evidence was directed, it restrains him for three years from entering into the employ of any firm which carries on a similar business within 25 miles "of London in the county of Middlesex," wherever it be that his employment is located. To my mind the employment of the appellant is in respect of its local character analogous to a milk-walk, where the servant is employed in distributing his master's goods in a certain defined district and not otherwise, and the portion of the covenant with which I am now dealing would amount in the case of a man so employed to prohibiting him from entering into the service of any milk-distributing company that had a place of business within twenty-five miles of his former milk-walk no matter where it was that they proposed to employ him.

But even now we have not exhausted the extravagances of this restrictive covenant. Under it the appellant must not for a like period "be engaged by or assist or help (either directly or indirectly) any person or persons who shall be employed (whether for remuneration or not) by any person or persons, firm or firms, company or companies, carrying on the same or a similar business as aforesaid, or who shall be assisting or helping either directly or indirectly in the carrying on of the same or a similar business."

It is difficult to construe with any certainty words which are so intentionally wide and general. I doubt whether a covenant that is so intentionally unreasonable merits even the benefit of the general rule of construction that a court should, if possible, construe language so as to give a reasonable meaning to the document. But however we construe it, the covenant is out of all measure wider than anything that can reasonably be required for the protection of the respondents in their business, and therefore the covenant is void in law and will not be enforced by the Courts.

It was suggested in the argument that even if the covenant was, as a whole, too wide, the Court might enforce restrictions which it might consider reasonable (even though they were not expressed in the covenant), provided they were within its ambit. I do not doubt that the Court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though, taken as a whole, the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause. It would, in my opinion, be *pessimi exempli* if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance, and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage in view of the longer purse of his master. It is sad to think that in this present case this appellant, whose employment is a comparatively humble one, should have had to go through four Courts before he could free himself from such unreasonable restraints as this covenant imposes, and the hardship imposed by the exaction of unreasonable covenants by employers would be greatly increased if they could continue the practice with the expectation that, having exposed the servant to the anxiety and expense of litigation, they would in the end obtain everything which they could have obtained by acting reasonably. It is evident that those who drafted this covenant aimed at making it a penal rather than a protective covenant, and that they hoped by means of it to paralyse the earning capabilities of the man if and when he left their service, and were not thinking of what would be a reasonable protection to their business.

I am of opinion, therefore, that the appeal should be allowed and the action dismissed, with all such costs as by the rules of the Courts are payable in the case of a defendant who, as in the present case, appeals *in formâ pauperis*.

Their Lordships allowed the appeal and dismissed the action.

Counsel for the Appellant—Rawlinson, K.C. — J. B. Matthews. Agents — Langhams, Solicitors.

Counsel for the Respondents — Danckwerts, K. C. — Waugh, K. C. — Newell. Agents — Jaques & Co., Solicitors — J. H. Richardson, Son, & Fox, Bradford.

HOUSE OF LORDS.

Monday, July 28, 1913.

(Before Lords Dunedin, Shaw, and Moulton.)

DAFF *v.* MIDLAND COLLIERY OWNERS' MUTUAL INDEMNITY COMPANY, LIMITED.

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

Master and Servant— Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 5, *sub-sec.* 1 — *Contract of Insurance — Mutual Insurance Society—Subsistence of Claims after Termination of Membership.*

Where membership of a mutual insurance society had been terminated upon the ground of alleged failure to pay a due call, *held* that, under the contract, the right to recover compensation for an accident, which had occurred in the past but involved a continuing liability, could not be forfeited, but upon the bankruptcy or liquidation of the late member, his right to recover from the insurer passed, in virtue of section 5 of the Workmen's Compensation Act 1906, to the injured workman.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 5 (1) enacts—"Where any employer has entered into a contract with any insurers in respect of any liability under this Act to any workman, then, in the event of the employer being bankrupt, or making a composition or arrangement with his creditors, or if the employer is a company in the event of the company having commenced to be wound up, the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in the enactments relating to bankruptcy and the winding-up of companies, be transferred to and vest in the workman, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer, so, however, that the insurers shall not be under any greater liability to the workman than they would have been under to the employer."

The *articles of association* of the Midland Colliery Owners' Mutual Indemnity Company, Limited contained, *inter alia*, these—"9. The directors may, at any time, upon breach of or failure to observe any regulation for the time being of the company, by notice in writing to any member, determine his protection in respect of any mine or works of such member, and shall thereupon cancel the entry of such mine or works in the register of protected mines and works, and such determination shall be without prejudice to the member's liability to perform all his obligations in respect of any accident occurring before such determination, and the directors shall be at liberty to annul such cancellation and restore such entry on such terms and conditions as they may think fit. 11. Whenever a member is in default as regards the payment of any money due to the company, he shall not be entitled to any indemnity in respect of any accident occurring whilst such default continues, and whenever a member's protection has been determined under clause 9 or clause 34 hereof, he shall not be entitled to any indemnity in respect of any accident unless he shall, within seven days after notice of such determination, give to the company notice in writing of his desire to appeal to a general meeting against such determination, and a general meeting, held within one month thereafter, shall nullify such determination, and when any such notice of appeal is given, the directors shall, without prejudice to their determination, until the meeting is held, continue to treat the protection as subsisting, and shall act accordingly, and the directors shall forthwith convene a general meeting to consider and determine the appeal, and if in the result the determination of the directors shall not be reversed, the member whose protection was determined thereby shall forthwith make good to the company all outgoings and expenses incurred by the company in the meantime, under the foregoing provisions of this clause, and a certificate under the common seal of the company, as to the amount thereof shall be conclusive. 23. If and whenever any mine or works is entered in the Register of Protected Mines and Works, the company is in respect of any extraordinary accident (or ordinary accident so far as relates to extra compensation in respect thereof . . .) occurring at or in relation to such mines or works whilst so registered, to be under the obligation following towards the member protected in respect of such mines or works, that is to say—(1) The company is to indemnify such member against all proceedings, costs, damages, claims, and demands in respect of the deaths resulting from such accident or alleged accident, and also in respect of extra compensation in respect of ordinary accidents. . . . 36. When any accident occurs at or in relation to a member's mine or works, in respect of which he is protected, the company shall be at liberty from time to time, and at any time, to take such steps as the company may think expedient with a view to resisting, defending, conceding, compromising, settling, or otherwise dealing with any claim in respect of such accident, and for that purpose may, without any further authority, use the name of the member and act on his behalf. Nevertheless, the member shall be bound from time to time, on the request of the company, to sign all such powers of attorney and authorities as the company may require for the purposes aforesaid."

