patent." Not to multiply quotations, their Lordships will only cite further what was said by a learned Judge in Scotland, where the patent law is the same as in this country. In *Gwynne* v. *Drysdale & Company* (13 R. 684, 23 S.L.R. 465) Lord President Inglis said—"I am not . . . to be understood as saying that an infringer by merely omiting some immaterial part of the mechanism described in the specification, or substituting for such immaterial part some mechanical equivalant, will escape conviction if his machine contains all the essential and characteristic features of the patented combination. But if in the machine of an alleged infringer any material part of the patented combination is omitted, then the combination used by the alleged infringer is a different combination from that of the patentee. The omission of one material part may be an improvement or the reverse. The possibility of dispensing with it may be a valuable discovery, or the omission may be made merely for the purpose of avoiding an fnfringement, but in either case the combination of the patentee minus an essential part of it is no longer his combination.' Their Lordships think it not necessary for the respondent to show that the omitted part was an essential element of the combination in the sense that the machine would not work without it. But it must be a material element, and not a mere detail in the complete machine, which may be varied or omitted altogether without serious detriment to the successful working of it, and they come to the conclusion that the hinge or rib was a material element in the appellants' combination, and the use of it materially contributed, if it was not essential, to the commercial success of their coupler. In determining the question whether the substance of the invention is taken, it is important to consider the position of the patent with reference to the previous knowledge on the subject. For if the merit of the invention consists in the idea or principle which is embodied in it, and not merely in the means by which that idea or principle is carried into effect, a machine which is based on the same idea or principle may still be an infringement although the detailed means adopted for carrying it into effect may be somewhat different. Giving Sewall full credit for having solved a problem which his predecessors have failed to solve, he cannot be said to have embodied any new idea or principle in his invention. The merit of it lies in the new combination of known features, and the fact remains that the use of the rib was a very material element in the commercial success of Sewall's solution of the problem. It is not proved that his coupler would have achieved that success without it, or that he ever contemplated the omission of it in using his invention. Their Lordships therefore have come to the conclusion that the appellants have failed to prove that the respondent has infringed their patent, and they will humbly advise His Majesty that the appeal should be dismissed.

Judgment appealed from affirmed.

Counsel for the Plaintiffs and Appellants—Moulton, K.C.—A. J. Walter. Agents—Faithful & Owen.

Counsel for the Defendant and Respondent—R. C. Smith, K.C.—The Hon. F. Russell. Agents—Charles Russell & Co.

HOUSE OF LORDS.

Thursday, August 6.

(Before the Lord Chancellor (Halsbury), Lords Macnaghten, Shand, Robertson, and Lindley.)

TOLHURST *v.* ASSOCIATED PORTLAND CEMENT MANUFACTURERS, LIMITED.

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

Contract—Assignation of Contract Made with Company—Right of Assignee to Enforce Contract—Effect of Voluntary Liquidation and Sale of Business.

By contract dated in 1898 the owner of some chalk quarries undertook to supply a Portland Cement Company for fifty years with 750 tons of chalk per week, and so much more, if any, as the company should require for the whole of their manufacture of Portland cement upon certain land which which they had purchased from him.

In 1900 the company went into voluntary liquidation and sold their business, including their rights under the contracts of 1898, to another and larger Portland cement company.

Held (*diss.* Lord Robertson) that the voluntary liquidation and sale had not rescinded or put an end to the contract of 1898, and that the Portland Cement Company to whom the business had been assigned was entitled to enforce the contract.

In two actions, both raised in the Commercial Court, one by Alfred Tolhurst against the Associated Portland Cement Manufacturers, Limited, and the other by that company against Tolhurst, the Judge (MATTHEW, J.) gave judgment in favour of Tolhurst. On appeal these judgments were reversed by the Court of Appeal (COLLINS, M.R., SIR F. JEUNE, and COSENS-HARDY, L.J.)

Tolhurst appealed.

The facts of the case are fully set forth in the opinion of Lord Macnaghten.

At delivering judgment—

LORD CHANCELLOR (HALSBURY)—I was inclined during the argument of this case to take a view favourable to the appellant, but on consideration I have with some hesitation come to agree with the judgments about to be delivered by

my noble and learned friends Lord Macnaghten and Lord Lindley.

