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THE MAKING OF RULES OF COURT.

The making of Rules of Court is generally supposed to be a somewhat formal proceeding, something like making an Act of Parliament on a small scale. In fact, Rules of Court derive their force and efficacy from Acts of Parliament by virtue of which they are made; and therefore have a statutory effect. But like many other things about which there is a halo of sanctity in the popular imagination, the making of Rules of Court would appear to be now really one of the most informal proceedings it is possible to conceive, judging by the results. Not having the entree of the judicial chambers, we are of course unable to speak with the positiveness of an eye-witness of the scene, but with a reasonably vivid imagination it is not difficult to supply the details of judicial law making.

It is well known that lawyers as a general rule, so far as their own business is concerned, are most inexact. There is the memorable instance of the Lord Chancellor who published books, pointing out to the public the necessity of depositing their wills in a place of safety, and yet, as a matter of fact, on his death his own will could nowhere be found; and its existence, and its contents had to be proved by the oral testimony of his daughter. There is also the memorable incident of another Lord Chancellor, who would never advise himself on a point of law without first transferring a guinea from one pocket to another. This attitude of mind of the legal profession is too well known to be necessary to dwell upon, but when it comes to a body of judges making Rules of Court, it is necessary to take account of it. People who do not take account of this idiosyncracy of the legal profession picture to themselves the whole body of judges seated round a table in solemn conclave, and suppose that any rule, or amendment of an existing rule, is brought up and debated with all the solemnity

attending the making of a statute. The proposed rule, according to this idea is duly printed and a copy of it is in the hands of each judge, who has carefully weighed its meaning and effect, and thoroughly satisfied himself as to whether or not it should become a law. All present desiring to be heard, having expressed their views the question is put and carried, or lost, as the case may be. If carried, the new rule is duly inscribed in the Book of Rules, according to its proper number, and is forthwith printed and distributed to all judges and officers of the Court, and published in the official Gazette.

Now this is a mere figment of the imagination, and by the actual results we know that it is really not the way Rules of Court are passed or published, and we must therefore have recourse to our imagination to supply us with a more probable conjecture as to the procedure, and one more in accordance with the actual and visible results. It may be that the way Rules of Court are really passed is somewhat as follows. After luncheon, a judge will probably say: "We haven't had any new rules lately; I am afraid we shall get credit for being asleep, why not pass a *Rule?* What shall it be about? is asked—"Well, I was talking to Smith the other day at Ottawa, and he said that he thought that Rule 900, I think it was, should be amended by adding the words: "as he shall think fit." "But there isn't any Rule 900." "Oh, he must have made a mistake, but that doesn't matter, that is a mere formality, I can look up the right number." "Well, what's your Rule?" "Oh I haven't written it out; has anybody got a scrap of paper?" After a general search of pockets, an old envelope is produced. "Oh, that will do (takes out a pencil and scrawls) "Rule —— is amended by adding the words 'as he shall think fit.'" "I can fill in the blank." The chief justice: "Is it your pleasure that this rule shall pass." Carried. "By the way brother Brown, if you happen to come across a reporter you might tell him we have passed that rule." "All right I'll do so." "By the way where is the proposed amendment to be inserted?" On which, one of the judge's says: "I move that brother Brown do take a pin and insert it between the leaves of the authorized copy of the Rules, and that the place he shall thus

strike, be the place." Carried. Brother Brown having done as directed, remarks "the place I have struck does not seem to have anything to do with the matter." Whereupon it is unanimously agreed that that is a matter of form, and really of no importance.

On his way from the lunch room, brother Brown meets a reporter, to whom he remarks: "We have just passed a Rule, if you will come to my room, I'll give you a note of it for the press." They go to the judge's room, the reporter is handed the draft Rule, and remarks that the number of the Rule to be amended is blank. He is assured that is a mere form, and of no importance. He also remarks that the Rule has no number and is assured that also is a mere form, and of no importance. In the corner of a Toronto newspaper next day the Rule is announced, and that is the last that is heard of it. It is neither printed nor distributed to anyone, and if you don't happen to have seen the paper containing the notice, well so much the worse for you.

It may be thought that the foregoing is an exaggerated and unjustifiable conjecture as to the modern procedure in passing Rules of Court, let us take a few concrete examples in the Province of Ontario.

To begin with, the Rule which regulates the sittings of the Appellate Division is to be found on page 1090 of Holmested's Jud. Act and Rules; but up to the present time this Rule has never been officially printed or published. It will be seen it is in the form of a recommendation, which is a curious form for a Rule, and it bears no number. If we turn to the Rules passed 1st December, 1912 (Holmested's Jud. Act and Rules, p. 1443,) we find also an omission to number the Rule passed on that day.

If we examine Rule 66 (2), we find it has no bearing on Rule 66 (1), and apparently should have been numbered 661. (2) If the pin method of finding a place for this Rule had been adopted, the result could not have been worse.

On 26th February, 1914, The County Court Tariff of Solicitors' fees was amended by inserting at the end thereof (p. 211, line 7) the following clause: "In the Counties of Carleton, Middlesex, Wentworth and York, where a fee (other than the counsel fee at the trial) may be increased by the judge, the clerk may allow the increase subject to an appeal to the judge, and upon any such

appeal the exercise of discretion by the clerk shall be subject to review;" and ordered the Rule to come into force forthwith. Although over a year has elapsed since the passing of this Rule, it has not yet been officially printed or published, and is apparently not known even to some of the officials of the Court, for we find it appears to have escaped the notice of even the Registrar of the High Court Division. for no mention is made of it in his recent edition of the Judicature Act and Rules. We believe at the time of its passage some note of it appeared in the Toronto daily papers. We may say that no notice of it was ever received by this Journal.

When we come to look at page 211 of the Rules, we find that the page selected is not "the Tariff of Solicitors' Fees in the County Court," but the "Tariff of Disbursements in the Supreme Court," with which the amendment has nothing whatever to do, and here again the pin method for finding a place for the proposed amendment, if resorted to, could not have produced any worse result.

Is it not about time that this slipshod method of dealing with the Rules of Court should cease?

JUDICIAL IRONY.

The judicial mind is always supposed to be calm and equable, but unfortunately being encased in a human body it is sometimes apt to be tempted to betray a passing irritation and to vent itself in ironical remarks on the failings or what it may think to be the failings of suitors, learned counsel, or even of those exalted beings whom fortune has called to a higher place in the judicial heirarchy. Take for instance the following from a recent judgment of a learned County Court Judge:—

"The almost absolute certainty of counsel in this case (as it is in fact in almost every case) that his particular view of the law is correct is somewhat shaken by a perusal of the various cases passed upon and reported in the February number of the Ontario Law Reports. I find that out of the ten cases reported

there were seven dissenting judgments, and, with all respect, in several of these cases I would agree with the conclusion arrived at by the dissenting minority Judge. I am much struck with the language of His Lordship Mr. Justice Riddell in the disposing of the case of *McMullen* v. *Wetlaufer,* 7 O.W.N. 799, where, discussing the judgment in the case of *Clements* v. *Ohrly,* he says, 'If the meaning of the language as used in *Clements* v. *Ohrly* be more than what I have narrated, and Lord Denman intended to lay down a rule of law, he should not be followed. We cannot abjure our common sense at the bidding of any person, however eminent and able, Judge or not, English or otherwise.' Now, it cannot be thought by any stretch of imagination that any Judge of a County or District Court should be allowed such freedom of exercise of common sense. The only benefit which comes to him from such cutting loose from authority is to enable him to see, as through a glass darkly, the process of reasoning by which a Judge of the Supreme Court is able to, as it were, sidestep or overlook a prior decision of even a Divisional Court. And to this extent I am assisted by the varying conclusions which have been submitted to me as authority in this case."

Or if we wish to see how cutting a Judge can be on a litigant, of whose conduct he disapproves, we may find it in the following remarks of a learned County Court Judge in a case in which the Morrisburg and Ottawa Electric Railway was plaintiff. The Court said:—

"I have gone into Mr. L.'s case at this length, not because I ever thought for one moment that he ever had the shadow of a defence in this case, but because I thought it so extraordinary that a man in Mr. L.'s position in this matter would have such a defence and counterclaim framed for him as appears on the record herein, and, not satisfied with that, should have procured the allowance of such an amendment to the record as he has procured. If it is the air of the Capital city which has produced the strength of nerve which this defendant evidently has, and if the general public could be made to believe it, the rush

to Ottawa of patients throughout the world suffering from weakened nerves would produce an influx of population which would make this electric road pay better than, in his most optimistic moments, John McFarlane ever believed that it might."

THE MINISTRY OF MUNITIONS.

The Ministry of Munitions Act which has just been passed is the third statute designed to give the Government special powers in regard to the supply of munitions of war. The first was the Defence of the Realm Consolidation Act, 1914, passed on 27th November (ante p. 115) which, by section 1 (3), empowered the Admiralty or Army Council (*a*) to require the whole output of any arms or ammunition factory to be placed at their disposal; and also (*b*) to take possession of and use any such factory. Then the Defence of the Realm (Amendment), No. 2, Act, 1915, passed on 16th March, conferred on the same authorities further powers, namely (*c*) to require the work in any factory to be done in accordance with the directions of the Admiralty or Army Council; (*d*) to regulate or restrict the work in one factory or remove the plant therefrom, with a view to increasing the production of war material in other factories; and (*e*) to take possession of unoccupied premises for the purpose of housing workmen employed in connection with war material. In a speech in Manchester on the 3rd inst., Mr. Lloyd George referred to these statutes as giving him great powers of compulsion. "Persuasion," he said, "is always best when you can afford it, but sometimes you can't—there is no time for it; and one troublesome person—I don't say that you have any in Lancashire; I have never met one yet—if you have such a person, may disarrange, dislocate and clog the whole machine. You can't wait in a war until every unreasonable man becomes reasonable, until every intractable person becomes tractable; some people you can convince quickly, some take a little longer, and some do take such a lot of persuading. With the third class

the best argument you will find will be the Defence of the Realm Act." But these statutes seem to deal only with the power of taking possession of factories, and taking over their output, and arranging the work in any particular factory or at all. In fact, the Defence of the Realm Acts, in this respect are confined in their compulsory effect to employers, and this is subject, of course, to compensation, so that it is merely a case of taking property for public purposes.