The Alma Colliery Company became a member of the Indemnity Company on 27th March 1903. Daff, the pursuer and appellant, had been an employee of theirs who was permanently incapacitated by an accident on 15th June 1909. He now claimed his compensation from the Indemnity Company, the Colliery Company being in liquidation, and the Court of Appeal (COZENS-HARDY, M.R., FARWELL and KENNEDY, L.JJ.) having affirmed the decision of the Deputy Judge of the Chesterfield County Court sitting as arbiter under the Workmen's Compensation Act 1906 in favour of the defenders, he appealed to the House of Lords.

Their Lordships gave their considered judgment, in which will be found the *facts*, as follows:—

LORD SHAW—The appellant was, in the employment of the Alma Colliery Company, and he sustained an accident arising out of and in the course of his employment at their colliery on the 15th June 1909. By reason of the accident he was totally incapacitated for work. He was paid certain sums for compensation, the details of which need not be entered into, for a period subsequent to that date and extending up to October 1911.

On the 24th July 1911 the Alma Colliery Company passed an extraordinary resolution that the company be wound up voluntarily. The application for arbitration, following upon which certain proceedings took place and this appeal has been brought, was made on the 17th February 1912. It bore to be an "application for arbitration where rights of employer against insurers are transferred to workmen under section 5" of the Workmen's Compensation Act 1906. Broadly stated, the effect of the

sections appears to be, that when liquidation or bankruptcy takes place the insurer shall stand in the shoes of the employer, having the same rights and remedies, and being subject to the same but no greater liabilities than the employer would have been liable in to the workman. Whereas with regard to the workman he is to have vested in him all the employer's rights as against the insurer. The statute creates an immediate and direct right of action by the workman against the insurer. It is in the exercise of that right that the application for arbitration was made.

There is no question as to the appellant being a person entitled to compensation, but the circumstances of this case are, it is maintained, such that the respondents do not stand liable to him under the statute. That defence demands careful consideration.

In the first place, it was maintained in the case for the respondents laid before this House that they are not insurers within the meaning of section 5 above quoted. I am of opinion this defence is not well founded. It appears to me that one has only to look at the memorandum and articles of association of the Midland Colliery Owners' Mutual Indemnity Company, Limited, to see that the primary object, according to the memorandum, was the indemnification of members of the company against damages, claims, and demands in respect of the injury of workmen employed in connection with any mine in which a member is interested, and in respect of which he has obtained protection. It is not denied that the employers' firm was a member of this company, and that the works on which the accident occurred were entered in the Register of Protected Mines and Works.

The twenty-third article of association has been much canvassed in regard to the other points more nearly affecting the merits of the case. It may as well be quoted now, for incidentally it shows very plainly that the Mutual Company was *de facto* an insurer. The terms were as follows—[*His Lordship then read it.*]

It was admitted in argument that the employers' firm was a member of the company, that the works on which the accident took place were in the list of protected mines, and further that the accident occurred whilst the works were registered. Accordingly all the conditions of fact for the application of this clause have occurred. I see no reason or principle for excluding the respondents from the category of insurers because their insuring concern took the form of a mutual company. The protective provisions of the statute would be defeated by countenance of such a plea. The situation is that when this contract of indemnity against claims in respect of accident has been entered into, the position of insurers is assumed by the Mutual Company, and it in no way affects their inclusion in the category of insurers whether they traded for profit or whether they bargained in respect of premiums paid upon an economic basis, or of payments taking the shape of contributions *inter socios*. The substantial business sense and object of the contract remained the same. And the rights and protection of the workman under the statute cannot be impaired or defeated because of the form in which the employer has in this instance secured his indemnity against the workman's claims.

But the second ground or rather suggested ground of defence was, that even although the respondents were originally within the category of insurers, yet that on the 24th July 1911, when the Alma Colliery Company went into liquidation, a certain default had occurred in the payment of a call upon it. And it is maintained that the respondents are in the same position as if on that date the membership of the Alma Colliery Company had been determined and the contract of insurance had come to an end. Accordingly, so it is argued, when the liquidation occurred it was impossible to give effect to the transfer of liability under the statute. This requires an examination of the facts.