LORD MACNAGHTEN.—The question, as it seems to me, depends simply and solely on the true meaning and effect of the contract of the 5th January 1898, made between Alfred Tolhurst of the one part and the Imperial Portland Cement Company Limited of the other. Two alternative constructions have been proposed. One follows the letter of the instrument and adheres to it closely; the other favours a more liberal interpretation, supplying it is said nothing more than what is required in order to carry out the obvious intention of the parties. The question is, which of these two constructions is to be adopted? When that matter is once determined there cannot I think be any further difficulty. There are contracts, of course, which are not to be performed vicariously, to use an expression of Knight Bruce, L.J. There may be an element of personal skill, or an element of personal confidence to which for the purposes of the contract a stranger cannot make any pretensions. But no-one I suppose, would seriously argue that a contract for delivery of chalk from particular quarries for the use of particular cement works cannot be performed by any person for the time being possessed of the quarries, or that it can make the slightest difference to anybody who the proprietors of the cement works or the actual manufacturers may be, provided that they are in a position to carry out the terms of the original contract. Tolhurst was the owner of property at Northfleet, in Kent, containing extensive and valuable chalk quarries. He sold a piece of his land there known as the Little Dockyard to the Imperial Company, and that company bought another piece of land from the British White Lead Company, who also derived title from Tolhurst. The main object for which the Imperial Company was formed was to establish cement works at Northfleet and carry on there the business of Portland cement manufacturers. It was of course important for Tolhurst to secure a regular market for his chalk, and it was equally important for the Imperial Company to secure a regular supply of chalk for their works. The effect of the contract of January 1898 may be stated shortly. Tolhurst had made a tramway to the boundary of the land bought by the Imperial Company from the White Lead Company, and the Imperial Company was to make a tramway continuing Tolhurst's tramway to a convenient spot on its land in order to enable him to bring chalk to the company's works. On completion of this tramway the contract provides that "the said Alfred Tolhurst will, for a term of fifty years to be computed from the 25th day of December 1897, or for such shorter period (not being less than thirty-five years) as he shall be possessed of chalk available and suitable for the manufacture of Portland cement, and capable of being quarried and got in the usual manner above water-level, supply to the company, and the company will take and buy of the said Alfred Tolhurst, at least 750 tons per week, and so much more, if any, as the company shall require for the whole of their manufacture of Portland cement upon their said land." Tolhurst was to provide rolling stock and traction power, carry the chalk over the company's tramway, and deliver it alongside the company's stores, but he was not to be precluded from supplying other persons. Delivery orders were to be sent in before four o'clock for the next day. The price was to be 1s. 3d. per ton. to be paid in cash monthly. The average monthly payment for any year after 1898 was to be not less than £188. Then there was a clause providing for the case of strikes and unavoidable stoppages, and authorising the company at its own expense to procure chalk elsewhere in the event of Tolhurst being thereby prevented from supplying the quantity required. In 1900 the Imperial Company sold its undertaking to the respondents the Associated Company, and went into voluntary liquidation. Its affairs were fully wound up and all its assets have been distributed. Tolhurst brought in no claim in the liquidation. He stood by while the Imperial Company was in process of dissolution. Tolhurst's case now is that by parting with its undertaking and going into liquidation the Imperial Company rescinded or put an end to the contract of January 1898, and that he is not bound under or in accordance with that contract to furnish supplies of chalk to the Associated Company for the purposes of the works at Northfleet which formerly belonged to the Imperial Company, whether the Associated Company requires delivery in its own name or in the name of the Imperial Company. Now, what is the meaning of the contract of January 1898? I cannot think that there is much difficulty about it. It is expressed to be made between Alfred Tolhurst and the Imperial Company. They, and they only, are named as the persons to perform the contract. From beginning to end of the instrument, if the contract be taken literally, there is not one word pointing to the continued existence of the contract in the hands of any other person either by succession or substitution. The obligations and benefits of the contract on the one side begin and end with Alfred Tolhurst; on the other, they begin and end with the Imperial Company. And yet the contract is to endure for a period of fifty years, or if the supply of chalk in the quarries does not hold out so long it is to last for thirty-five years at least. Now, when it is borne in mind that the Imperial Company must have been induced to establish its works at Northfleet by the prospect of the advantages flowing from immediate connection with Tolhurst's quarries, and that the contract in substance amounts to a contract for the sale of all the chalk in those quarries by periodical deliveries (less what Tolhurst might sell elsewhere), it is plain that it could not have been within the contemplation of the parties that the company would lose the