Employers, as Mr. Lloyd George pointed out, are now, under the Defence of the Realm Acts, practically subject to State control for industrial purposes, and he suggested that the same principle must be applied to labour. There must, he said, be greater subordination in labour to the direction and control of the State.—*Solicitors' Journal.*

MODERN LEGAL PEERAGES.

At the accession of Queen Victoria in 1837, Lord Cottenham held the Great Seal. He was created Earl of Cottenham in 1850, and died in 1851. The other legal peers living were the venerable Earl of Eldon, Lord Manners, Lord Plunket, Lord Lyndhurst, Lord Wynford, Lord Brougham, Lord Denman, Lord Abinger, and Lord Langdale. Lord Plunket was Lord Chancellor of Ireland, Lord Denman Chief Justice of the Queen's Bench, Lord Abinger Chief Baron, and Lord Langdale Master of the Rolls. The judicial business of the House of Lords was shared by the Lord Chancellor, Lord Lyndhurst, and Lord Brougham.

In 1841, Sir John Campbell, the Attorney-General, was sent to Ireland as Lord Chancellor and created Lord Campbell. His tenure in Ireland lasted barely six weeks. He took considerable part as a Law Lord till he became, in 1850, Chief Justice of the Queen's Bench. He attained the Woolsack in 1859, and died in 1861.

In 1850, Sir Thomas Wilde, Chief Justice of the Common Pleas, became Lord Chancellor, and was created Lord Truro.

In the same year Vice-Chancellor Rolfe became Lord Cranworth. He subsequently became Lord Justice of Appeal in Chancery, and twice Lord Chancellor.

In 1852, Sir Edward Sugden, after two Chancellorships in Ireland, became Lord Chancellor with the title of Lord St. Leonards.

In 1856, there was what now appears as a ripple on the surface, though then a constitutional crisis of the first importance, in the Wensleydale Peerage case. Sir James Parke who had long been a Baron of the Exchequer, resigned his judgeship, and it was desired to secure his services for the appellate work of the Lords. He was created by patent a baron for life as Baron Wensleydale of Wensleydale. The Lords' Committee of Priviliges held, however, that a writ of summons to the holder of such a patent gave no right to sit and vote. A fresh patent, with the ordinary limitation, was eventually conferred upon Lord Wensleydale as Baron Wensleydale of Walton: (8 St. Tri. N.S. 479). Just twenty years later Parliament passed the Appellate Jurisdiction Act, 1876, which accepted the principle of life peerages.

In 1858, Sir Frederick Thesiger became Lord Chancellor, with the title of Lord Chelmsford. In the same year, Mr. Pemberton-Leigh, who had been a member of the Judicial Committee of the Privy Council since 1843, was raised to the peerage as Lord Kingsdown.

In 1861, Sir Richard Bethell attained the Woolsack, and was created Lord Westbury. In 1866, Sir John Romilly, Master of the Rolls, was raised to the peerage as Lord Romilly.

In 1867, a Scottish lawyer was added to the House of Lords in the person of Duncan MacNeill, on his retirement from the offices of Lord Justice-General and Lord President of the Court of Session. He took the title of Lord Colonsay.

In the same year, Lord Justice Cairns was ennobled as Lord Cairns. He was subsequently twice Lord Chancellor, and was created Earl Cairns in 1878.

The Great Seal fell, in 1868, to Lord Justice Page Wood,

who was created Lord Hatherley. Sir James Plaisted Wilde, judge of the Probate and Divorce Courts, was created Lord Penzance in 1869. In 1870, Lord Chancellor O'Hagan, of Ireland, was created Lord O'Hagan.

Sir Roundell Palmer became Lord Chancellor in 1872 with the title of Lord Selborne. He was created Earl of Selborne in 1881, during his second Chancellorship.

In 1873, a peerage was conferred upon Sir John Duke Coleridge on his becoming Chief Justice of the Common Pleas, by the title of Lord Coleridge. He became Lord Chief Justice of England in 1880. His son, the present Lord Coleridge, has been, since 1907, a judge of the King's Bench Division.

Another Scottish lawyer was ennobled in 1874, when James Moncreiff, Lord Justice-Clerk, became Lord Monerieff. His son, the second Lord Monerieff, was a Lord of Session from 1888 to 1905.

The Appellate Jurisdiction Act, 1876, authorized the appointment of four Lords of Appeal in Ordinary—two immediately (sec. 6), and two more as vacancies occurred in the paid judges of the Judicial Committee (sec. 14). The two appointments made in 1876, were those of Mr. Justice Blackburn (Lord Blackburn) and Lord Advocate Gordon (Lord Gordon). The subsequent appointments are dealt with in tabular form below.

Returning to the class of hereditary peerages, Lord Justice Bramwell, shortly after his retirement from the Bench, was created Lord Bramwell in 1882, thus reverting to the style of Baron Bramwell, which he had long borne in the Exchequer. Sir Robert Collier, one of the paid Judges of the Judicial Committee, whose appointment via the Common Pleas had occasioned "the Collier scandal" in 1871, became, in 1885, Lord Monkswell. In 1885, Sir Hardinge Giffard became Lord Chancellor for the first time, with the title of Lord Halsbury. He was created Earl of Halsbury, during his third Chancellorship, in 1898, and, in his vigorous old age still participates in the legislative and judicial work of the Lords. In 1885, Sir William Baliol Brett, Master of the Rolls, became Lord Esher.

On his retirement from the Rolls in 1897, he was created Viscount Esher. In 1885, too, Lord Chancellor Gibson, of Ireland, was created Lord Ashbourne; and Sir Arthur Hobhouse, a member of the Judicial Committee, was created Lord Hobhouse. Sir Farrer Herschell attained the Woolsack in 1886, being ennobled as Lord Herschell. He held the Chancellorship for a second time before his premature death in 1899.

Mr. Justice Field, on retiring from the Bench in 1890, became a peer by the title of Lord Field. In 1892, Mr. Shand, who had sat in the Court of Session as Lord Shand, became a baron of the United Kingdom by his former judicial title.

In 1895, Sir Henry James, who had been twice Attorney-General and refused the Woolsack, became Lord James of Hereford and Chancellor of the Duchy of Lancaster. As a member of the Judicial Committee, he became qualified to sit as a Lord of Appeal. In 1897, Lord Justice Lopes was created Lord Ludlow, in view of his retirement from the Court of Appeal. In the same year, Lord Kinnear, of the Court of Session, became a baron by his judicial title. In 1899, Sir Henry Hawkins, who had recently retired, was created Lord Brampton.

In 1900, Sir Peter O'Brien, Bart., Lord Chief Justice of Ireland, was created Lord O'Brien. In the same year, Sir Richard Webster, Bart., Master of the Rolls, was created Lord Alverstone, and later appointed Lord Chief Justice of England. On his retirement in 1913, he was created Viscount Alverstone. In 1902, John Blair Balfour, Lord Justice-General and Lord President of the Court of Session, became Lord Kinross. In 1905, his successor as head of the Scottish judiciary, Andrew Graham Murray, was created Lord Dunedin. He has been, since 1913, one of the Lords of Appeal in Ordinary, and is the only holder of an hereditary peerage who has held the office. The case is provided for by sec. 6 of the Act of 1876.

Sir Francis Jeune, on retiring from the Presidency of the Probate, Divorce, and Admiralty Division in 1905, became Lord St. Helier. Sir Robert Reid, on becoming Lord Chancellor in

1905, took the title of Lord Loreburn. He was created Earl Loreburn in 1911.

Two more retiring Presidents of that division, have been ennobled—Sir John Gorell Barnes, in 1909, as Lord Gorell, and Sir John Bigham, in 1910, as Lord Mersey. An interesting new departure was made in 1910, when Sir John Henry de Villiers, the veteran Colonial lawyer who had been Chief Justice of Cape Colony since 1874, and became Chief Justice of the Supreme Court of South Africa, was created Lord de Villiers.

In 1911, Mr. Haldane, K.C., the Secretary of State for War, was created Viscount Haldane of Cloan. He was subsequently nominated a member of the Judicial Committee, and thus became qualified to sit as a Lord of Appeal. Since 1912 he has been Lord Chancellor. Among the New Year honours of 1914 were three legal peerages—Lord Reading (Sir Rufus Isaacs), the Lord Chief Justice of England; Lord Strathclyde (Alexander Ure), the Lord Justice-General and Lord President of the Court of Session; and Lord Parmoor (Sir Charles Alfred Cripps, K.C.), whose nomination as a member of the Judicial Committee qualifies him to sit as a Lord of Appeal. Later in the year the Master of the Rolls became a peer by the title of Lord Cozens-Hardy.