On the 26th May 1911 the respondents made a call upon the Alma Colliery Company to contribute to the ordinary accident fund a sum equal to one-fifth of a penny per ton upon the colliery output for the year 1910. That sum was £59, 14s. 5d., and notice was given that payment should be made not later than the 24th July 1911. It was on that same day that the Colliery Company passed the extraordinary resolution to wind up. At the actual time of that resolution and at the beginning of the winding-up, it accordingly is the fact that no default had occurred in payment of the call. The statutory transfer operated as from the moment of the winding-up, and at that moment the membership of the Alma Colliery Company and the inclusion of the colliery in the list of protected works were unaffected and unimpaired.

The respondents, the Mutual Company, also on the same day, however, wrote a reminder that the call "made on the 26th May 1911 became due on the 24th instant," that is, on the day on which this reminder was written. They follow by stating that "they cannot consider your company as entitled to indemnity during the period of default in respect of the call in arrear, and that such call must be considered as carrying interest at the rate of 5 per cent. from the due date to the date of payment." It again is to be noticed that at the date of that letter there was no call in arrear. The letter winds up by stating that "the directors consider that the two months now given from the date of the call is amply sufficient to enable any company to obtain signatures to a cheque in payment therefor." The liquidator was put by this letter, and one in the identical terms of the 28th July, in a position of difficulty, but in compliance with the suggestions made in those letters, he, on the 2nd August 1911, inclosed cheque for the full amount of the call so as to purge the default. This was received by the company on the 3rd. It was only thereafter—namely, on the 4th August 1911—resolved by the respondent company that the protection of the Alma Colliery Company "in respect of their mines and works, be, and the same is hereby determined, the said Alma Colliery Company Limited hav-

ing committed a breach of, and failed to observe, the regulations for the time being of this company—namely, having made default," and it was also resolved that the entry of the mines of the company in the register of protected mines and works be cancelled.

I am of opinion that it was not open to the respondents, having pointed out a default and invited and received a cheque for a payment of a call to purge this default, to adopt at a subsequent date such a resolution of determination of the membership of protection. I do not think it doubtful that the sole object in view in passing such resolutions was to endeavour to escape obligations in respect of one of its own members whose firm was by that time in liquidation, and to effect this escape on the ground of the default above mentioned, and even after the same had been purged. In my view that was a ground which in the circumstances the respondents were not entitled to take up, and this part of the defence is unsound in law.

But the respondents lastly and strenuously contend that upon the true reading of the contract of indemnity they, the Mutual Company, became bound so long as, and only so long as, their member—namely, the employer—continued to fulfil all his obligations. It is maintained to be a consequence of the true doctrine of mutuality of obligation that all liability upon the respondents' part in respect of accidents ceases from the moment of determination of membership and protection of the mine. It is further argued that not only does this determination operate as a cessation of contract relations between the parties for the future, but it wipes out liability in respect of all accidents which had occurred prior to the determination of membership and protection.

A brief examination of the articles of association of the Mutual Company is accordingly required. For the purpose of this examination it may be assumed that since the date of the liquidation, or at least since the date of the resolution determining the membership, the liquidator has been unable to fulfil his obligations as to contributions, calls, or the like, and that the colliery's protection has now been fully determined; and it may further be assumed that this determination dates from the 4th August 1911. In these circumstances the respondents invoke art. 9, which gives the directors power of determination of the protection of any mine of a member "upon breach of or failure to observe any regulation for the time being of the company," and they found specially upon these words "and such determination shall be without prejudice to the member's liability to perform all his obligations in respect of any accident occurring before such determination." A reference is then made to art. 11, which prescribes as follows:—[*His Lordship read the article and continued*]—There was no such appeal, and the remainder of the clause is of no importance. The first portion of this clause undoubtedly refers to indemnity in respect of "accident occurring whilst such default continues," and it is said that the second portion of the clause specifies that he shall not be entitled to any indemnity in respect of any accident whensoever occurring.

I am of opinion that this is a strained construction of clause 11. It is plain that a member insuring with the Mutual Company would thus incur by a default a forfeiture of, it may be, a most serious and far-reaching character if it was open to the directors to cut off by their determination the whole rights of the employer and the whole liabilities of the Mutual Company in respect of accidents which occurred years before the determination or default, and in respect of which contributions may have continued to be made and funds may have continued to be accumulated for the very object of discharging the liabilities in respect of such accidents. A forfeiture of this character should not be lightly inferred; and it is necessary to see what was the exact indemnity which originally was given to the member by the Mutual Company. Section 23 makes it plain that the indemnity was an indemnity in respect of "any extraordinary accident (or ordinary accident so far as relates to extra compensation in respect thereof) occurring at or in relation to such mines or works whilst so registered." To apply it to the case in hand, the contract, by the 23rd of these articles, was to indemnify the Alma Colliery Company against all proceedings, damages, or claims in respect of the accident occurring on the 15th June 1909. I am of opinion that at that date when the accident occurred the rights of all parties were settled in the following sense—First, there arose to the workman a right to compensation which was of the nature of a debt due by the employer. Secondly, there rested on the employer as from that date, and so long as compensation was due, a liability as debtor to the workman as creditor. Thirdly, under the contract of insurance that liability was *in toto* transferred to the insuring company.