benefit of the contract if anything happened to Tolhurst, or that Tolhurst would lose the benefit of the market which the contract provided for him at his very door in the event of the company parting with its undertaking, as it was authorised to do by its memorandum. Mr Pickford said, and said truly, that those powers in the memorandum to which his attention was called placed the company in the position of an individual. That is so. But if the contract had been between two individuals —between Alfred Tolhurst and John Smith—I do not think there would have been any doubt about the matter. It is, I think, the introduction of a company—a body with perpetual succession, defined capital, and specified objects—as one party to the contract, that really creates or suggests the difficulty—that the use of the word "their," "their manufacture," "upon their land." But the word "their" in the case of the company must not be taken too literally any more than the word "his" in the case of Tolhurst, where the contract speaks of "his" land. Something more is comprehended than the particular company and the individual Tolhurst. It seems to me that the contract is to be read and construed as if it contained an interpretation clause saying that the expression "Tolhurst" should include Tolhurst and his heirs, executors, administrators, and assigns, owners and occupiers of the Northfleet quarries, that the expression "company" should include the Company and its successors and assigns, owners and occupiers of the Northfleet Cement Works, and that the words "his" and "their" should have a corresponding meaning. That, I think, was the plain intention of the parties. The contract is a contract for the mutual benefit and accommodation of the chalk quarries and the cement works, and of Tolhurst and the company as the owners and occupiers of those two properties. Construed fairly, the provision in clause 2, about which there was so much argument, means I think nothing more than this—that the Imperial Company was to take the whole of the supply of chalk required for the Northfleet works (the quantity to be ascertained by daily orders, but guaranteed not to be less than 750 tons per week) from Tolhurst's chalk quarries and from no other source whatever. As long as that is done, how can it matter who is carrying on the works? There is nothing in the contract to restrict the development of the works on the land which formerly belonged to the Imperial Company, or to check the expansion and improvement in the ordinary course of things of the process of manufacture there. If the view I have expressed be correct, all difficulty vanishes. It is well settled that as a rule the benefit of a contract is assignable in equity, and may be enforced by the assignee. The assignor ought in ordinary circumstances to be made a party. But I cannot think that this is necessary when the assignor is a mere name, as the Imperial Company is in the present case, without any means and without any executive or board of directors, if indeed it has now any corporate existence. I am not aware of any authority for this proposition, but it seems to me to be in accordance with the practice in equity, and it is supported by what was said by James, V.C. in *Castellan* v. *Hobson*; L.R. 10 Eq. 47. The result is that Tolhurst's action fails, because, as regards the chalk which has been supplied to the Associated Company, the company is entitled to have it at a stipulated price of 1s. 3d. per ton. The second action succeeds, but I think the Imperial Company was not a necessary or proper party. If the requirements of sections 142 and 143 of the Companys Act 1862 have been complied with the company is "deemed to be dissolved," and therefore I should suggest that in lieu of the declaration in the order pronounced by the Court of Appeal there should be inserted a declaration to the effect that the Associated Company is entitled to the benefit of the contract of the 5th January 1898, they paying, as provided by the contract, for all chalk supplied to them in accordance with the contract. With this variation, I think that the orders under appeal should be affirmed, and the appeal dismissed with costs. My noble and learned friend Lord Shand, who is unable to be present to-day, has asked me to express his concurrence in this opinion.

LORD ROBERTSON—I can explain in a few sentences what I find an insuperable objection to the judgment appealed against. It seems to me that the demand of the respondents is that the appellant should supply them with something different to that which he bound himself to give. The subject-matter of the contract is expressed to be the supply of 750 tons and so much more chalk, if any, as should be required for the business of a particular company, while the demand of the respondents is that the appellant shall supply 750 tons and so much more chalk as is required for the business of another and a different company. The appellant's point is, therefore, not the bare one that the contract is not transmissible, but it is that the thing for which the assign is asking is something which the appellant never bound himself to give. Now, first of all, about the facts. It is true, or at least I assume it to be true, that the original company still exists in such sense that it can sue. But it is still more certain that it has finally ceased business; and it exists and comes into court solely in order to enforce this contract (if it can) in favour of the new company. And the crucial fact (in my view) is that the original company is, as a manufacturer, dead and done with, and has no requirements large or small. The requirements which the appellant is now called on to meet are not the requirements of the old company, but the requirements of the new. It seems to me to be no answer to this to say that the old company might have increased its capital and its operations so that its requirements would have been as onerous as those of the new company. This is merely the old and often rejected argument that a man can be

forced to do something which he never agreed to merely because it is very like and no more onerous than something which he did agree to. I have only to add that I should find it impossible to split up the subject of the contract, and to hold that, even if the appellant is not bound to meet the requirements of the new company, he is bound to give them the 750 tons. In a commercial contract like this the benefit of the more elastic provisions belongs to both parties, and neither the person who supplies nor the person who takes can be held to the one part of the contract when the opposite party has by his own act rendered the other part of the contract impossible of fulfilment.