Finally, under the title Baron Wrenbury of Old Castle, Co. Sussex, the Lords have secured the judicial strength of one who, as Mr. Justice and Lord Justice Buckley, has been such an efficient judge in the Chancery Division and Court of Appeal. It is noticeable that on the creation of hereditary peerages, about one-third of the newly created peers have taken their surname as their title, about two-thirds taking some territorial title. In the case of life peerages created under the Act of 1876, the convention is entirely different. Only one of the nineteen life peers so created has not adopted his surname as his title. The exception is Lord Sumner of Ibstone, whose surname, Hamilton, was already the style of a dukedom, a baronage, and several courtesy titles.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

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COMPANY — SHAREHOLDERS — GENERAL MEETING — NOTICE OF MEETING—INSUFFICIENCY OF NOTICE — ACTION BY SHAREHOLDERS—PARTIES.

Baillie v. *Oriental Telephone Co.* (1915) 1 Ch. 503. This was an action by a shareholder on behalf of himself and all other shareholders of a limited company against the company and the directors to restrain the directors from acting upon certain resolutions passed at a general meeting of shareholders, on the ground that the notice of such meeting omitted to give reasonable and sufficient information as to the nature and effect of the business to be transacted at the meeting. The facts were that the directors of the defendant company were also directors of subsidiary company in which the defendant company held nearly the whole of the shares. In 1907, the directors in exercise of the powers of the defendant company in the subsidiary company obtained the passing of a resolution whereby the articles of the subsidiary company were altered so as to increase the fixed remuneration of the directors and also to give them a percentage of the profits. In 1913 the auditors of the defendant company drew attention to the fact that the receipt by the directors of remuneration in the capacity of directors of the subsidiary company ought to be sanctioned by the shareholders of the defendant company. An extraordinary general meeting of the defendant company was called with the object of passing special resolutions ratifying what had been done by the directors in 1907, and authorizing them to retain all remuneration received and to be received by them as directors of the subsidiary company, and altering the articles of the defendant company so as to authorize the directors receiving remuneration as directors of the subsidiary company, and to exercise the voting powers as they saw fit. The notice convening the meeting set out the proposed resolutions, and was accompanied by a circular, but neither the notice nor the circular gave particulars as to the amount (which was very large) of the remuneration which had been received, or would be receivable under the proposed resolutions. The resolutions were passed by the requisite majority and were subsequently confirmed. Astbury, J., who tried the action dismissed it on the technical ground that the company ought to have been

joined as plaintiffs. The Court of Appeal (Lord Cozens-Hardy, M.R., and Kennedy, and Eady, L.JJ.), however, held that the action was properly constituted; and on the merits determined that the notice of the meeting was insufficient and the resolutions were invalid and not binding on the company.

COMPANY—WINDING-UP PETITION—JUDGMENT CREDITOR—"PROCEED TO ENFORCE ANY JUDGMENT"—COURTS (EMERGENCY POWERS) ACT, 1914 (4-5 GEO. V. c. 78, s. 1)—(THE MORTGAGORS AND PURCHASERS RELIEF ACT, 5 GEO. V. c. 22, s. 1, ONT.).

In re A Company (1915) 1 Ch. 520, the Court of Appeal (Lord Cozens-Hardy, M.R., Phillimore, L.J., and Joyce, J.), held that a petition by a judgment creditor of a company for a winding up order is not a proceeding "to execution on, or otherwise to the enforcement of a judgment" within the meaning of *The Courts (Emergency Powers) Act* (4-5 Geo. V. c. 78, s. 1), see 5 Geo. V. c. 22, s. 1, Ont., and an injunction granted by Astbury, J., restraining such proceedings was dissolved.

RESTRAINT OF TRADE—MASTER AND SERVANT — AGREEMENT BY SERVANT NOT TO SOLICIT CUSTOMERS, OR ADVERTISE THAT SERVANT WAS "LATE WITH THE MASTER"—REASONABLE RESTRICTION—BREACH BY FIRM—RESPONSIBILITY OF PARTNER—DETERMINATION OF CONTRACT BY PAYMENT OF WAGES IN LIEU OF NOTICE—WRONGFUL DISMISSAL.

Konski v. *Peet* (1915) 1 Ch. 530. The plaintiff in this action claimed an injunction against the defendant who had formerly been in his employ from soliciting his customers, or advertising herself as "late with Konski" contrary to an agreement in that behalf. After she left the plaintiff's employment she had become a saleswoman in the employment of one Phillip who had also been in the employment of the plaintiff, but who had not entered into any agreement with the plaintiff not to advertise himself as "late with Konski," and he published advertisements of his firm "Phillip (Russian) from Konski." It was alleged that the defendant was a partner of Phillip and that this advertisement was a breach of her agreement. The only customer the defendant was proved to have solicited was a lady who, as the judge found, had ceased to be a customer of Konski before the defendant's employment began; and he also found

that it had not been established as a fact that the defendant was a partner of Phillip. In these circumstances Neville, J., held that the advertisement could not be taken to mean that the defendant was "late with Konski," and was therefore no breach of the agreement: also that there had been no soliciting of the plaintiff's customers proved. The defendant set up that the dismissal of the defendant from the plaintiff's employment was wrongful, notwithstanding wages had been paid her in lieu of notice, and therefore that the agreement was abandoned, but the learned judge negatived that contention. But he found that the agreement was unlimited in time and extended to all who had been or might at any time thereafter be customers of the plaintiff, and was therefore too wide, and an unreasonable restraint, and not severable, and therefore void.

LEASE—COVENANT NOT TO ASSIGN WITHOUT CONSENT OF LESSOR—REFUSAL OF CONSENT—REASONABLE CAUSE—COVENANT RUNNING WITH LAND.

Goldstein v. *Sanders* (1915) 1 Ch. 549. This was an action by a lessor to recover possession of the demised premises for breach of covenant not to assign without the consent of the lessor. It appeared that the lessee had suffered part of the demised premises to be enclosed and used with adjoining premises and it was held by Eve, J., that this was a reasonable cause for refusing to consent to an assignment of the lease, notwithstanding that the proposed assignee was a respectable and responsible person. He also held that the covenant ran with the land and bound assigns though assignees were not mentioned.

COMPANY—PROSPECTUS — MISREPRESENTATIONS — DIRECTORS—UNCORROBORATED STATEMENTS OF PROMOTERS.

Adams v. *Thrift* (1915) 1 Ch. 557. This was an action by a shareholder against the directors of a company to recover damages for misrepresentations in a prospectus, on the faith of which the plaintiff became a shareholder. The defendants it appeared had relied on the uncorroborated statements of the promoter, and had not made independent inquiry, and had suffered themselves to be put off from so doing by manifestly insufficient excuses; and it was held by Eve, J., that the existence of a reasonable ground for belief in the truth of the statements of fact made in the prospectus had not been established, and that the defendants were liable as claimed.

WILL—GIFT OF SPECIFIC PROPERTY "FREE OF LEGACY DUTY"—FRENCH MUTATION DUTY—DUTY WHETHER PAYABLE BY EXECUTORS OR LEGATEES.

In re Scott, Scott v. *Scott* (1915) 1 Ch. 592. In this case the Court of Appeal (Lord Cozens-Hardy, M.R., and Phillimore, L.J., and Joyce, J.), have affirmed the judgment of Warrington, J. (1914), 1 Ch. 847 (noted ante vol. 50, p. 435), to the effect that upon a gift of property in France "free from legacy duty" the legatee and not the testator's estate must discharge the French mutation tax to which the property is liable.

LIEN—MOTOR CAR—AGREEMENT TO KEEP MOTOR IN REPAIR AND SUPPLY CHAUFFEUR—RECEIVER.

Hatton v. *Car Maintenance Co.* (1915) 1 Ch. 621. This was an action to recover a motor car, and for the appointment of an interim receiver. The plaintiff was the owner of the car and had made an agreement with the defendants whereby they were to supply a chauffeur and keep the car in repair and provide all necessary materials therefor, the plaintiff to be at liberty to use the car whenever she wished, and to pay an agreed price for the services of the defendants and materials supplied by them. When in London the car was kept at the defendants' garage. An amount having become due to the defendants under the agreement, the defendants took possession of the car and claimed a lien on it for the amount due. On the motion for a receiver Sargant, J., held that as what the defendants did to the car did not improve it but only maintain it in its former condition they had no lien on it, and that even if the company had a lien it would be lost by the arrangement which allowed the plaintiff to take it away as she pleased; and on the trial of the action he remained of the same opinion, and gave judgment for the plaintiff with a direction to set off damages and costs of the plaintiff against the amount due under the agreement.

CRIMINAL LAW—HIGH TREASON—AIDING KING'S ENEMIES—ASSISTING GERMAN SUBJECTS TO RETURN TO GERMANY AFTER WAR DECLARED—DIRECTION TO JURY.

The King v. *Ahlers* (1915) 1 K.B. 616, in view of some recent prosecutions which have taken place in Ontario, will be found of interest. The defendant, up to the time war was declared, had been German Consul at Sunderland. The evidence

shewed that on the 5th August, 1914, after war was declared, the defendant had assisted German subjects of an age rendering them liable to military service, with money and information to enable them to return to Germany. The defendant denied that he knew war had been declared on 5th August, 1914, when he did the acts charged, and said that he thought that after a declaration of war the subjects of the belligerents were allowed a margin of time within which to return to their respective countries. The defendant was convicted, the presiding judge having charged the jury that it was no defence that the defendant believed that he was entitled to do what he had done. The Court of Criminal Appeal (Lord Reading, C.J., and Darling, Bankes, Lush, and Atkin, JJ.), however, were of the opinion that the jury should have been told that they must consider whether the acts had been done by defendant with the intention to assist the King's enemies, or whether he acted without any evil intention and in the belief that it was his duty to assist German subjects to return to Germany, in which case he was entitled to acquittal, and in the absence of such direction the conviction must be quashed.

