HOUSE OF LORDS.

Tuesday, July 16, 1907.

(Before the Lord Chancellor (Loreburn), Lords James of Hereford, Robertson, and Atkinson.)

KLEINWORT, SONS, & COMPANY *v.* DUNLOP RUBBER COMPANY.

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

Payment—Payment by Mistake—Right to Recover.

A. was financed by B. & Co. and C. & Co., both firms of bankers, who advanced him money on the security of goods. A. sold goods to D. & Co., and instructed them to remit the price direct to B. & Co., who had a right of security over the particular goods sold. D. & Co. by mistake remitted the price to C. & Co., who received it in good faith believing that it represented a sum due to them of a similar amount. In a previous action, reported (1905) A.C. 454), the House of Lords found D. & Co. liable to pay the sum again to B. & Co. In the present action (a jury having found in fact that what had occurred had not altered C. & Co.'s position as regarded A. for the worse), *held* that D. & Co. were entitled to recover the money from C. & Co. as being money paid under a mistake of fact.

Appeal from a judgment of the Court of Appeal (Collins, M.R., Cozens-Hardy, and Moulton, L.JJ.), delivered in February 1907, affirming a judgment of Channel, J., at the trial of the case before him with a special jury in November 1906.

The action was brought by the respondents against the appellants to recover money alleged to have been paid under a mistake of fact.

The facts are fully set out in the judgment of the Lord Chancellor.

Lord Chancellor (Loreburn) — The facts of this case are simple enough. Messrs Kleinwort, Sons, & Company, bankers, were in the habit of making advances to Kramrisch & Company upon the security of parcels of indiarubber. Sometimes they released rubber which they held as security in order that it might be sold; sometimes they advanced money wherewith to buy rubber, on the terms that when it was sold by Kramrisch & Company the proceeds of sale should be remitted direct by the purchasers to them, Kleinwort, Sons, & Company. Among others the Dunlop Rubber Company were in the habit of buying rubber from Kramrisch, and on the 16th September 1902 Kramrisch & Company directed the Dunlop Company in future to send all remittances direct to their bankers Kleinwort, Sons, & Company instead of to themselves. Kramrisch & Company were at the same time borrowing upon similar security from other bankers, namely, Messrs Brandt. On the 5th January 1903 Kramrisch sent to the Dunlop Company a quantity of indiarubber which Messrs Brandt had enabled him by advances to deliver, and directed the Dunlop Company to pay the price, £3263, 16s. 4d. to Messrs Brandt, who had an equitable mortgage upon it. The Dunlop Company agreed to remit this money to Messrs Brandt as directed, but by an oversight they did not so remit, and sent the £3263, 16s. 4d. to Messrs Kleinwort, Sons, & Company instead of to Messrs Brandt. The payment was made and received in entire good faith, the receivers believing that it represented a sum due to them of a very similar amount. But in fact it was a payment made in error. Shortly afterwards it was discovered that Kramrisch was a rogue. He was convicted of frauds in connection with this rubber business, and the facts of this payment came to light. The Dunlop Company were held liable in your Lordships' House to pay this money to Messrs Brandt (1905) A.C. 454, and now they have brought their action to recover it from Messrs Kleinwort, Sons, & Company as money paid under a mistake of fact. The only other material fact which I need mention is that when they received this money on the 20th January 1903 Messrs Kleinwort, Sons, & Company had allowed Messrs Kramrisch & Company considerably to exceed their agreed overdraft of £100,000. They placed the money so received to the credit of the account, and continued the account for some little time longer, making further advances. Your Lordships heard an interesting and learned argument as to the difference in law between the position of a principal to whom money has been paid under a mistake of fact and that of an agent in like case. The appellants contended that this sum had been paid to them as agents, and that they had accounted for it to their principals in a way equivalent to payment. The respondents asserted that in receiving this money Messrs Kleinwort, Sons, & Company were really principals, and therefore liable to repay it whether they had paid it over to others or not. In the view which I take of the case this is immaterial, for it is indisputable that if money is paid under a mistake of fact, and is redemanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid in whatever character it was received. Now, that is this case. The third finding of the jury disposes of the controversy raised at the trial on this head. Channel, J., put the question very plainly to the jury, and explained to them the contention of the appellants (which I need not examine in detail) that they would not have continued, as they did continue, to make advances to Kramrisch & Company if it had not been for this payment of £3263, 16s. 4d. by the Dunlop Company. This contention the jury refused to accept. To my mind nothing could be more disastrous to the course of justice than a practice of lightly overthrowing the finding of a jury on a question of fact. There must be some plain error of law which the Court

believes has affected the verdict, or some plain miscarriage, before it can be disturbed. I see nothing of the kind here. On the contrary, it seems to me that the jury thoroughly understood the points put to them and came to a sensible conclusion. They thought that the appellants would have acted in exactly the same way if no payment had been made by the Dunlop Company at all. That is, in my opinion, what this finding means, and there is sufficient evidence to support it. Accordingly I move your Lordships to dismiss this appeal, with costs.