LORD LINDLEY—In January 1898 Mr Tolhurst, who was the owner of some chalk land in Northfleet, sold part of that land to the Imperial Portland Cement Company, and by an agreement dated the 5th January 1898 he agreed that they should have for fifty years from his adjoining chalk quarries all such chalk as they should require for their cement works on the land they had bought. They were to pay 1s. 3d. a ton for all they wanted, and they bound themselves to take at least 750 tons a-week. The company were not to come on to Tolhurst's land and get the chalk themselves. He was to get it and deliver it to them, and they were to pay him monthly for what was so delivered. Mr Tolhurst was at liberty to sell chalk to other persons, and provision was made for the possible event of all his chalk being worked out before the expiration of the fifty years. The nature of the agreement and the time it was to last negative the idea that it was confined to the parties to it. The word assigns does not occur in the agreement. But this does not show that the benefit of the contract is not assignable. An agreement for a lease, and even an option to require a lease or a renewal of a lease, is assignable in equity, even although there is no mention of executors, administrators, or assigns (see *Buckland* v. *Papillon*, L.R., 1 Eq. 47, and 2 Ch. 67). If the above agreement had been with an ordinary individual his interest would on his death have passed to his executors or administrators; or if he had become bankrupt his trustees could have claimed it and have sold it for the benefit of his creditors. It follows that on the same supposition he could have assigned such interest in his lifetime. The Imperial Company could, in my opinion, have done the same thing; they could have assigned their interest themselves before winding-up proceedings commenced, and their liquidators could have assigned it as part of their assets afterwards. But it is necessary to look a little further and see what limit is set to the right conferred by the agreement. The Imperial Company were not entitled to an unlimited supply of chalk, but only to so much as they might want for making cement on their own piece of land. I do not think that their right to have chalk from Tolhurst's quarries could be assigned apart from their land and cement works. The Imperial Company could not by alienation or otherwise increase the burdens which Mr Tolhurst undertook to bear. But this is the only limit which I can find in the present case. Mathew, J., thought that the mere fact that the Imperial Company was a comparatively small company and that the Associated Company was much larger, and would or might want more chalk than the other, involved a material increase in the burden thrown on Mr Tolhurst. But the learned Judge apparently overlooked the fact that the Imperial Company could have increased its capital to any extent, and could have increased its cement works to any extent which the land they had bought from Mr Tolhurst could carry. The limit of the burden thrown on Mr Tolhurst is in any case measured by this consideration, and this limit can no more be passed by the Associated Company than by the Imperial Company. But then Mr Pickford in his very able argument relied on the words "as the company shall require for the whole of their manufacture of Portland cement upon their said land." By throwing a strong emphasis on the words "the company" and "their," the impression may be produced that these words, which plainly refer to the Imperial Company, were purposely used to exclude all other persons. But I cannot think that these expressions indicate any such intention. There is no question here of any personal confidence or personal skill. There is no reason whatever for supposing that any personal element entered into the minds of either of the parties to the agreement, and I cannot find anything in it to prevent the Imperial Company from assigning the benefit of it to any other company or to any individual. By so assigning it the Imperial Company would not get rid of their obligations to Mr Tolhurst; but the contract is one the benefit of which is assignable in equity quite independently of the Judicature Acts. The Judicature Act 1873, sec. 25, clause 6, has not made contracts assignable which were not assignable in equity before, but it has enabled assigns of assignable contracts to sue upon them in their own name without joining the assignor. I cannot agree with the Court of Appeal in thinking that the Associated Company could not sue Mr Tolhurst on this contract without joining the Imperial Company as co-plaintiffs. The supposed necessity of making them parties or of postponing their dissolution to enable the Associated Company to sue as their assignees has, I think, obscured the true position of the parties. I see no such necessity. But the joinder of the Imperial Company, although unnecessary, has not increased the costs and need not be further noticed. If Mr Tolhurst has any provable claim against the Imperial Company, and if he is not too late, he can prove against it, and the liquidators can, if necessary, obtain the means of paying him from the Associated Company under their indemnity. In conclusion, I will only add that the *British Waggon Company* v. *Lea* (5 Q.B. Div. 149) was, in my opinion, rightly

decided, and is an authority very much in point for the Associated Company. The contract there was held assignable, although the word assigns did not occur. The appeal fails, and the order of the Court of Appeal should be affirmed with costs, but the formal order of the Court of Appeal will, I think, be improved if amended as suggested by Lord Macnaghten.