NEGLIGENCE—DEATH OF WIFE—HUSBAND'S PECUNIARY LOSS OCCASIONED BY LOSS OF WIFE'S SERVICES—FATAL ACCIDENTS ACT (9-10 VICT. C. 9.)—FATAL ACCIDENTS ACT, 1864 (27-28 VICT. C. 95)—(R.S.O. C. 151, S. 4).

Berry v. *Humm* (1915) 1 K.B. 627, was an action brought by a husband under the Fatal Accidents Act, (see R.S.O. c. 151, s. 4) to recover damages for the death of his wife caused by the negligence of the defendants. The plaintiff was a labouring man and after his wife's death, he had to employ a housekeeper and to incur extra expenses of management by the housekeeper instead of by his deceased wife. It was contended by the defendants that the plaintiff was not entitled to recover the expense so occasioned, but his damages were limited to the money value of things lost by reason of the death of the wife, but Scrutton, J., who tried the action, held that the plaintiff was also entitled to recover for the expense occasioned to him by having to provide for the gratuitous services which had been rendered by the deceased. He distinguishes *Osborne* v. *Gillett*, L.R. 8 Ex. 88 on the ground that the Court treated the case as one of master and servant simply, and omitted to consider the fact that it was also the case of parent and child, and that while the relation of

master and servant is not covered by the Fatal Accidents Act, that of parent and child is.

NEGLIGENCE—DANGEROUS PREMISES—HOUSE LET IN SINGLE ROOMS —FLIGHT OF STEPS IN POSSESSION OF LANDLORD—DEFECTIVE RAILING AT SIDE OF STEPS—LIABILITY OF LANDLORD TO INFANT SON OF TENANT—KNOWLEDGE BY TENANT OF DEFECT IN RAILING.

Dobson v. *Horsley* (1915), 1 K.B. 634. The plaintiffs in this case were an infant and his father, the latter being tenant of the defendant of a room in a house owned by the defendant. The house was reached from the street by a flight of steps, which were in the defendant's possession. On both side of the steps was an area eight feet deep. The railing at the side of these steps was defective at the time of the letting, owing to a rail being missing. The infant plaintiff who was 3½ years of age, whilst playing on the steps fell through the aperture caused by the missing rail and was injured. The jury found that the railings were in a defective condition at the time of the letting so as to be dangerous to children. Ridley, J., who tried the action, dismissed it, on the authority of *Cavalier* v. *Pope*, 1906, A.C. 428 (see ante vol. 43, p. 90). The Court of Appeal (Buckley, Phillimore, and Pickford, L.JJ.), affirmed the decision, holding that the absence of the railing was not in the nature of a trap or concealed danger as the defect was obvious. They therefore held that *Miller* v. *Hancock* (1893) 2 Q.B. 177, (see ante vol. 29, p. 553) did not apply; they also held that the case was not governed by *Cavalier* v. *Pope*, because there the defect complained of was in the demised premises.

MASTER AND SERVANT — NEGLIGENCE OF SERVANT — OMNIBUS DRIVEN BY CONDUCTOR IN PRESENCE OF DRIVER.

Ricketts v. *Tilling* (1915) 1 K.B. 644. This was an action brought by the plaintiff to recover damages from the defendants, occasioned by the negligent driving of their motor omnibus. At the end of a journey the conductor, in the presence of the driver who was seated beside him, for the purpose of turning the omnibus in the right direction for the next journey drove it through some by-streets so negligently that it mounted the pavement and struck and injured the plaintiff. Atkin, J., who tried the action, on the authority of *Beard* v. *London General Omnibus*

Co. (1900) 2 Q.B. 530 (see *ante* vol. 37, p. 58), held that as there was no evidence that the conductor had any authority to drive the omnibus, the plaintiff could not recover and he dismissed the action. The Court of Appeal (Buckley, Phillimore, and Pickford, L.JJ.) ordered a new trial, distinguishing the case from the *Beard* case because in the present case the driver was present, and in the *Beard* case he was absent, and so far as appeared, without any negligence on his part; and the question in this case was whether the driver had properly discharged his duty in permitting the conductor to drive, or if he did permit him, then in omitting to see that he drove properly—which questions the Court held must be submitted to a jury.

CONTRACT—BREACH OF CONTRACT—DAMAGES—BREACH OF CONTRACT OCCASIONING PENAL OFFENCE—WHETHER FINE AND COSTS RECOVERABLE AS DAMAGES FOR BREACH OF CONTRACT.

Leslie v. *Reliable Advertising Co.* (1915) 1 K.B. 652, seems a rather hard case. The plaintiffs were money-lenders and as such issued circulars to the public and employed the defendants to address and send them out. By the terms of the contract with the defendants no circular was to be sent to a minor. The sending of such circulars to minors being a penal offence under the Betting and Loans (Infants) Act, 1892. In breach of their contract the defendants addressed and sent a circular to a minor and the plaintiffs were convicted and ordered to pay a fine and costs. This fine and costs and the costs they were put to in defending themselves the plaintiffs claimed to recover in this action, but Rowlatt, J., held that the plaintiffs had no right to recover against the defendants any of the damages they had been put to by breach of the criminal law, and that there is no right of indemnity in such cases; because a person convicted of a criminal offence is not entitled to the assistance of a court of justice to ease himself of the punishment by the recovery over either of the amount of the fine or costs from some other person. He therefore held that the plaintiffs were only entitled to nominal damages.

MONEY LENDER—EXCESSIVE INTEREST—HARSH AND UNCONSCIONABLE TRANSACTION—QUESTIONS OF LAW OR FACT—MONEY LENDERS ACT 1900 (63-64 VICT. c. 51), s. 1—(R.S.O. c. 175, s. 4).

Abrahams v. *Dimmock* (1915) 1 K.B. 662. The only point in this case which needs to be noted here is the fact that the Court

of Appeal (Buckley, Phillimore, and Pickford, L.JJ.) have affirmed the judgment of the Divisional Court (1914) 2 K.B. 372 (noted ante vol. 50, p. 347) to the effect that under the Money Lenders Act, 1900 (63-64 Viet. c. 51) (see R.S.O. c. 175, s. 4), the questions whether interest charged by a money lender is excessive, and whether a transaction by a money lender is harsh and unconscionable are questions for the judge and not for the jury.

CONTRACT—AGREEMENT TO BUILD STEAMSHIP—DELIVERY WITHIN SPECIFIED TIME—EXCEPTIONS—FORCE MAJEURE — INDIRECT EFFECT OF STRIKE — BREAKDOWN OF MACHINERY — BAD WEATHER.

Matsoukis v. *Priestman* (1915), 1 K.B. 681. This was an action for a penalty for breach of a contract for the building of a steamship to be delivered at a specified time. The contract contained this exception: "If the said steamer is not delivered entirely ready to the purchaser at the aforementioned time the builders hereby agree to pay for liquidated damages (a specified penalty). . . . being excepted only the cause of force majeure and for strikes of workmen of the building yard where the vessel is being built, or at the works where steel is being manufactured for the steamer, or any works of any sub-contractor." As a result of the coal strike in 1912 the works from which the defendants obtained their materials for other ships they were building got behind; the ship in turn to be built before the plaintiff's occupied the berth that was intended to be occupied by the plaintiff's much longer than otherwise she would have done and consequently the plaintiff's steamer was late in being laid down. According to the finding of the jury there was a delay on this account of seventy days. There was a further delay of five days owing to a breakdown of machinery, and of two days owing to a shipwright's strike, and delay was also caused by bad weather and absence of defendant's men attending football matches, and in attending the funeral of the shipyard manager. It was claimed by the defendants that all of these causes of delay amounted to force majeure within the meaning of the exception; but Bailhache, J., who tried the action, held that while delays due to, or consequent upon strikes, and breakdown of machinery, were within the exceptions, delays caused by football matches, bad weather, and a funeral were not, and so far as delays were occasioned by the latter

causes the defendants were liable and judgment was given against them on that basis.

PRACTICE—NEW TRIAL—FRESH EVIDENCE—VERDICT OBTAINED BY FRAUD.

Robinson v. *Smith* (1915), 1 K.B. 711. This was an action for breach of promise of marriage, which had been tried and judgment given in favour of the plaintiff. The defendant applied for a new trial on the ground that since the trial he had discovered evidence of two persons previously unknown to him, to the effect that some years before the trial the plaintiff had admitted to them that she was married to a man now living. The plaintiff filed an affidavit in answer to the motion, but did not deny making the statements, but stated that she never was married to the man or to anyone else. But it was shewn that wedding cards had been sent out and that the plaintiff had written letters speaking of the man in question as her husband. The majority of the Court of Appeal (Buckley, and Bankes, L JJ.) held that in these circumstances the defendant was entitled to a new trial, but limited to the question of the alleged marriage of the plaintiff at the time of the defendant's promise to marry her. Pickford, L.J., dissented, thinking the evidence of the alleged marriage insufficient to warrant the granting of a new trial.

CONTRACT—BUILDING CONTRACT—INTERFERENCE BY WRONGDOER WITH ACCESS TO PREMISES—DELAY AND DAMAGE CAUSED TO BUILDER—LIABILITY OF BUILDING OWNER.