With regard to the first two of these propositions, they appear to me to have been conclusively settled by the case of *United Collieries Limited* v. *Simpson* (*or Hendry*), 1909 A.C. 383, 46 S.L.R. 780. It dealt expressly with section 5 of the statute, and with the important question of the nature and character of the rights and obligations of parties as and from the occurrence of an accident. "The Act itself," says Lord Macnaghten, "treats the liability as a subsisting liability from the very moment of the accident and as a present right." In my own judgment I ventured to say that I did not think it doubtful "that upon the one hand the statute creates a liability and upon the other a right, and that these two things are correlative to each other," and with regard to the liability, "in this subsection [of section 5] it is accordingly clear that the liability to the workman is in the circumstances mentioned not only to be treated as a debt but as specially preferable among debts." It was accordingly held that the right to compensation conferred on the dependant of a deceased workman vests in the dependant on his death

through accident, and transmits to the representatives of the dependant even although that dependant might have made no claim during his lifetime. It is accordingly too late in the day to question the doctrine that on the occurrence of an accident a right in the nature of a vested right to compensation is conferred upon the injured workman.

With regard to the third proposition, I am of opinion that these articles of association create as between insurer and insured liabilities which entirely meet and fit in with the very liabilities under which the employer stands to his workmen. They take over, in my opinion, these liabilities in full. They accept the situation that upon the occurrence of an accident a right to compensation in the nature of a vested right is *ipso jure* given to the injured man. They place, as is very usual in all such contracts, substantially the entire control of the arrangement, compromise, settlement, or payment to be made with or to him in the hands of the Mutual Company. The respondents could have settled the case for a lump sum, for periodic payments of a large amount, or for a continuing payment as was done. But, in my opinion, having adopted the last-mentioned course they are not entitled by determining the employer's registration of works upon their list, or the employer's membership, to cause that determination to operate as a forfeiture which would cut off from the date of their own resolution their continuing liability. I desire to add that should a contract of that character ever be entered into, its terms would require to be carefully scrutinised so as to settle the serious question whether, having insured in respect of accidents and for all the liabilities in regard thereto, a forfeiture is possible, looking to the provisions of transfer from the insured employer to his workman, of that workman's claims, and of the insuring company's liability therefor. It is not necessary in this case to make a pronouncement upon that point, but its seriousness is undoubted.

In the present case, however, the contract in several of its other articles appears to me to make it clear, not only that a forfeiture of this kind was not intended, but that the determination of membership or protection was meant to operate only in regard to the contract relations of parties in respect of accidents subsequently occurring. It determined these. For such accidents no responsibility was taken. The member and his works stood out of all protection as well as of all liability.

But as to liability for accidents previously occurring, the real fact is that elaborate provisions are made in these articles for the establishment of funds to meet calls to be made upon them in future years in respect of past accidents. Section 25, for instance, provides for the establishment of such a fund, to be called "The Extraordinary Accident Fund." Calls are to be made from time to time, to be payable in a lump sum or by instalments, and the fund is to be applied for compensation, but no call is to be made in respect of the fund so long as the amount in hand is £50,000 or over. Provision is made by article 26 for the fund being kept separate and for its investment.

So far for a fund to meet future claims in respect of past accidents. But with regard to the occurrence of the "withdrawal of a member, whether voluntarily or by reason of cessation or determination of membership or otherwise," there is, for instance, an article, 10, which seems to me to be of great importance, for it provides that in such an event "such member shall be entitled to be repaid half of the amount standing to the credit of the separate account of such member . . . and applicable to his particular work in the mine." But before he is paid calculations have to be entered upon and the fund has to be debited with a sum "sufficient in the opinion of the directors to recoup the company the further sums which it may have to expend under clause 23 hereof in respect of any accident which shall have occurred prior to such withdrawal."

This appears to me conclusive. It is in itself eminently reasonable from a business point of view, and, in short, I do not detain your Lordships with a further analysis of these articles, because they appear to me to establish quite clearly that it was the intention to accept liability for accidents, whether present liability or future liability, and to accept it there and then, and once for all, on the occasion of the occurrence itself. It was substantially in respect of that that members insured. They paid their contributions, their funds were accumulated and separately invested, in order that they might definitely know that for accidents occurring the responsibility for compensation was once for all taken off their shoulders.

The transfer operated by section 5 of the Workmen's Compensation Act also entirely meets and covers such a situation. In short, the legal rights and obligations as between master and insurer, the legal rights and obligations as between master and workman, and the statutory transfer of the workman's rights and the employer's liabilities into direct rights as against the insurer and into direct liabilities of the insurer — all these things produce a harmonious scheme which fortunately accords with the spirit of this remedial legislation.

I regret that for these reasons I cannot, with much respect to the Court of Appeal, agree with the judgment pronounced, nor with the judgment of the County Court Judge. The doubts of Kennedy, L.J., appear to me to have been only too well founded. I regret that there has been no report of the judgment of Channell, J., in *Kniveton* v. *Northern Employers' Mutual Indemnity Company, Limited*, which, as cited in the Courts below, would appear to have been one in accord with the judgment now to be pronounced by this House, and with the reasons which your Lordships entertain therefor.

I move your Lordships that the judgments appealed from be reversed, and that the cause be remitted to the County Court to

have the arbitration on the claim proceed should the parties not see their way to arrange on the question of amount. The appellant will have the costs of the appeal and in the Courts below.

