amount to which Churm is entitled under the Act, and accordingly bye-law 13 has never come into operation and does not avail them.

Even if this interpretation were doubtful, which I think it is not, bye-laws 2 and 13 seem to me to be ambiguous and to fall precisely within the words of Lord Macnaghten in *Elderslie Steamship Company* v. *Borthwick*, 1905 A.C., at p. 96—"I am unable to reconcile the two clauses. In such a case as this an ambiguous document is no protection." The Colliery Company have prepared their own by-laws and incorporate them by reference into the contract which is signed. By one by-law they promise wages; by another they try to stipulate that in certain cases they are to be deemed to have promised none, but they do this in a halting fashion, which, if it does not bear the above interpretation, bears no clear interpretation at all. I think therefore that the appeal succeeds, and I concur in the motion proposed by the Lord Chancellor.

Appeal allowed.

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Counsel for the Respondents—Sir R. Finlay, K.C. — Scott, K.C. — Ellison. Agents—Johnson, Weatherall, & Sturt, for Parker, Rhodes, & Company, Rotherham, Solicitors.

HOUSE OF LORDS.

Monday, January 31, 1916.

(Before the Lord Chancellor (Buckmaster), Lords Atkinson, Parker, Sumner, and Parmoor.)

OWNERS OF STEAMSHIP "SERBINO" v. PROCTOR.

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

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1—"*Accident Arising Out of and in the Course of the Employment*"—*Unexplained Disappearance of Seaman from Ship during Voyage—Inference of Fact from Circumstantial Evidence.*

The applicant, as the dependent of the chief engineer of the steamship "S.," who mysteriously disappeared from the vessel while she was on a voyage, tendered evidence in proceedings under the Workmen's Compensation Act 1906 to show that—The chief engineer, the deceased man, was responsible for all the machinery of the ship. He had evinced much concern because there was something wrong with the propeller. On the evening before the morning of his disappearance from the ship he had given orders to be called two hours earlier than usual. He was