Porter v. *Tottenham Urban District Council* (1915), 1 K.B. 776. In this case the Court of Appeal (Buckley, Phillimore, and Pickford, L.JJ.), have affirmed the decision of Ridley, J. (1914) 1 K.B. 663 (noted ante vol. 50, p. 265). The facts were that the plaintiff had contracted with the defendant to build a school-house on the lands of the defendants. The access to the land was through some adjoining lands of the defendants, over which a temporary roadway had to be made by the plaintiff to the street. The defendants put the plaintiff in possession of the site and enabled him to make the temporary roadway over the adjoining property, but the owner of the soil of the street alleged it was not a public highway and prohibited the plaintiff and threatened to sue him for an injunction. In consequence

the plaintiff ceased work for two months until after the defendants had sued the owner of the soil of the street and obtained a declaration that it was a public highway. The plaintiff claimed damages for the delay so occasioned but Ridley, J., dismissed his action and the Court of Appeal have held that he was right and that there was no warranty to be implied from the contract to the effect that the plaintiff should be at liberty to work on the land without interruption, and consequently defendants were under no liability to indemnify the plaintiffs against the loss caused by the wrongdoer interfering with the plaintiffs' access to the site.

BREACH OF PROMISE OF MARRIAGE—ACTION AGAINST EXECUTOR OF PROMISOR—SPECIAL DAMAGE—BUSINESS GIVEN UP IN CONSIDERATION OF PROMISE TO MARRY—ABATEMENT OF CAUSE OF ACTION—ACTIO PERSONALIS MORITUR CUM PERSONA.

Quirk v. *Thomas* (1915) 1 K.B. 798. This was an action for breach of promise of marriage brought against the executor of the promisor. The plaintiff alleged special damage occasioned by her having given up her business in consideration of the promise. The defendant contended that the maxim *actio personalis moritur cum persona* applied, and that the action would not lie; but the fact that special damage was alleged was immaterial because whether the damage was general or special there was only one cause of action, and that abated by the death of the promisor. The jury found special damage which they assessed at £350. Lush, J., who tried the action held that it was not maintainable, and dismissed it, on the ground that the cause of action was personal and did not survive, and he also held that the loss sustained by the plaintiff was not special damage flowing from the breach of the promise of marriage. The loss, in his judgment, was incurred on the faith of the two promises, that is, the mutual promise of the plaintiff and deceased, being fulfilled. The loss of business would still have been suffered even if the promise to marry had been performed.

ATTACHMENT OF DEBT—FEES PAYABLE TO PANEL DOCTOR—PUBLIC POLICY.

O'Driscoll v. *Manchester Insce. Committee* (1915) 1 K.B. 811. Under the National Insurance Acts 1911, 1913, certain doctors in a district placed on a panel for the discharge of certain duties

under the Acts, and the Insurance Committee appointed under the Acts, entered into agreements with the panel doctors of their district by which the whole amount, received for medical services from the National Insurance Commissioners, were to be pooled and distributed among the panel doctors in accordance with a certain scale. One of the panel doctors who was a defendant in the present action was entitled under this arrangement to receive a sum not yet ascertained, this sum the plaintiff as judgment creditor attached, and the question was raised whether the debt was attachable and an issue was ordered to be tried between the plaintiff and the garnishees. Rowlatt, J., who tried the issue, held that there was a debt due or accruing from the insurance committee to the judgment debtor which was attachable notwithstanding the exact amount of it had not yet been ascertained; and that there was no principle of public policy preventing the attachment of such a debt.

LANDLORD AND TENANT—NOTICE TO QUIT—VALIDITY OF NOTICE—CLAIM TO CANCEL NOTICE TO QUIT IN CERTAIN EVENT.

May v. *Borup* (1915) 1 K.B. 830. In this case the sufficiency of a notice to quit was in question. The defendants were tenants of the plaintiff under an agreement for a yearly tenancy which provided that the tenancy might be terminated by a six months' notice to be given on March 1 or September 1 in any year. On December 23, 1913, the defendant wrote to the plaintiff giving notice to quit the premises "at the earliest possible moment" and stating that if, as they hoped, a satisfactory reorganization of their business was effected, the notice would be "cancelled." The action was brought to recover rent for the month of September, 1914; the defence was that the tenancy had been terminated on 31st August, 1914—the notice above referred to being relied on. The County Court Judge who tried the action held that the notice was conditional and therefore bad and he gave judgment for the plaintiff, which, however, was reversed by the Divisional Court (Lawrence, and Sankey, JJ.), on the ground that notwithstanding the defendants claimed the right to cancel the notice in a certain event which they did not in fact possess that did not render the notice bad as being conditional, and therefore the notice was a valid termination of the tenancy at the expiration of six months from 1st March, 1914.

ALIEN ENEMY—RIGHT TO SUE—LIABILITY TO BE SUED—RIGHT TO APPEAR AND DEFEND—RIGHT OF ALIEN ENEMY TO APPEAL.

Porter v. *Freudenberg* (1915) 1 K.B. 857. In this and two other cases which are reported together, some points of interest regarding the rights of alien enemies in Courts of Justice are determined by the Court of Appeal (Lord Reading, C.J., Lord Cozens-Hardy, M.R., and Buckley, Kennedy, Eady, Phillimore, and Pickford, L.JJ.). In the first place the test whether a person is an alien enemy is held to be not his nationality, but the place in which he resides and carries on business. A person voluntarily residing in, or carrying on business in, an enemy's country is defined to be an alien enemy. In the second place it is held that an alien enemy may be sued in the King's Courts and if so sued is entitled to appear and defend himself and has also a right to appeal against any judgment given against him, and where an action is brought against an alien enemy resident in the enemy's country, but who carries on a branch business in the King's dominions by an agent, leave may be given to issue a concurrent writ and make substituted service of notice of the writ on the defendant by serving the agent.

ALIEN ENEMY—LIMITED COMPANY—SHARE CAPITAL HELD BY ALIEN ENEMIES—RIGHT TO SUE.

Continental Tyre & Rubber Co. v. *Daimler Co.* (1915) 1 K.B. 893. In this case it was held by the Court of Appeal (Lord Reading, C.J., Lord Cozens-Hardy, M.R., and Kennedy, Phillimore, and Pickford, L.JJ., Buckley, L.J., dissenting), that a limited English company, the share capital of which is owned by alien enemies is entitled to sue in the King's Courts, the Court holding that the company as a legal entity, brought into existence by Statute, was distinct from the shareholders, and that it did not change its character owing to the outbreak of war whereby the shareholders became alien enemies. The company, as the Court held, could only become enemy by being incorporated in the enemy's country, but no such incorporation had taken place. An interesting discussion of the principles involved in this case is to be found in vol. 139, L.T. Jour., p. 64.

HUSBAND AND WIFE — MARRIAGE SETTLEMENT — CHATTELS ASSIGNED TO TRUSTEES—WIFE ENTITLED TO USE OF CHATTELS —DETENTION BY HUSBAND—ACTION BY WIFE — TRUSTEES NOT JOINED—PARTIES.

Healey v. *Healey* (1915) 1 K.B. 938. The plaintiff in this

case sued the defendant, her husband, for the recovery of certain chattels, which by marriage settlement had been assigned by the defendant to trustees "upon trust to allow the same to be used by" the plaintiff. The defendant took the objection that the trustees were necessary parties, but Shearman, J., overruled the objection. To say that a cestui que trust may sue in respect of the trust estate without joining the trustee appears to be a new departure.

PRACTICE—SET-OFF OF COSTS IN SEPARATE ACTIONS—SOLICITOR'S LIEN—(ONT. RULE 666).

Reid v. *Cupper* (1915) 2 K.B. 147. In this case the Court of Appeal (Buckley, Phillimore, and Pickford, L.JJ.), hold, affirming Scrutton, J., that notwithstanding the decision of *David* v. *Rees* (1904), 2 K.B. 325, which held that under Eng. Rule 989, a set-off of costs in separate actions could not be ordered to the prejudice of the solicitor's lien, yet that the Court had, under its equitable jurisdiction prior to 1853, a discretion to make such an order. It may be remarked that the Ont. *Rule* 666 expressly prohibits such a set-off, and in view of *Rule* 2 it would not seem that this case would be of any authority in Ontario.

PRACTICE—INTERPLEADER—RIGHT OF CLAIMANT TO RELY ON TITLE OTHER THAN THAT SET UP ON APPLICATION FOR ISSUE.

Flude v. *Goldberg* (1915) 2 K.B. 157. This was an interpleader issue to try the right to goods seized in execution under a judgment against one of two partners—and which were claimed by the other partner as his property. An issue had been ordered to try this question. At the trial of the issue it appeared by the evidence that the goods were the property of the partnership and the question was whether the claimant could rely on this title, having failed to establish his separate claim. The issue was tried in the County Court and judgment given in favour of the execution creditors, but on appeal, the Divisional Court (Ridley, and Lawrence, JJ.), held that this was wrong. Ridley, J., says: "In my opinion, the fact of his having claimed under a title which he was found not to have, did not estop him from relying on a title which he was found to have as against the execution creditors who had no title at all."

CERTIORARI—CROWN OFFICE RULE—TIME LIMIT LAID DOWN BY RULE—RULE NOT BINDING ON CROWN.