LORD DUNEDIN—In the construction to be put upon the 5th section of the Workmen's Compensation Act I agree with what was said in this case by the learned Master of the Rolls and what was decided in the case of *King* v. *Phœnix Insurance Company* (1910, 2 K.B. 666). The 5th section, once called into efficiency by the bankruptcy or liquidation of the employer, person, or company, effects a special assignation in favour of the claimant workman to the exclusion, so far as his claim goes, of the general body of creditors in the bankruptcy or liquidation. But the proviso secures that, as is generally the case, *assignatus utitur jure auctoris*, and the workman can recover no more from the insurer than the insured person or company could have recovered. I agree also with the argument of Mr Upjohn, which in truth is only the corollary of the above proposition, that if the contract with the insurer contain a clause resolutive of the contract in certain events, that clause will be effectual against the workman as it would have been effectual against his employer.

The whole question therefore comes to be in this case, what was the right of the Alma Company as at the date of liquidation? and, in particular, was it a contract which, so far as the indemnity to be recovered in respect of the accident to John Daff was concerned, was liable to be put an end to or made non-effective for further payments if the Alma Company at a subsequent date made such default as entitled the insurer company to determine the Alma Company's protection? I need not recapitulate the facts which have already been set out by Lord Shaw. The judgment of the Court of Appeal is rested entirely on the words of section 11 of the articles of association, which embody the contract between the parties. When the member's protection has been determined under section 9 (as was here done, I assume rightly, on the 4th August 1911), "he shall not be entitled to indemnity in respect of any accident unless . . ." (a contingency which did not happen). "Any accident," say the learned Judges, includes accidents past as well as future; relief from a weekly payment to be made to John Daff is an indemnity in respect of John Daff's accident, and consequently such weekly payments by the insurer company must cease after the 4th August. I am unable to agree with this view, but to explain my own view it is necessary to examine somewhat in detail the general scheme of the contract.

The company is, as its name denotes, a mutual indemnity company. The articles provide—first, for admission to membership (arts. 3 and 4), and then subsequently for admission of any member to protection in respect of any specified mine or work within certain limits. It is not denied that the Alma Company had been admitted to membership, and that they had been admitted to protection in respect of the Alma Mine. The result that follows from this is to be found (*inter alia*) in the twenty-third article. The twenty-third article is headed "Extraordinary Accidents," and provides as follows—[*His Lordship read it*].

Here it is admitted that the accident to John Daff happened at a mine which was entered in the register as a protected mine, and that his claim being for a payment which has extended beyond twenty-six consecutive weeks, gives rise to a claim for indemnity as a claim for extra compensation in respect of an ordinary accident. What then is the meaning of the obligation to indemnify the company against all claims in respect of an accident? It seems to me that it is necessary, first, to come to a conclusion as to what is the claim against which indemnity is sought. I think that is settled by the decision of this House in the case of *United Collieries Limited* v. *Simpson or Hendry*, 1909, A.C. 383, 46 S.L.R. 780. That case, as I understand it, settled authoritatively that the moment an accident happens (assuming of course, that it arises in the course and out of the employment) there is vested in the workman, or in the case of death in his representatives, a present claim of compensation—*i.e.*, a right to be paid in terms of the schedule. The quantitative amount of that payment is as yet undetermined, but the claim itself is a vested interest. Even if the workman partially recovers and the compensation is reviewed, it is not a new compensation that is awarded but the old that is reviewed. It seems to me to follow that the indemnity is of the same character, vesting for once and for all time so long as the claim exists. In other words, it is an indemnity to pay all claims in respect of the accident, not a series of indemnities against successive weekly payments as each fall due. This view is certainly helped and not hindered by art. 36, which gives an absolute power of compromise to the insurer company.

If this be so, it follows that the words of section 11, "shall not be entitled," truly do not apply to the case of a past accident. It was argued that if confined in application to future accidents they would be pleonastic, because the loss of the right to indemnity for such accidents was a necessary consequence of the determination of the protection. This argument, I think, ignores the fact that the sentence does not end with the words "shall not be entitled to any indemnity," but goes on "unless" (I abbreviate what follows) an appeal is taken, in which case other consequences follow. In other words, upon a just construction I do not think section 11 is a forfeiture clause at all, but is a clause dealing with the rights that are to arise in two particular situations, viz., first branch, accident happening at a time when there was default of payment while still in a protected state; second branch, accident happening when there has been a determination of protection by the action of the directors and an appeal against that determination by the member to a general meeting of the company.

To sum up, the general scheme is that indemnity in respect of the claim arising on the accident accrues at the time that claim arises, viz., at the moment of the accident. I do not doubt that it might have been provided that the right was forfeited on the occasion of a certain event, such as bankruptcy or the non-payment of future contributions, and if this had been so I do not doubt that the clause would have been as effectual against the workman who enjoys the assignation given by section 5 of the Workmen's Compensation Act as it would have been against the company. But I think any such clauses, as all clauses of forfeiture, must be clearly expressed; and for the reasons I have given I do not find any such clause here.

I am therefore of opinion that the appeal ought to be allowed.

LORD MOULTON—In this case the point to be decided by this House is whether the conditions of section 5, sub-section (1), of the Workmen's Compensation Act had been complied with in the case of the appellant, so that his right to payment of compensation by his employers, the Alma Colliery Company, Limited, became a right to payment by the respondents on the company going into liquidation.