Judgment appealed from affirmed.

Counsel for the Appellant—Pickford, K.C.—George Wallace. Agents—Sismey & Cook for Tolhurst, Lovell, & Clinch, Gravesend.

Counsel for the Respondents—Younger, K.C.—Bremner—H. E. Wright. Agents—Ashurst, Morris, Crisp, & Co.

HOUSE OF LORDS.

Friday, August 7.

(Before Lords Macnaghten, Shand, Robertson, Davey, and Lindley.)

FENTON *v.* THORLEY & COMPANY.

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

Master and Servant - Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (1)—"*Accident*"—*Injury by Accident—Rupture Caused by Strain.*

The expression "accident" in the Workmen's Compensation Act 1897 is used in the popular and ordinary sense of the word as denoting an unlooked for mishap or an untoward event which is not expected or designed.

A workman ruptured himself while attempting in the course of his employment to turn the wheel of a machine which had stuck.

Held that his injury was an "injury by accident" within the meaning of the Workmen's Compensation Act 1897, and that he was entitled to compensation.

Stewart v. *Wilsons and Clyde Coal Company, Limited*, November 14, 1902, 5 F. 120, 40 S.L.R. 80, *approved.*

In an arbitration under the Workmen's Compensation Act 1897, brought in the County Court of Surrey by Fenton, a workman, against his employers Thorley & Company, the County Court Judge held that Fenton, who had ruptured himself while attempting to turn a wheel in the course of his employment, was not entitled to compensation, no accident having occurred within the meaning of the Act.

On appeal the Court of Appeal (COLLINS, M.R., MATTHEW, and COZENS HARDY, L.JJ.) affirmed this decision.

Fenton appealed.

The facts of the case are fully stated in the opinion of Lord Macnaghten.

At delivering judgment—

LORD MACNAGHTEN—Fenton, the appellant, was a workman in the employment of the respondents, who manufacture for sale an article called "Thorley's Food for Cattle. He was employed to look after one of the machines used in preparing the food. It seems to have been a sort of combination of kettle and press. The actual operation performed by this machine takes about six or eight minutes. At the end of that time the workman in charge moves a lever, and then turns a wheel for the purpose of raising the lid and removing the contents, which come out, or ought to come out, dried and pressed into separate layers of cakes. On the 3rd December 1901 Fenton was at work at his machine. He had got through the operation on that day a good many times without hitch or difficulty, but about 9 p.m. or a little later, when the time came for opening the vessel the wheel would not turn. He then called a fellow-workman to his assistance, and the two men together set to work to move the wheel. Suddenly Fenton felt something which he describes as a "tear" in his "inside," and it was found that he was ruptured. Fenton was a man of ordinary health and strength. There was no evidence of any slip or wrench or sudden jerk. It may be taken that the injury occurred while the man was engaged in his ordinary work, and in doing or trying to do the very thing which he meant to accomplish. There is evidence that the wheel was short of one spoke or handle, which may have made it more difficult to grasp than usual, and it was discovered afterwards that there was a leak in the kettle which let moisture into the vessel below, glueing its contents together and so causing the lid to stick. I mention these circumstances merely for the purpose of putting them aside. It was indeed argued by the learned counsel for the appellant that if the mishap that befel Fenton was not of itself and apart from all other circumstances an accident within the meaning of that word as used in the Act, then these two things—the loss of a spoke in the wheel and the leak in the kettle—introduced an element of accident—a fortuitous element it was called—which would satisfy the terms of the enactment, however narrowly it may be construed. In my opinion they do not affect the question in the least. The Court of Appeal held that the injury which Fenton sustained was not "injury by accident" within the meaning of the Act. In so holding they followed an earlier decision of the Court in the case of *Hensey* v. *White* (1900), 1 Q.B. 481, which in its circumstances is not distinguishable from the present case. In *Hensey* v. *White* a passage was cited from the opinion of Lord Halsbury, L.C., in *Hamilton, Fraser, & Co.* v. *Pandorff & Co.*, 12 App. Cas. 518, in which his Lordship said—"I think the idea of something fortuitous and unexpected is involved in both words 'peril' or 'accident.'" Founding themselves upon that expression, the learned Judges of the Court of Appeal held in *Hensey* v. *White*, as they have held here, that there was no accident,