In *The King* v. *Amendt* (1915) 2 K.B. 276, the Court of Ap-

peal (Lord Reading, C.J., and Eady, L.J., and Bray, J.), on appeal from a Divisional Court, decide that a Rule of the Crown office limiting the time within which a writ of certiorari may issue, is not binding on the Crown and has no application where the writ is applied for on the fiat of the Attorney-General. The time limit laid down by Ont. Rule 1285 (see Holmested's Jud. Act, p. 141), and by the Ont. Jud. Act, s. 63 (7) (*a*) would therefore appear, on the authority of this case not to apply to applications made by the Attorney-General assuming that he may, and does proceed, under those provisions.

CONTRACT—ILLEGALITY—FRAUD ON BANKRUPTCY LAWS—AGREEMENT WHEREBY CREDITOR IS TO GET PART OF TRUSTEE'S REMUNERATION.

Farmers' Mart v. *Milne* (1915) A.C. 106. This, though an appeal from a Scotch Court, nevertheless deals with a question in which Scotch and English law are similar. The plaintiffs were a firm of land agents, and they agreed with their own manager that he should undertake trusteeships in bankruptcy on the terms that his remuneration as such trustee should be pooled with the receipts of the firm for any business done by the firm for any such estate of which he should become trustee, and that the net proceeds, after deducting any debt due by such estate to the firm, should be divided in certain specific proportions between the firm and the manager. The House of Lords (Lords Dunedin, Atkinson and Shaw) held that this was an attempt on the part of the plaintiffs to eke out the dividends payable to them as creditors out of such estates by sharing in the trustees' remuneration, and that such a transaction was a fraud on the bankruptcy laws, which aimed at an equal distribution among all creditors, and was, therefore, illegal and consequently not enforceable.

LOCAL GOVERNMENT—DWELLING-HOUSE UNFIT FOR HABITATION—CLOSING ORDER—PROCEDURE—RIGHT OF OWNER TO BE ORALLY HEARD—RIGHT OF OWNER TO INSPECT INSPECTOR'S REPORT—"NATURAL JUSTICE."

Local Government Board v. *Arlidge* (1915) A.C. 120. This case, though turning on the provisions of an English statute conferring powers on local authorities to inspect and order the closing of premises found unfit for human habitation, is deserving of notice here. The Act authorised the local authority to make a closing order, and provided that an appeal might be had from such order

to the Local Government Board, and that the procedure on such an appeal shall be such as the Board may by rules determine. A closing order having been made, an appeal was had to the Board, on which the appellant claimed the right to see the report of the inspector on which the Board was proposing to act, and he also claimed he had a right to be heard orally. The rules of the Board made no provision for any such alleged rights, and they were denied, but the appellant had an opportunity to put in any statement in writing he saw fit. The Act and rules provided that the Board should not dismiss any appeal without having first held a public local inquiry. The public inquiry having been made by an Inspector, the Board acted on his report and dismissed the appeal, which dismissal, the appellant contended, was invalid (1) because it did not shew on its face by which officers of the Board the case had been decided; (2) because of the denial of inspection of the inspector's report and refusal to hear the appellant orally. The House of Lords (Lord Haldane, L.C., and Lords Shaw, Moulton and Parmoor) reversed the decision of the Court of Appeal, which had given effect to the owner's contention. The House of Lords considered that the Act conferred administrative powers on the Local Government Board, and, in the exercise of these powers, the Board was not necessarily to be governed by the procedure in Courts of justice, and that there was nothing objectionable in the way they had carried out their duties, and that the owner had no legal right either to inspect the report or to be heard orally. Their Lordships rather flout the idea that "natural justice" can have anything to do with such proceedings; indeed, one may infer that "natural justice" has in Courts of law no existence apart from legal justice.

CANADA—LEGISLATIVE AUTHORITY OF DOMINION AND PROVINCIAL PARLIAMENTS—COMPANY INCORPORATED BY DOMINION—RESTRICTION OF CORPORATE RIGHTS OF DOMINION COMPANY BY PROVINCIAL LEGISLATION—B.N.A. ACT (30-31 VICT. c. 3), ss. 91-92.

John Deere Plow Co. v. *Wharton* (1915) A.C. 330. In this case the important question presented for decision was whether a provincial legislature can validly impose restrictions on companies incorporated by Dominion authority, so as to prevent them from doing business in the province unless they are registered or licensed under the Provincial Act. Two actions were consolidated. In the one a director of a Dominion corporation,

against the corporation, sought to restrain the corporation from doing business in British Columbia until it had been licensed or registered under an Act of that province. The British Columbia Court had granted the injunction as prayed. In the other action the plaintiffs sought to recover the price of goods sold, and the defendant pleaded that the action was not maintainable because the plaintiffs (a Dominion company) was not licensed or registered under the laws of British Columbia, and in this case also the Supreme Court of British Columbia had given effect to the defence. The Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Moulton and Sumner, and Sir Charles Fitzpatrick and Sir Joshua Williams) allowed the appeal, and reversed the judgments of the Court below, their Lordships holding that, under the B.N.A. Act, s. 91, the Dominion Parliament has power to prescribe the extent and limits of the powers of the companies which it incorporates, and that such status and powers cannot be destroyed or limited by any Provincial Legislature; and a provincial Act of B.C. providing that Dominion companies must be licensed and registered under that Act was held to be *ultra vires* of the Provincial Legislature.

BY-LAW STOPPING UP LANE—POWERS OF MUNICIPAL CORPORATION—R.S.O., c. 192, s. 472.

United Buildings Corporation v. *Vancouver* (1915) A.C. 345. This was an appeal from the Court of Appeal of British Columbia. The proceedings were instituted against the City of Vancouver to quash a by-law of that city. The corporation had a statutory power to stop up lanes and also to lease land of lanes so stopped up, but, in order to grant any bonuses the by-law required the assent of the electors. In pursuance of its powers, the corporation stopped up a certain lane, and conveyed the land to a company which owned the land on either side of the lane, for a term of 25 years, at a nominal rent, upon its conveying to the corporation a piece of land over which the lane could be and was diverted. It was objected by the applicants that this transaction was in the nature of a bonus to the company, and that the by-law authorizing the lease was invalid for want of the consent of the electors; also on the ground that it was not in the public interest, but solely in the interest of the company to which the lease had been made. It appeared that the application for diverting the lane had the consent of the majority of the owners of property in the lane, although it was strongly opposed by the present appellants. Clement, J., who heard the motion, dis-

missed the application, and his judgment was affirmed by the Court of Appeal of British Columbia. The Judicial Committee of the Privy Council (Lords Moulton, Parker and Sumner), without calling on the respondents, dismissed the appeal, there being no evidence of any bad faith or improper conduct on the part of the municipality, and their Lordships being of the opinion that a transaction does not constitute the giving of a bonus "merely because steps taken in the public interest are accompanied by benefit specifically accruing to private persons," though if the only parties benefited had been the company to whom the lease was made, it might have been otherwise.

CANADA—ALBERTA RAILWAY ACT (STATUTE OF ALBERTA, 1907, c. 8), s. 82 (3)—RAILWAY ACT (R.S.C., c, 37), s. 8—B.N.A. ACT (30-31 VICT. c. 3), ss. 91, 92.

Attorney-General of Alberta v. *Attorney-General of Canada* (1915) A.C. 363. By the Railway Act of Alberta, Stat. 1907, c. 8, s. 82 (3), it is provided that a railway company authorized by that Act may, with the approval of the Lieutenant-Governor, take possession of, use or occupy the lands belonging to any other railway company, and purports to apply that provision to every railway authorized otherwise than under the legislative authority of the province, " in so far as the taking of such lands does not unreasonably interfere with the construction and operation" of the railway whose lands are taken. The question submitted for the consideration of the Judicial Committee (Lord Haldane, L.C., and Lords Moulton and Sumner and Sir Charles Fitzpatrick and Sir Joshua Williams) was whether this provision was valid so far as it purported to affect railways under Dominion control, and their Lordships held that it was not, and that it would not be *intra vires* even if the word "unreasonably" were omitted, affirming the judgment of the Supreme Court of Canada, 48 S.C.R. 9.

VENDOR AND PURCHASER—TIME FOR COMPLETION—UNNECESSARY DELAY—NOTICE MAKING TIME OF THE ESSENCE—REASONABLENESS OF NOTICE—RETURN OF DEPOSIT.

Stickney v. *Keeble* (1915), A.C. 386. This was an action by a purchaser of land to recover his deposit on the ground of failure to complete pursuant to notice. The contract did not provide that time should be of the essence of the contract. The day fixed for completion was October 11. At the date of the contract the defendants had no legal title to the land, it being

a part of an estate which the defendants had agreed to purchase as a speculation, and which they re-sold in lots to twenty-three purchasers. The defendants delayed completion of the plaintiff's contract in order to complete their title, and to procure the simultaneous execution of the conveyances to the sub-purchasers. On January 12 the plaintiff, who had repeatedly pressed for completion, gave notice to the defendants to complete in a fortnight or return the deposit. At the date of the notice the conveyance to the plaintiff awaited approval by certain mortgagees, and execution by eight parties residing in various parts of England. The Court of Appeal held that the plaintiffs had acquiesced in the delay; but the House of Lords (Lords Loreburn, Atkinson, Mersey, Parker, and Parmoor) came to a different conclusion on the facts, and held that the reasonableness of the notice must be determined by what had previously taken place between the parties, and in the circumstances of this case the notice was sufficient, and the plaintiff was therefore entitled to succeed.

FIRE INSURANCE POLICY—ARBITRATION CLAUSE—CONDITION PRECEDENT TO ACTION—REPUDIATION OF CLAIM—WAIVER.