It is plain that the employer had entered into a contract with the respondents in respect of their liability to pay compensation to the appellant in respect of the admitted accident which occurred to him on the 15th June 1909. I shall presently examine more minutely the nature of this contract, but it is sufficient here to say that it was undoubtedly one of insurance. It is also admitted that the employer was a limited company, which commenced to be wound up on the 24th July 1911, when a resolution of voluntary liquidation was passed. It therefore follows that the rights of the employer against the respondents as respects their liabilities to the appellant were vested in and transferred to the appellant, and that they were subject to the same liabilities to him as they had previously been to his employer. Unless, therefore, the respondents have some defence under the last clause of section 5 (1) of the Act, which reads as follows, "So, however, that the insurers shall not be under any greater liability to the workman than they would have been to the employer," the appellant is entitled to payment by the respondents of the full compensation of 11s. 7d. per week.

In order to appreciate the case set up by the respondents under this clause it is necessary to state briefly certain facts relative to the acts of the parties at or about the critical date, *i.e.*, the date on which the employers, the Alma Colliery Company, Limited, passed the resolution for voluntary winding-up. On the 26th May 1911 a notice had been sent to that company by the respondents making a call to the amount of £59, 14s. 5d. in respect of its liability to contribute to what was known as the ordinary accident fund of the respondent company. The date upon which such payment became due was the 24th July 1911, and inasmuch as that would give to the company the whole of the day to pay the call, there was at the date of the passing of the resolution to wind up no default, either substantial or technical, on the part of the Alma Colliery Company, Limited, towards the respondents.

The call was not paid upon that day, but a few days later a cheque for the amount of the said call was sent by the liquidator of the company to the respondents, which was received by them on the 2nd August 1911. It is clear, and in fact it is not disputed, that payment by cheque was the regular and proper mode of payment. The respondents kept the cheque for a day, and then, under pretext that the call had not been made, refused to retain the cheque (apparently under the idea that they could refuse to receive payment of the call after its due date) and determined the membership of the company. This was a wholly mistaken idea. The call was a continuing debt from the company to the respondents, and therefore there was a continuing duty on the part of the company to pay that debt and a concomitant continuing right to pay it. It may be that the circumstances of a case make the payment of a debt after the due date insufficient to avert all the consequences of the payment not having been punctual. But that is a different question to the right to pay the debt. It was not open, therefore, to the directors of the respondent company to refuse to receive the payment, and as I think that on a fair construction of the conduct of those directors the ground on which they determined the membership was that the call was then unpaid, they were in fact taking advantage of their own wrong in so doing. This is a thing which the law does not permit, and it is least likely to do so when it is made the ground of a harsh and unconscionable forfeiture such as, according to the contention of the respondents, the determination of the membership of the company would have been. If I were prepared to accept the contentions of the respondents in other matters a very serious question would arise as to the validity of this determination of membership, but under the actual circumstances of the case I need not examine it further. It is only necessary, therefore, in this connection to point out that the respondents cannot claim that the Alma Colliery Company, Limited, was in default in respect of non-payment of money to them, either on the ordinary accident account or the extraordinary accident account, at the date of the alleged determination of its membership or at any date subsequent to the 2nd August 1911.

I shall now proceed to examine into the nature of the contract between the employers of the appellant, *i.e.*, the Alma Colliery Company, Limited, and the respondents, in order to ascertain whether it was a contract of insurance, and if so what were the rights of the employers against the respondents which passed to the appellant at the commencement of the liquidation. The respondent company is, as its name implies, a mutual indemnity company, formed among the owners of collieries in

the Midlands. Its chief object is set out in the first paragraph of section 3 of the memorandum of association, and so far as is material it reads as follows—"To indemnify the members of the company against proceedings, losses, costs, damages, claims, and demands in respect of any accident resulting in injury to any workman employed at any mine in which any member of the company is interested, and to which the Coal Mines Regulation Act 1887 applies."

The scheme of the company is to have members who are admitted on written application on giving an undertaking that they will observe the obligations imposed upon them by the regulations and bye-laws of the company. Such membership, however, does not bring with it protection, nor expose the member to any liability, unless the company is wound up during his membership or within one year afterwards, in which case he becomes liable to contribute towards the payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member. Such liability is limited to £20.

The contract which your Lordships have to consider in the present case arises when a member seeks protection for his mine or mines. On obtaining it his name is placed on a register of protected mines and works, and he is required to pay contributions in respect of such protection. By the articles of the company accidents are divided into "ordinary" and "extraordinary" accidents. An "ordinary accident" means an accident which does not result in the death of any person. An "extraordinary accident" means one which does result in death. But where the compensation payable in respect of total or partial incapacity extends over more than twenty-six consecutive weeks, all subsequent payments are termed "extra compensation in respect of ordinary accident," and such compensation is treated in all respects in the same way as compensation in respect of "extraordinary accidents." It is admitted that at all material times the compensation payable to the appellant came under this denomination.

The two classes of compensation are treated in entirely different ways, and for the purposes of this case it is necessary to consider the arrangements as to "extraordinary accidents" only. The nature of the protection given is set out in clause 23 of the articles of association, which, so far as is material, is as follows—"If and whenever any mine is entered in the Register of Protected Mines and Works, the company is, in respect of every 'ordinary accident' (so far as relates to extra compensation in respect thereof) occurring at such mine whilst so registered, to be under the obligations following towards the member protected in respect of such mine—that is to say—(1) The company is to indemnify such member against all proceedings, costs, damages, claims, and demands in respect of extra compensation resulting from such accident."

