in that case, which was one of personal service, to have put an end to it. As Fry, L.J., however, points out in his judgment, even in the case of contracts of service it by no means follows as matter of principle that all such contracts are determined when a mortgagee takes possession. It is, for example, far from clear that in the absence of a bankruptcy the mere appointment, although compulsory, of a manager to continue in the name of the mortgagor the existing management of an agricultural estate would effect such a disturbance of the owner's possession as to determine the agreements with the farm labourers employed on the property. In the case of contracts to deliver paper, such as existed in the present case, there appears to be no reason for saying that the possession of the undertaking and assets, given by the order of the Court for the express purpose of carrying on the business, put an end to these contracts. The company remained in legal existence, and so did its contracts, until put an end to otherwise.

Their Lordships think that the first repudiation which was made by the receivers and managers took place when the letter was written to the appellants on the 17th June 1907 declaring the contracts cancelled. As the result, a right arose to counterclaim against the company damages for breach, and neither the company nor its assignees could sue for the price of the paper delivered excepting subject to this counter-claim, which was in existence when the notice of assignment to the respondents was given some time later on the 30th July. It was agreed that if this view was the true one, there could be nothing due to the respondents by reason of the amount of the damage recoverable against the company exceeding the amount of the claim. Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed and the action dismissed. The respondents must pay the costs here and in the Courts below.

Appeal allowed.

Counsel for the Appellants—Buckmaster, K.C.—H. S. Preston—G. L. Smith (of the Colonial Bar). Agents—Rivington & Son, for Smith, Rae, & Grier, Toronto, Solicitors.

Counsel for the Respondents—Sir R. Finlay, K.C.—Bicknell, K.C. (of the Colonial Bar)—Geoffrey Lawrence. Agents—Blake & Redden, Solicitors.

HOUSE OF LORDS.

Friday, November 1, 1912.

(Before the Lord Chancellor (Viscount Haldane), the Earl of Halsbury, Lords Atkinson and Shaw.)

HOWLEY PARK COAL AND CANNEL COMPANY *v.* LONDON AND NORTH-WESTERN RAILWAY COMPANY.

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

Railway—Minerals—Right of Support from Adjacent Land—Railways Clauses Consolidation Act 1845 (8 *and* 9 *Vict. c.* 20), *secs.* 77 *to* 85.

The fact that a railway has acquired land under sections 77-85 of the Railways Clauses Consolidation Act 1845 does not exclude the common law right to lateral support from strata outside the forty yards or other prescribed limit mentioned in the Act.

This was an appeal from a judgment of the Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.JJ.), reported 1911, 2 Ch. 97, reversing a judgment of Eve, J., in an action brought by the respondents.

Their Lordships' judgment was delivered as follows:—

Lord Chancellor (Haldane)—The question in this appeal is purely one of law, and I find myself in such complete agreement with the judgments in the Court of Appeal that I do not feel it necessary, speaking for myself, to take time to consider further the reasons which I am going to offer to your Lordships for recommending an affirmance of the judgment.

The London and North-Western Railway Company, who are the respondents to the appeal, are owners, as part of their Yorkshire Railway, of a tunnel near Morley. The appellants are the lessees of various seams of coal, and, amongst others, of a seam known as the "Top Beeston Bed Seam," which lies near the Morley Tunnel, and the coal of it, at present in question, is situate beyond forty yards from the site of the tunnel.

The question which was raised in the action and comes before the House—the only question which remains to be determined—is whether the Railway Company were entitled to an injunction to restrain the appellants from so working their "Top Beeston Bed Seam" as to deprive the tunnel of its lateral support. Broadly put, the question is really whether as between a vendor of land to a railway company and the railway company, upon a purchase subject to clauses 77 to 85 of the Railways Clauses Consolidation Act 1845—a set of clauses which are commonly called the "Mining Code"—the railway company acquires of right a support from minerals belonging to the vendor lying under other lands outside the distance of forty yards from the railway.