Jureidini v. *National British & I. M. Insce. Co.* (1915) A.C. 499. This was an action to recover the amount of a fire insurance policy. The policy contained the usual arbitration clause. The defendants before action repudiated the plaintiff's claim *in toto* on the ground of fraud and arson. They now set up the arbitration clause, and the Court of Appeal gave effect to the contention and held that the action was not maintainable. The House of Lords (Lords Dunedin, Atkinson, Parker, and Parmoor), however, held that as the defendants had repudiated the claim on a ground going to the root of the contract, it precluded the defendants from setting up the arbitration clause as a bar to the action.

Reports and Notes of Cases.

Province of Alberta.

SUPREME COURT.

Scott, Stuart, and Walsh, JJ.] [21 D.L.R. 97.

YOUNG v. SMITH.

1. *Corporations and Companies—Share Subscription Obtained by Fraud or Misrepresentation.*

A representation by the seller of company shares that other shareholders had paid cash for their shares is a material representation.

2. *Contracts—Rescission — Misrepresentation — Materiality—*

The test of a material inducement on a claim to rescind a contract for misrepresentation is not whether the buyer would have acted differently if the misrepresentation had not been made, but whether he might have done so; it is sufficient to prove that in the ordinary course of events the natural and probable effect of the misrepresentation was to influence the mind of a normal representee in the manner alleged.

3. *Contracts—Rescission — Misrepresentation — Materiality—Inducement.*

Both materiality and inducement are questions of fact on a claim to rescind a contract for misrepresentation.

Young v. *McMillan*, 40 N.S.R. 52, considered.

ANNOTATION IN D.L.R. ON ABOVE CASE.

A contract to buy shares induced by misrepresentation may be rescinded at the option of the deceived party. If the purchase money has been paid to the company he may bring an action of rescission. *Re London & Staffordshire Co.*, 24 Ch.D. 149.

He must, however, act promptly upon the discovery of the misrepresentation and a short delay has been held to be sufficient to deprive him of the right to rescind. *Petrie* v. *Guelph Lumber Co.*, 11 Can. S.C.R. 450; *Re Scottish Petroleum Co.*, 23 Ch.D. 413; *Beatty* v. *Nealon*, 12 A.R. 50. And means of knowledge as distinguished from actual knowledge, may be sufficient to

debar him. *Ashley's Case*, 9 Eq. 263. He may also lose his right of rescission by conduct such as attending or voting at a meeting of the shareholders. *Sharpeley* v. *Louth*, 2 Ch.D. 664, or by attempting to dispose of his shares or executing a transfer of same. *Crawley's Case*, 4 Ch. 322, or by making a payment on account of the stock. *Shearman's Case*, 66 L,J. Ch. 25. See also *Nelles* v. *Ontario Investment Association*, 17 Ont. R. 129; Parker & Clark on Company Law, 73.

The payment of money on account of shares, the act of participating in the affairs of the company, the knowingly allowing the name to appear as a shareholder or director and the like have always been considered as important, but not conclusive evidence. Each case must depend upon and be governed by its own circumstances. *Bank of Hamilton* v. *Johnston*, 7 O.W.R. 111, and *McCallum* v. *Sun Savings Loan Co.*, 1 O.W.R. 226.

Where a shareholder in an action for calls has put in a counterclaim for rescission, he is entitled to raise all the defences in the winding up that he could have raised in such action. *Re Pakenham*, 6 O.L.R. 582.

A mis-statement of the names of the directors has been held to be a material mis-statement. *Re Scottish Petroleum Co.*, 23 Ch.D. 413. So also a statement that stock has been subscribed when in reality it has been or is to be allowed in paid-up shares to a promoter or vendor. *Arnison* v. *Smith*, 41 Ch.D. 348.

A statement of intention or words to the effect that something will be done, is not regarded as a statement of fact. *Edgington* v. *Fitzmaurice*, 29 Ch.D. 459.

Where the statement is ambiguous the applicant is entitled to put any reasonable construction on it, and the company will be bound by such construction. *Arkwright* v. *Newbold*, 17 Ch.D. 301. A statement that the company's process is a commercial success is regarded as a statement of fact and not an expression of opinion. *Stirling* v. *Passbury Grains*, 8 T.L.R. 71; *Greenwood* v. *Leather Shod Wheel Co.* (1900), 1 Ch. 421. For further cases illustrating the principles see *London and Staffordshire Ins. Co.*, 24 Ch.D. 149; *Ross* v. *Estates Investment Society*, 3 Ch. 682; *Alderson* v. *Smith*, 41 Ch.D. 348.

If the effect of a document is stated and it is also stated that it may be inspected at a certain place the subscriber is entitled to accept the statement as to the effect of the document. He is not bound to go and examine the documents for himself. *Redgrave* v. *Hurd*, 20 Ch.D. 1; *Smith* v. *Chadwick*, 9 A.C. 187.

An unfounded statement recklessly made by the company's agent in order to obtain a subscription for company shares, without any reasonable basis for his opinion, that the company would earn 30 per cent. dividends on its shares, may be relied on as a misrepresentation avoiding the subscription. *Pioneer Tractor Co. Ltd.* v. *Peebles*, 15 D.L.R. 275.

A subscriber for shares is not precluded from questioning the truth of statements contained in a company prospectus by an admission made

by him before subscribing for his shares, to the effect that he was not influenced by anything contained in the prospectus, where he afterwards gave his subscription in reliance on false statements in the prospectus and oral misrepresentations by an agent of the company. *Pioneer Tractor Co. Ltd.* v. *Peebles*, 15 D.L.R. 275; *Aaron Reefs* v. *Twiss*, [1896] A.C. 273, 280; *Edgington* v. *Fitzmaurice*, 55 L.J. Ch. 650, 653; and *Peek* v. *Derry* (1880), 37 Ch.D. 541, 584, specially referred to.

A statement in a prospectus that thousands were interested in a company, which guaranteed its financial success, when, as a fact, there were not over one hundred and twenty-five shareholders, is a false representation sufficient to invalidate a subscription for shares made in reliance thereon. *Pioneer Tractor Co. Ltd.* v. *Peebles*, 15 D.L.R. 275.

A plaintiff suing the company for rescission had learned on January 24, 1904, that material representations, upon which he had been induced to purchase shares in the defendant company on June 24, 1903, were untrue. On February 16 and on March 8, 1904, he demanded at meetings of the company a return of the purchase money. Neither demand was assented to, and on April 13 the company communicated to him a formal refusal. A suit for rescission was commenced by him on December 27, following. It was held that the suit was barred by delay, and that directors who adopted a resolution to sell shares of the company and to employ a broker for the purpose were not responsible in damages for misrepresentations in a prospectus issued by the broker, to a holder of shares who had purchased relying upon the prospectus, it having been issued by the broker as the agent of the company without their authority. *Farrell* v. *Portland Rolling Mills Co.*, 38 N.B.R. 364.

In an action by a corporation to recover the amount alleged to have been subscribed by the defendant for shares in the corporation, the defendant testified that he was induced to subscribe by the representations of the plaintiff's agent that two other named persons had each subscribed $10,000 of shares upon the condition that subscriptions for $50,000 were obtained by a certain date; that the defendant's subscription was required to make up the $50,000; and that his subscription would not be binding unless the $50,000 was fully subscribed by the date named. It was proved that neither of the named persons had subscribed or promised to subscribe for $10,000 each, either conditionally or unconditionally, that they did not do so at any time after the defendant's subscription, and that $50,000 was not subscribed on or before the date named. The defendant's testimony was not contradicted, the plaintiff's agent having died some years before the commencement of the action; and the trial Judge credited the testimony. The Court held the evidence sufficient without direct corroboration, and that in the absence of facts or circumstances of countervailing weight, should be accepted. It was also held that the plaintiff corporation was bound by the material representations of the agent, who was duly authorized to solicit subscriptions for shares, whether those representations were made in good faith and with a belief in their fulfilment or not. *Ontario Ladies College* v. *Kendry*, 10 O.L.R. 324 (C.A.).

Scott, Stuart, Beck, and Simmons, JJ.] [21 D.L.R. 321.

BRAUCHLE *v.* LLOYD.

1. *Contracts—Rescission—Grounds—Misrepresentation—Waiver.*

The right to set aside a contract for misrepresentation by the other party which was unintentional and did not amount to fraud may be waived or released by payments made thereon after the untruth of the misrepresentation had been clearly revealed.

Re Bank of Hindustan, 42 L.J. Ch. 71, applied; *Morse* v. *Royal,* 12 Ves. 373, and *Moxon* v. *Payne,* L.R. 8 Ch. 881, distinguished.

2. *Vendor and purchaser—Sale of land—Rescission of—Misrepresentation.*

An innocent misrepresentation as to the value of land on a sale thereof is not upon the same footing as a misrepresentation as to facts which cannot be matters of opinion, as a ground for repudiating the contract in the absence of fraud.

C. C. McCaul, K.C., for the plaintiff, respondent. *Frank Ford,* K.C., and *W. J. A. Mustard,* for defendants, appellants.

ANNOTATION ON ABOVE CASE IN 21 D.L.R. 329.

Rescission of an executory contract will be allowed for a material misrepresentation made by the other party, although the misrepresentation may have been made in good faith in a belief of its truth: *Eisler* v. *Canadian Fairbanks Co.,* 8 D.L.R. 390, (*Derry* v. *Peek,* 14 A.C. 337, applied).