LORD JAMES OF HEREFORD concurred.

LORD ATKINSON—It is admitted in this case that the course of dealing between Kramrisch & Company, Kleinwort, Sons, & Company, and William Brandt's Sons & Company, and the plaintiffs, is correctly set forth in the judgment of Lord Macnaghten in *Brandt & Company* v. *Dunlop Rubber Company* (1905) A. C. 454. The facts of the case have been fully stated by the Lord Chancellor, and I need not repeat them. Many authorities were cited to your Lordships, the decisions in which are little more than applications of the broad principle laid down by Lord Mansfield, C.J., in *Butler* v. *Harrison* (2 Cowp. 565). They seem to establish that, whatever may in fact be the true position of the defendant in an action brought to recover money paid to him under a mistake of fact, he will be liable to refund it if it be established that he dealt as a principal with the person who paid it to him. Whether he would be liable if he dealt as agent with such a person will depend upon this, whether before the mistake was discovered he had paid over the money which he received to the principal, or settled such an account with the principal as amounts to payment, or did something which so prejudiced his position that it would be inequitable to require him to refund. In *Holland* v. *Russell* (1 B. & S. 424, 4 B. & S. 14) the case is rested on the ground that the defendant who received the money was agent for a foreign principal; that the plaintiffs knew this, paid him in that capacity, and with the intention that he should pay over the money to his principal. The defendant was therefore held not to be liable. In *Newall* v. *Tomlinson* (L. Rep. 6 C. P. 405) both the plaintiff and the defendant were cotton brokers in Liverpool. Each was in fact agent for an undisclosed principal, but they dealt with each other as principals, that being customary amongst such brokers in Liverpool. It was urged that, both being brokers, each must have known that the other was acting for an undisclosed principal. The defendant, before the mistake was discovered, had made advances to and settled an account with his principal, and when the latter suspended payment a balance of £2000 was owing by him to the defendant on the footing of these transactions, yet, as the plaintiff and defendant had dealt with each other as principals, it was held that the latter was liable, the determining consideration being, not what the defendant in fact was, but the character in which he purported to deal with the person who paid him the money. That being the state of the law, Channell, J., apparently with consent of the counsel on both sides, left to the jury the two questions following, with another—(1) "Was the money paid to Kleinwort & Company as principals or as agents?" (2) "Did Kleinwort & Company receive the money as principals or as agents?" To the first question the jury answered, "It was paid as agents for Kramrisch & Company;" and to the second they answered, "As principals, and in their own right," by which answer they apparently meant to say that Kleinworth & Company took this money when they got it, and dealt with it as if they were principals. Together these findings must, I think, be taken to mean, as suggested by Moulton, L.J., that Kleinwort & Company were by the letters of the 16th September and the 18th October designated as the persons to receive payment on behalf of Kramrisch & Company, and that Kleinwort & Company received the money as equitable assignees of the plaintiff's debt, and when they received it held it on behalf of themselves as such assignees, and dealt with it in that character and by that right. Had the original purchase of the rubber, of which this cheque represented the price, been financed by Kleinwort & Company instead of by Brandt's Sons and Company, as in fact it was, and had the debt due by the plaintiffs in respect of it not been equitably assigned to Brandt's Sons & Company, as in fact it was, there might be nothing to object to these findings; but Sir Robert Finlay, on behalf of the appellants, urged that, neither of these things being so, the money being in fact the money of Brandt's Sons & Company, not of Kramrisch & Co., and the respondents having in fact no claim to it whatever, the finding of the jury on the second question is contrary to the facts, and cannot be sustained; that Kleinwort & Company may, at the time when they received the money, have been under the impression that they were equitable assignees of the plaintiff's debt, and may have dealt with the money when received in that character; but that this was in truth part of the mistake of fact under which the money was paid, and that the legal result of the receipt of and dealing with the money must depend on the true facts and not on the erroneous impressions of the receivers at the time when they received it; that the jury having found that it was paid to them as agents for Kramrisch & Company, it could in fact only have been received by them at the latter's bankers, and held by them in that right. He further contended that if this be the true position, then something has taken place between the appellants as bankers and Kramrisch & Company as customers, which is equivalent to payment over to the customer of the money received, or has prejudiced the position of the appellants to such an extent as to