The question turns upon the construction which is to be put upon the set of clauses in the Act of 1845 to which I have referred, known as the "Mining Code." These clauses were introduced for the purpose of facilitating transactions between a railway company and a landowner from whom land was acquired. They were passed to render it unnecessary for the railway company to purchase out and out the minerals which were necessary for the support of the railway. It might be some time before the taking away of these minerals would affect the support, and therefore it was thought less burdensome to the railway company that the owner of the land should be left with considerable freedom, and accordingly it was provided by section 77 that the railway company should not get the minerals unless they were expressly conveyed to them. That was the starting point of the catena of propositions in the code. In the second place it was provided that the mineral owner should be free to work, provided always that he gave a thirty days' notice to the railway company, which the railway company could meet by giving a counter-notice enabling them to stop the working by paying compensation, which might or might not amount to the whole value of the minerals.

It was decided by this House in a case which turned upon the corresponding sections, in practically identical terms, of the Scottish Railways Clauses Act, the case of *Dixon* v. *Caledonian Railway Company* (1880, 7 R. (H.L.) 116, 17 S.L.R. 102, 5 App. Cas. 820), that railway companies were free to give that counter-notice at any time, so that the effect of sections 78 and 79 is this, that the railway company is protected and the position of the landowner is easier. He may be able to work a considerable part of his minerals, and when the railway company require to stop him they have had full notice and can then give their counter-notice dealing with him at a later stage than the stage of the initial purchase of the land. That being so it was natural that the Legislature should go on to enact other clauses. Those clauses amount to this, that if the working is prevented by the railway company having given that counter-notice, then the owners of the minerals might make such ways for air, water, access, and so on, as would enable them to get the minerals without letting down the surface. If, upon the other hand, no counter-notice had been given, and the mineral owner chose to work, then he was to be at liberty to work, even to the extent of letting down the surface, so long as he worked in accordance with the ordinary customary fashion. The railway company has of course, the protection that, according to the doctrine of *Dixon* v. *Caledonian Railway Company*, they could give their counter-notice at any time, subject to this, of course, that, so far as the minerals had already been worked out, the notice could not affect the state of things which had come into existence. Now in that position of matters, with the law so ascertained, and with the statute, what is the position of a railway company which is situated as the London and North-Western Railway Company is situated in this case? It has acquired the site of the tunnel, and it has acquired the protection which the statute gives as regards what is called the prescribed limit on each side of the tunnel, that is to say, forty yards, in the absence of any variation in the Special Act. Within these limits it has protection for its support under the railway and on each side of the railway. It has not only vertical support, but it has also lateral support, and it can make this support available by putting in motion the machinery of the Mining Code. But the question in this case is as to how it stands as regards minerals outside the prescribed limits, because the minerals with which we have to deal are really outside these limits, and the question which is raised, as stated in argument, is this, whether the code is a new and exclusive code, which lays down the law for the two parties, so as to get rid altogether of any right at common law to lateral support, whether within the prescribed limits or without them. Now that depends upon the construction of the sections, and when I turn to the sections the first words which I find are the words on which reliance was placed by the counsel for the appellants. The title which introduces the succession of sections is, "And with respect to mines lying under or near the railway, be it enacted as follows." But although the word used there is "near," it is plain when you pass to section 78 that you find an interpretation of the word "near" by the prescribed distance. I do not say that it is the only meaning which could be attached to the word "near" in the title to the group of mining sections in this Act of Parliament. In *Midland Railway Company* v. *Miles* (1885, 30 Ch. Div. 634), Pearson, J., suggested that section 80, which enables ways to be made for the working of adjacent mines, related to mines outside the forty yards limit. If so, that would give a wider interpretation to the word "near." It is not necessary in this case to express any opinion as to whether Pearson, J., was right or wrong in that case. It is sufficient to point out that what he is said to have decided is very remote from anything which can assist the appellants in this case. It only shows that if he was right in the particular instance with which his Lordship was dealing there, of a way made to obtain access to a mine lying at a short distance, the mine might be outside the forty yards limit. I express no opinion upon that, because it is not necessary for the decision of the only question which we have before us, and that is, whether sections 78, 79, and the subsequent sections, so far as concerned with vertical and lateral support, relate to anything but minerals either under the railway or within the forty yards limit. For the reasons which were admirably given in the judgment of the Master of the Rolls, I think that the code, at all

events so far as support is concerned, does not relate to any minerals outside these limits. It is plain that the Legislature had in view what was to take place within these limits, and was not thinking of minerals lying beyond them.