In my opinion the construction of this language admits of no doubt. On the occurrence of the accident during the protected period a right to indemnity against the pecuniary consequences of that accident becomes vested in the member. This answers decisively in the appellant's favour the question whether the contract between his employers and the respondents was a contract of insurance. In *United Collieries Limited* v. *Simpson or Hendry*, 1909 A.C. 383, 46 S.L.R. 780, the nature of a workman's right to compensation in respect of an accident was subjected to a thorough examination in this House, and it was established that the happening of the accident created and vested in the workman or his dependants, as the case may be, a present right subsisting from the moment of the accident. It is against claims effectively put forward in respect of this right that the member is protected by his contract with the respondents, and such a contract is in its nature a contract of insurance, and is indeed in all respects a typical example of such a contract.

But the language of the clause makes it also clear that the indemnity is against the whole of the right of the workman which thus results from the accident. Nothing turns upon the question when the money becomes payable to the injured workman; the member is entitled to be indemnified against all such payments, at whatever date they occur. It is therefore immaterial whether they occur inside or outside the protected period. This is in accordance with the ordinary scheme of insurances. An insurance under a time policy upon a ship at sea gives an indemnity against losses caused during the term of the policy, whether the payments thereunder are or ever can be made within that term or not. That this is the meaning of the article quoted above is plain, not only from the language used therein, but also from the language consistently used throughout the whole of the articles. The indemnity is regularly spoken of as an indemnity "in respect of an accident." I can find no trace throughout the articles of any limitation of this complete indemnity by considerations of the date at which payments under it are to be made. And in addition to this uniform treatment of the indemnity as being an indemnity in respect of an accident, there is one article, viz., art. 36, which to my mind establishes clearly though indirectly that the liability of the company depends on the date of the accident, and is independent of the date of the payments made in respect thereof. It is headed "Conduct of Proceedings," and reads as follows: —[*His Lordship read it and continued*]—

It would be impossible that such a clause should appear in the articles if the indemnity were an indemnity in respect of payments within the protected period only, and not a complete indemnity against accidents occurring within the protected period, because otherwise the compromising or settling of a claim would not be a mere matter of procedure, but might radically change the benefit to the member and the burden on the society. For instance, compromising for a lump sum within the protected period would completely indemnify the member,

even though he left the company immediately after the payment, whereas if the payments to the workman were allowed to remain in the normal form of payments by weekly instalments this would not be so.

For these reasons, I am of opinion that throughout the articles of association (which define the contract between the member and the company) the indemnity referred to is an indemity against all claims arising out of the accident, and that if the accident occurs within the protected period such an indemnity at once vests in the member.

By the articles it is provided that a fund should be formed for the purpose of meeting the liabilities of the company in respect of the class of indemnities to which this case relates, and should be styled the "Extraordinary Accident Fund." It is composed of calls made on the members (other than non-contributing members) from time to time. No such call is to be made so long as the amount in hand amounts to £50,000 or more. I gather from the arguments at the Bar that such was the case in July 1911, but whether this be so or not it is common ground that no call had in fact been made and was outstanding at that date, so that no default in contributing to this fund can be alleged against the Alma Colliery Company, Limited.

I now come to arts. 9 and 11, upon which the respondents base their defence to the appellant's claims, so far as is material. Art. 9 reads as follows:—[*His Lordship read it and continued*]—To form a just view of the application of this article in the present case it is desirable to refer again to certain facts and dates. The call of £59, 14s. 5d. became due on the 24th July 1911. On the 28th the directors wrote to the company reminding them that it had not been paid, and notifying that interest at 5 per cent. would be claimed from the due date to the date of payment. On the 3rd August the call was paid. No question arises about the 5 per cent. interest, because it appears that the Alma Colliery Company, Limited, was at that time making payments of 11s. 7d. per week to the appellant, against which the respondents were admittedly bound to indemnify them, whereas the 5 per cent. on the call would amount to about 1s. per week only. There was, therefore, no default of any kind existing on the 4th August 1911, when the directors purported to determine the protection of the mines of the Alma Colliery Company, Limited. The contention of the respondents is, however, that they were entitled to terminate that protection because the payment had been made a few days late, even though they had claimed and were entitled to interest at 5 per cent. in respect of the period of delay.

Had this been a litigation between the Alma Colliery Company, Limited, and the respondents for a declaration that on the 4th August 1911 they were not entitled to terminate its protection, a serious question would have arisen as to the true construction of this section. That a past delay in payment of money (or, say, a payment to the company at a place other than that fixed in the notice) should by reason of its not being a payment in strict accordance with the articles entitle the directors at any future time to terminate the member's protection is so unreasonable that the Court might well be entitled to reject such a construction of the language used. The only argument for not rejecting it when considered purely as a question of construction is that in drafting such articles the draftsman has not in mind the possibility of such an unscrupulous abuse of powers as we find here, and therefore has possibly not provided against it. It is impossible to believe that the action of the directors in this matter was *bona fide*, or that the measure they were meting out to the Alma Colliery Company, Limited, was the same as that which they were meting out to other members of the respondent company. The alleged default was evidently a mere excuse for a deliberate act of injustice, and I doubt whether it would have stood the test of litigation had the question been properly raised.