render it inequitable to require them to refund, and that the jury's finding on the third question is against the evidence and the weight of evidence, and cannot be sustained. I do not think that this contention is sound—first, because the legal result of the receipt of the money, and the subsequent settlement of account, if such it was, must depend upon the character in which, and the rights by which, the parties concerned purported and intended to act. Since Kleinwort & Company believed, as apparently they did, that they were equitable assignees of this debt, entitled to receive and hold the money paid in discharge of it on their behalf and for their own use, they can, I think, only claim for any settlement of account which took place on that basis such an effect as it would have if the supposed facts were the real facts. And secondly, because I do not think that what took place between Kramrisch & Company and Kleinwort & Company, as appears from the correspondence from the 19th to the 21st January 1903, was of such a convincing character that the jury were not justified in finding, as they apparently did find in answer to the third question, that no settlement of account equivalent to payment had taken place then at all. On the second issue, covered by the third question left to the jury—namely, the issue whether Kleinwort & Company had by reason of the receipt of the amount of this cheque prejudiced their position by making further advances to Kramrisch & Company, or giving them extended credit—the jury had the evidence before them. I think that Channell, J., directed their attention to it fairly, and instructed them properly as to how they should deal with it. He said nothing which amounted to a misdirection, and though possibly the conclusion to which the jury came is not that at which one would be disposed to arrive, still I do not think that their finding can be disturbed as being against the evidence or the weight of evidence. It was quite competent for them after having heard the evidence to come to the conclusion that if this money had never been received by Kleinwort & Company at all they would have made the further advance and given further credit to Kramrisch & Company as in fact they did. I am therefore of opinion that this appeal should be dismissed, with costs.

LORD ROBERTSON took no part in the judgment.

Appeal dismissed.

Counsel for the Appellants—Sir R. Finlay, K.C.—Chaytor. Agents—Hollams, Sons, Coward, & Hawksley, Solicitors.

Counsel for the Respondents—M. Lush, K.C.—Schiller. Agents—John B. & F. Purchase, Solicitors.

PRIVY COUNCIL.

Monday, July 22, 1907.

(Present—The Right Hons. the Lord Chancellor (Loreburn), Lords Ashbourne and Macnaghten, Sir Arthur Wilson, and Sir Alfred Wills.)

COMMISSIONER OF STAMP DUTIES v. SALTING AND ANOTHER.

(ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.)

Probate Duty—Locality of Property—Business in a Colony Carried on by Person Residing in England through Agent.

The share of a deceased partner in a business is situate in the country where the business is carried on at the time of his death, and is subject to probate duty there.

Two brothers resided in England but carried on through an agent the business of graziers in New South Wales. One of them died. *Held* that his share in the property and business was liable to probate duty in New South Wales under the Stamp Duties Act of 1898 of New South Wales.

This was an appeal from a judgment of the Supreme Court of New South Wales (DARLEY, C.J. and COHEN, J., PRING, J., dissenting) allowing an appeal against an assessment made by the appellant in respect of probate duty alleged to be due on the estate of William Severin Salting deceased.

The facts appear from the judgment of their Lordships, delivered after consideration by

LORD MACNAGHTEN—The appellant in this case is the Commissioner of Stamp Duties in the State of New South Wales. The respondents are the executrix and executor of the will and codicil of William Severin Salting, who died on the 23rd June 1905. William Severin Salting and his brother the respondent George Salting both resided in England. But they were partners in equal shares, though without any written agreement of partnership, in the business of graziers and sheep farmers, carried on by their agent on a station known as Cunningham Plains, in the State of New South Wales. The assets of the partnership consisted of lands, live stock, and other property of the aggregate value of £200,086, 0s. 9d. The duties imposed upon the estates of deceased persons by the Stamp Duties Act 1898 of New South Wales, as amended by the Probate Duties (Amendment) Act 1899, are "charged and chargeable upon and in respect of all estate, whether real or personal, which belonged to any testator or intestate dying after the commencement of" the "Act." The commissioner was of opinion that the testator's interest in the partnership was a half share, and therefore of the value of £100,043, and he considered that this sum should be added to the value of the estate shown in the affidavit and inventory lodged upon the