Then it is said that, the words being what they are, there has been a decision of this House in *Great Western Railway Company* v. *Bennett* (1867, L.R., 2 H.L. 27) which is in effect a decision that the sections apply to minerals which are outside the forty yards limit, because it has been discovered apparently since the hearing of that case, from an examination of the record, that part of the land in question—a small part I think, but still some part—was outside the limits. I can only say that I cannot regard that decision as an authority for the proposition that the sections apply to land outside the limit. The question whether the sections apply beyond the limit was not one which was present to the mind of the House, so far as one can discover from an examination of the terms of the judgment or of the arguments, and I do not think that a decision of this House on a point which was not presented to it, from mere implication of general words, can be relied upon as laying down a proposition which is binding by way of authority. To the other authorities quoted I make very little reference because they are purely negative. *New Moss Colliery Company* v. *Corporation of Manchester* (1908, A.C. 117, 45 S.L.R. 981), a case which was also decided in this House, was not only decided on a different statute, but related to quite a different point, and I do not think that much reliance was placed on it in the argument, nor is it an authority for the proposition put forward. Then as to the other authorities which were mentioned, they are purely negative, and lend no support to the appellants' arguments.

When you look at the matter on principle, free as it is from authority, it stands thus: The right to lateral support is not an easement which arises out of a grant or by some implication of the intention of the predecessor in title in making the conveyance. It is a natural right of property. By the law of this country, and by the law of other countries, when a man has got land he is entitled to look to his neighbour whose land is laterally supporting the land which belongs to himself, not to use that neighbour's property in such a way as to do injury to him. There is an obligation on the neighbour, and in that sense there is a correlative right on the part of the owner of the first piece of land, but the right is what has been described as a natural right of property or incident of ownership. It is not necessary for me to enter upon the authorities for this proposition, which was one of the few, I think I may say, which were agreed upon by all, or nearly all, the learned Judges who decided the great case of *Dalton* v. *Angus* (1881, 6 App. Cas. 740). But if that be so, then in order to take away such a natural right of property you must look for something more than a conjectural intention on the part of any statute which may affect it; you would expect to find a plain indication of intention. Now from the beginning to the end of the group of sections with which we are dealing I can find no such intention. I find a clear intention to modify the rules of common law which would otherwise have regulated the right to subjacent and lateral support underneath the railway and within the prescribed limits. That was the very purpose for which the code was introduced, but with that dubious exception which was referred to by Pearson, J., in *Midland Railway Company* v. *Miles* (*ubi sup.*) I cannot find anything inside the group of sections which in any way relates to minerals outside the limit. The notice and counter-notice clauses and the compensation clause all relate to matters within the prescribed area, and I find no machinery provided which ousts the application of the common law as regards the natural right of lateral support from land lying beyond. It may be that the result of this case as bearing on modern methods of working may lead both mineral owners and railway companies to scrutinise anew their practice in making these bargains. What we have to do is to decide the question of law as submitted to us, and, speaking for myself, I cannot entertain a doubt that the judgment of the Court of Appeal was right, and that this appeal ought to be dismissed, and I move your Lordships accordingly.

EARL OF HALSBURY—I concur in the judgment which the Lord Chancellor has delivered.

LORD ATKINSON—I concur, and I have nothing to add.

LORD SHAW—Speaking for myself, in view of the importance of the question I should have liked to have had time to consider the judgments to be delivered; but, on the other hand, I do not dissent from—on the contrary I most heartily assent to—the conclusions reached by your Lordships, and for the reasons which have been stated by the Lord Chancellor. From one point of view I approach this question from a different standpoint. I have been accustomed to the jurisprudence of Scotland. With regard to that jurisprudence I may say quite frankly—and I hope that it will never be doubted—that upon this part of the law there is essentially no difference between the law relating to the rights of railway companies and coterminous owners in Scotland and in England. My view of the whole matter may be put in this proposition, that there is between the owners of coterminous properties a reciprocal right to lateral support for their respective lands, and a reciprocal duty upon the part of each owner to respect that right on the part of the other. That is not of the nature either of a servitude in Scotland or of an easement in England. The whole of this branch of the law was dealt with very fully in the judgment delivered by Lord Campbell, C.J., in *Humphries* v. *Brogden* (1850, 12 A. & E. 739)