But in the view which I take of the meaning of the articles it is not necessary to decide this, and the chief importance of art. 9 for the purposes of this case is that it states clearly that though a member is in default he continues liable to perform all his obligations in respect of past accidents. This emphasises that which is abundantly clear on every page of the articles, viz., that the indemnity acquired is as to all the consequences of an accident, that once acquired it vests in the member, and that the obligations with respect to it on both sides are unaffected by subsequent events.

Art. 11 commences thus—"Whenever a member is in default as regards the payment of any money due to the company he shall not be entitled to any indemnity in respect of any accident occurring whilst such default continues."

This provides a penalty for delay in payment of money due to the company which is automatic in its action and ceases when the default ceases. I have no doubt that this was intended to be the sole penal consequence of mere delay in payment, and that the article contemplated that the default was for all purposes purged when payment was made. This strengthens the view that clause 9 was not intended to refer to a case of mere delay in payment of money, for which its language is very inept.

Art. 11 (so far as is material) continues thus—"And whenever a member's protection has been determined under clause 9 or clause 34 hereof he shall not be entitled to any indemnity in respect of any accident unless he shall give notice of appeal to a general meeting," and in that case conditional protection shall exist till the general meeting has decided.

The whole of the argument on behalf of the respondents rested on the words "shall not be entitled to any indemnity in respect of any accident." They would have us read these words as meaning that they shall "forfeit every indemnity which they have acquired in times past." But the Court

will not give to a clause a meaning which makes it a forfeiture clause of a highly penal type unless the words clearly require that meaning, and here there is a natural alternative meaning which at once suggests itself. The clause speaks of a future time, and the words "be entitled to" obviously mean "acquire a title to," or "become entitled to." This interpretation removes all difficulty, and saves the article from being startlingly inconsistent with the general tenour of the other articles, as would be the case if the construction contended for by the respondents were adopted. Counsel for the respondents felt the difficulty of interpreting the above-mentioned words of this article as divesting the members of rights already vested, and even disclaimed the intention of giving it such a meaning. Accordingly he was compelled to devote his main argument to endeavouring to show that the indemnity provided for by the articles was not an indemnity in respect of the whole of the consequences of an accident, but only against payments in respect of it which fall to be made during the protected period. I have already dealt with this contention. The suggested interpretation is utterly at variance with both the express language and the general tenour of the articles, and, so far as I have been able to discover, derives no support from any passage in anyone of them.

For the above reasons I am of opinion that at the date of the commencement of the liquidation there was a right of indemnity vested in the employers against all payments to be made to the workman in respect of the accident, and that under section 5 (1) of the statute this right passed to the workman. We have not in this case to consider the question whether the respondents could have set up against that right any set-off which at that date they might have lawfully raised against the Alma Colliery Company Limited, because there is no evidence of any sum being at that date due to them from that company. The appeal should therefore be allowed, with all costs here and in the Courts below.

Their Lordships allowed the appeal.

Counsel for the Appellant—Scott Fox, K.C.—Shakespeare. Agents—King, Wigg, & Brightman, Solicitors, for Bertram Mather, Chesterfield.

Counsel for the Respondents — Upjohn, K.C.—Sanderson, K.C.—Shebbeare. Agents Ullithorne, Curry, & Co., Solicitors, for C. F. Elliot Smith, Mansfield.

PRIVY COUNCIL.

Wednesday, July 30, 1913.

(Before the Right Hons. Lords Atkinson, Shaw, and Moulton.)

ANGLO-NEWFOUNDLAND DEVELOPMENT COMPANY *v.* NEWFOUNDLAND PINE AND PULP COMPANY.

(On Appeal from the Supreme Court of Newfoundland.)

Contract—Construction—Reservation.

The appellants sought by reading in the words "their assigns or nominees" to extend a reservation under a licence to cut lumber granted by them. *Held* that as in the present instance this would destroy the only effective limitation on the scope of the reservation, this was clearly not the intention of the agreement.

The *facts* are fully stated in their Lordships' considered judgment, which was delivered by

Lord Moulton—In this case the respondents, the Newfoundland Pine and Pulp Company, Limited (which may be conveniently styled the Pulp Company), are suing the appellants the Anglo-Newfoundland Development Company, Limited (which may be conveniently styled the Development Company), for the value of timber belonging to the Pulp Company which it is alleged the Development Company cut and carried away and disposed of to its own use. The case was heard in the first instance before Johnston, J., who found in favour of the Pulp Company for the sum of 6040 dollars in respect of timber which had admittedly been wrongfully cut and appropriated by the Development Company, but he disallowed the claim in respect of certain other timber which he held that the Development Company were entitled to cut and appropriate under a certain reservation clause of a sub-licence, which will be more particularly dealt with later on. On appeal to the full Court his judgment upon the latter point was reversed and the damages were accordingly increased to 1,553,668 dollars. It is against this variation of the judgment of Johnson, J., that the present appeal is brought. The figures at which the damages have been assessed are not in dispute. The sole question is as to the right to recover these damages at all.

The relevant facts are not in dispute. On the 30th June 1906 certain licences were granted by the Government to the Pulp Company entitling them to cut timber over an area mainly situated within the watershed of the Exploits River in Newfoundland. By an indenture dated the 26th April 1907 the Pulp Company assigned these licences, with certain reservations, to Albert E Reed & Company (Newfoundland), Limited (which may be conveniently styled the Reed Company), and by an agreement of the same date the Reed Company, as holders of these licences, granted certain sub-licences to the