and that learned Judge there cited a passage from Erskine bearing upon the same matter, and that passage I will respectfully cite to the House. Lord Campbell dealt with the question as one of natural right, and he dealt with a question very frequently found in Scotland of the application of that principle of natural right to the case of tenement houses in which during a long period in the history of Scotland there has been a variety of ownership in the various flats. Lord Campbell cited the principle given by Erskine (Inst. ii, 9, 11) as exactly the same as that applicable to land laterally owned. "Where a house," says Erskine, "is divided into different floors or storeys, each floor belonging to a different owner, which frequently happens in the city of Edinburgh, the property of the house cannot be said to suffer a full or complete division. The proprietor of the ground floor is bound merely by the nature and condition of his property, without any servitude, not only to bear the weight of the upper storeys, but to repair his own property that it may be capable of bearing that weight." But the whole of this part of the law, if I may without any presumption say so, is brought to a focus in the dictum of Bell in his "Principles," 965, applicable to the law of both countries, in which he quotes with high approval this clause—"A proprietor's absolute use of his land is limited by neighbourhood, so far as he is obliged to afford to his neighbour's property such support as its natural situation in relation to his requires. So far at least as the natural soil is concerned, the reciprocal right of support exists as a common law right incident to the ownership of land both in England and Scotland, the rules of law in both countries being the same, whether the support required is lateral, as in the ordinary case of adjoining superficial estates, or vertical, when the mineral strata are separated from the estate in the surface." That in terms applies to the case which is before us but for the argument which has been presented by counsel for the appellants that this natural right and the doctrine which enforces it are excluded by reason of the provisions of the Railway Clauses Act. With reference to that, I lay down the first proposition, which is, that this being a fundamental natural right it is open, of course, to show that *ex contractu*, or by reason of the statute, it has been excluded, but it must be excluded in the most express terms. A case which was very anxiously considered at the time, and has been the subject of much comment since, was the case of *Buchanan* v. *Andrew* (1873, L.R., 2 H.L. Sc. 286, 11 M. (H.L.) 13) in this House, where the House of Lords, reversing the unanimous judgment of the Scottish Court, decided that there was such a contract which excluded the right of support. In this case what have we? It appears to me, on a review of those sections, that instead of there being an exclusion of the right of support for property acquired by way of purchasing the title by the Railway Company since the date of its giving notice to treat, there is throughout these sections a marked incidence of the parliamentary mind to this effect, that there is a fundamental, or, I might put it, a pre-eminent, right of support guaranteed under the statute.

There are provisions for the purchase of the immediately subjacent minerals. There are provisions for the prevention of the working of the immediately subjacent minerals. There are provisions for the prevention of the working of minerals within an area of forty yards on either side of the line unless there be a contract to the contrary; but then there is section 80, which appears to me to be of the utmost importance and to bear directly upon the point which is before the House, because that section provides as follows—"If the working of any such mines under the railway or works, or within the above-mentioned distance therefrom"—that is to say, within the forty yards to which I have referred—"be prevented as aforesaid by reason of apprehended injury to the railway, it shall be lawful for the respective owners, lessees, and occupiers of such mines, whose mines shall extend so as to lie on both sides of the railway, to cut and make such and so many airways, headways, gateways, or water levels through the mines, measures, or strata, the working whereof shall be so prevented, as may be requisite to enable them to ventilate, drain, and work their said mines, but no such airway," &c., "shall be of" certain dimensions; and then follow these words, "nor shall the same be cut or made upon any part of the railway or works so as to injure the same or to impede the passage thereon." Then there follows section 81.

Section 81 is a provision for the connection of the working of coal measures extending on both sides of the railway, and even on both sides of the forty yards limit, and that provision for inter-communication of the workings is by statute expressly provided to be under such restrictions as not to prejudice or injure the railway. Now in the present case what has been done, or what as the result of the argument being successful might be done, would be to conduct operations in such a way as to deprive the railway of that lateral support which under the natural rights to which I have referred, under the common law, as purchasers of the ground they would have. Where is there a parliamentary bargain to that effect? On the contrary, the parliamentary bargain seems manifestly to be to the very opposite effect for the protection of the railway which is the subject of the purchase. It may be said that there are serious consequences which would follow—probably there are. I agree that one of the serious consequences at least would be this, that if the argument maintained by the appellants be correct, there would then have been granted a privilege to the owners of land coterminous with the forty yards limit to excavate their lands to an extent to which they could not have done if the lands had not been lands under parliamentary railway

rights. I do not know what is the foundation for such an argument. It appears to me to be in flat contradiction to what the statute has provided, with the best judgment of Parliament, within certain limits, namely, an arrangement for the purchase on the one hand and the protection of both parties on the other, and that there is nothing, either by express contract or by the language of the statute, to warrant your Lordships in invading the common law rights as they exist in England and Scotland to the extent sought.

Judgment appealed from affirmed and appeal dismissed with costs.

Counsel for the Appellants — Sir A. Cripps, K.C.—P. O. Lawrence, K.C.—J. Dixon—Ashworth James. Agents—Rawle, Johnstone, & Co., for Mason, Fernandes, & Greaves, Wakefield, Solicitors.

Counsel for the Respondents—Sir R. Finlay, K.C.—Ernest Page, K.C.—MacSwinney—Tweedale. Agent—C. de J. Andrewes, Solicitor.

HOUSE OF LORDS.

Monday, November 11, 1912.

(Before the Lord Chancellor (Viscount Haldane), Lords Atkinson and Moulton.)

HEILBUT, SYMONS, & COMPANY *v.* BUCKLETON.

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

Contract—Sale—Warranty—Misrepresentation.

In an action of damages for fraudulent misrepresentation and breach of warranty, the plaintiff founded on a conversation between himself and the defendants' representative. In this conversation the plaintiff said—"I understand that you are bringing out a rubber company." The reply was—"We are." The plaintiff then asked "if it was all right," and received the answer—"We are bringing it out," to which he replied —"That is good enough for me." He thereupon applied for and received an allotment of 5000 shares in the company at a premium, which subsequently fell in value. A jury having negatived fraudulent misrepresentation, but found that the company could not properly be described as a rubber company, and that the defendants had given a warranty to that effect, *held* that the intention to constitute a representation of the seller a warranty must be clearly proved, that the evidence put before the jury was insufficient to prove such intention, and should therefore not have been submitted by the judge to the jury as material on which to base a finding.

This was an appeal from a judgment of the Court of Appeal (Lord Alverstone, C.J., Vaughan Williams and Farwell, L.JJ.), affirming Lush, J.'s, judgment in a jury trial.

The *facts* are apparent from their Lordships' considered judgment, which was delivered as follows:—

Lord Chancellor (Haldane) — The appellants, who were rubber merchants in London, in the spring of 1910 underwrote a large number of shares in a company called the Filisola Rubber and Produce Estates, Limited, a company which was promoted and registered by other persons about that time. They instructed a Mr Johnston, who was the manager of their Liverpool business, to obtain applications for shares in Liverpool. Johnston, who had seen a draft prospectus in London but had then no copy of the prospectus, mentioned the company to several people in Liverpool, including a Mr Wright, who sometimes acted as broker for the respondent. On the 14th April the respondent telephoned to Johnston from Wright's office. As to what passed there is no dispute. The respondent said, "I understand that you are bringing out a rubber company." The reply was "We are." The respondent then asked whether Johnston had any prospectuses, and his reply was in the negative. The respondent then asked "if it was all right," and Johnston replied "We are bringing it out," to which the respondent rejoined "That is good enough for me." He went on to ask how many shares he could have, and to say that he would take almost any number. He explained in his evidence-in-chief that his reason for being willing to do this was that the position which the appellants occupied in the rubber trade was of such high standing that "any company which they should see fit to bring out was a sufficient warranty" to him "that it was all right in every respect." Afterwards, as the result of the conversation, a large number of shares were allotted to the respondent.

About this time the rubber boom of 1910 was at its height and the shares of the Filisola Company were, and for a short time remained, at a premium. Later on it was discovered that there was a large deficiency in the rubber trees which were said in the prospectus to exist on the Filisola estate and the shares fell in value. The respondent brought an action against the appellants for fraudulent misrepresentation, and alternatively for damages for breach of warranty that the company was a rubber company whose main object was to produce rubber.

The action was tried at Liverpool Assizes before Lush, J., and a special jury. The jury found that there was no fraudulent misrepresentation by the appellants or Johnston, but that the company could not properly be described as a rubber company, and that the appellants or Johnston or both had warranted that the company was a rubber company.

The only evidence of warranty before the jury was the conversation which I have