Where the purchaser of land or other real estate had taken possession, he could not, at common law, afterwards avoid the contract and reclaim the purchase-money or his deposit, because the intermediate occupation was a part execution of the agreement, which was incapable of being rescinded. And "where a contract is to be rescinded at all, it must be rescinded *in toto,* and the parties put *in statu quo*": *Hunt* v. *Silk* (1804), 5 East 449; *Blackburn* v. *Smith* (1849), 18 L.J. Ex. 187, 2 Ex. 783. But in equity, and the equitable rule must now prevail, the mere possession of the property taken under a contract of sale, which is vitiated by fraud or other sufficient cause, does not prevent the court ordering a rescission of the sale and a reconveyance of the property upon equitable terms if the situation of the parties has not been altered in any substantial way: *Lindsay Petroleum Co.* v. *Hurd* (1874), L.R. 5 P.C. 221. And the court can give compensation for the possession had by ordering, if necessary, an account of the rents and profits taken, or the payment of an occupation rent: *King* v. *King* (1833), 1 M. & K. 442. And in the converse case where the vendor is entitled to set aside a conveyance the court will decree the land to stand as security only for what has been paid with interest: *Addison* v. *Dawson* (1711), 2 Vern. 678; *Aylesford (Earl)* v. *Morris* (1873), 42 L.J. Ch. 546, L.R. 8 Ch. 484.

Notwithstanding the fact that a vendee was induced to purchase timber lands through the vendor's misrepresentations as to the number of acres thereof, rescission of the contract of purchase will be denied the former after he had entered into a contract with the vendor under which the latter had begun to carry on lumbering operations on the land for the vendee, on the ground that, as the parties could not be placed in their original positions, both contracts must stand: *Eaton* v. *Dean*, 5 D.L.R. 604.

The defendant bought a house and lot from the plaintiff for $1,400, purchase money to be payable by instalments of $10 a month. The contract further provided that unless the amounts were punctually paid, all payments made should be forfeited and all rights of the defendant cease and determine, and the plaintiff be at liberty to re-enter. The defendant paid the first three instalments, although after paying the third he became aware of misrepresentations of the plaintiff inducing the contract. He refused to pay the fifth instalment, but continued to hold possession. The plaintiff brought this action for possession, and claimed for use and occupation since the last payment on the contract. The defendant counterclaimed for rescission and return of his money paid, and in the alternative damages for the misrepresentations. It was held that the defendant had by his conduct affirmed the contract after knowledge of the misrepresentations, and the plaintiff was entitled to judgment for possession unless the defendant should elect to pay the proper value of the property, having regard to the amount to be deducted as compensation for misrepresentations. If he declined to do this, the measure of the defendant's damages would be the amount which he had paid, less a proper occupation rent: *Webb* v. *Roberts*, 16 O.L.R. 279 (D.C.).

An executed contract induced by misrepresentation cannot be set aside unless the misrepresentation be fraudulent, but the rule does not extend to executory contracts: *Angel* v. *Jay*, [1911] 1 K.B. 666; *Abrey* v. *Victoria Printing Co.*, 2 D.L.R. 208, 3 O.W.N. 868; *Reese River Co.* v. *Smith*, L.R. 4 H.L. 64; *Adams* v. *Newbiggying*, 13 App. Cas. 308; *Angus* v. *Clifford*, [1891] 2 Ch. 449, and see *Kinsman* v. *Kinsman*, 5 D.L.R. 871, 3 O.W.N. 966, reversed on other grounds by 7 D.L.R. 31.

A communication from a person representing a real estate agent made to an owner of land from whom he was trying to get a contract of option for the purchase of his property, that there were no other property transactions going on in the neighbourhood in which this property was situated, although the person making the communication may have known that his principal had been buying other pieces of property in that neighbourhood, is not a misrepresentation *dans causam contractui* which would be ground for rescission, where the parties were dealing at arm's length and there was no duty of disclosure: *Kelly* v. *Enderton*, 9 D.L.R. 472, [1913] A.C. 191, 107 L.T. 781, affirming *Kelly* v. *Enderton*, 5 D.L.R. 613, 22 Man. L.R. 227.

An agreement for the sale of land whereby the purchaser was to take the property at "its fair actual value" to be fixed by the vendor may be rescinded, where it appears that the vendor fraudulently made the purchase price of the property several hundred dollars in excess of "its fair actual

value" the purchaser being a woman who lacked business experience and who was unable to form an opinion herself as to the real value of the property, notwithstanding that she went into possession and leased part of the land and sold another part, it appearing that she had not become aware of the fraud until the action: *Larson* v. *Rasmussen*, 10 D.L.R. 650.

A representation by the purchaser of land to the vendor that he was buying for himself and not for a third party to whom he knew the vendor would not sell, although false, is not a representation material to the contract or one resulting in any damage to the vendor as its immediate and direct consequence, so that a sale which the vendor was induced to make by such false representation cannot be rescinded on the ground of fraud: (*Bell* v. *Macklin* (1887), 15 Can. S.C.R. 576, followed). *Nicholson* v. *Peterson*, 18 Man. L.R. 166.

Although it may no longer be open to the party defrauded to avoid the agreement, he may have a remedy for the fraud by action for damages or compensation for the loss occasioned by it, provided the fraud amounts to a substantive cause of action against the party who committed it. Campbell, C.J.: *Clarke* v. *Dickson* (1858), 27 L.J.Q.B. 223, E. B. & E. 148; Blackburn, J., in *Reg.* v. *Sadlers' Co.* (1863), 32 L.J.Q.B. 337, 10 H.L.C. 404. But in such action he cannot recover any damages which might have been prevented by avoiding the contract when he had the opportunity if any, of which he did not avail himself; as the loss upon shares which he might have repudiated before they fell in value, or the deterioration of goods which he might have returned: *Ogilvie* v. *Currie* (1868), 37 L.J. Ch. 541; *Waddell* v. *Blockey* (1879), 48 L.J.Q.B. 517, 4 Q.B.D. 678. See *Arnison* v. *Smith* (1889), 41 Ch.D. 348.

Delay is not imputable against the party defrauded until he has knowledge of the fraud, or at least such means of knowledge as he was bound to avail himself of: *Browne* v. *McClintock* (1873), L.R. 6 H.L. 424; *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218. And it lies upon the party against whom the fraud is established and who charges the delay to prove the knowledge in the other party, and the time of acquiring it: *Lindsay Petroleum Co.* v. *Hurd* (1874), L.R. 5 P.C. 221; *Arnison* v. *Smith* (1889), 41 Ch.D. 348. Delay is no answer to a substantive action for damages caused by fraud, at law or in equity, except under the Statute of Limitations: *Peek* v. *Gurney* (1873), 43 L.J. Ch. 19, L.R. 6 H.L. 377.

Avoidance of the agreement involves a restitution of the parties to their original rights and property; it can be effected only upon this condition, and, therefore, only so long as such restitution is possible: *Western Bank* v. *Addie* (1867), L.R. 1 H.L. (Sc.) 145, 164; Bramwell, L.J., *Clynoweth's Case* (1880), 15 Ch.D. 13, 20. A contract voidable for fraud cannot be avoided when the other party cannot be restored to his *status quo;* for a contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded *in toto*, it cannot be rescinded at all; but the party complaining of the non-performance, or the fraud, must resort to an action for damages: *Sheffield Nickel Co.* v. *Unwin* (1877), 46 L.J.Q.B. 299, 2 Q.B. 214. Where the contract has been completely executed, there cannot be rescission for misrepresentation unless fraudulently made: *Seddon* v. *North-Eastern Salt Co.*, 74 L.J. Ch. 199, [1905] 1 Ch. 326.

The party who has once determined his election to affirm a fraudulent contract cannot afterwards avoid it upon the discovery of additional incidents of fraud; the effects of such discovery being only to corroborate the fraud which has been waived, and not to revive the right of avoidance: *Campbell* v. *Fleming* (1834), 3 L.J.K.B. 136, 1 A. & E. 40; *Law* v. *Law* (1904), 74 L.J. Ch. 169, [1905] 1 Ch. 140. But the disaffirmance of a contract in fact may be supported by any grounds of fraud subsequently discovered: *Wright's Case* (1871), 41 L.J. Ch. 1, L.R. 7 Ch. 55.

Delay in determining his election may operate presumptively in affirmance. Lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and where the lapse of time is great, it probably would in practice be treated as conclusive evidence to shew that he has so determined: *Clough* v. *L. & N.W. Ry.* (1871), 41 L.J. Ex. 17, L.R. 7 Ex. 26; *Martin* v. *Pycroft* (1852), 22 L.J. Ch. 94, 2 DeG. M. & G. 785: *Morrison* v. *Universal Insce.* (1873), 42 L.J.Ex. 415, L.R. 8 Ex. 197; *Sharpley* v. *Louth Ry.* (1876), 46 L.J. Ch. 259, 2 Ch.D. 663.

But in every case, if an argument against relief which otherwise would be just is founded upon mere delay, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are: the length of the delay and the nature of the acts done during the interval which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy: *Lindsay Petroleum Co.* v. *Hurd* (1874), L.R. 5 P.C. 221; *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218.

Non-performance for a considerable lapse of time, or under such circumstances as manifest the intention of abandoning it, may be treated as a rescission of the contract: *Davis* v. *Romford* (1860), 30 L.J. Ex. 139, 6 H. & N. 245.

Where an agreement had been made between a mortgagor and the mortgagee for the former to give up possession and release all his interest to the mortgagee, which was not acted upon, and twelve years afterwards the mortgagee sold under his power as mortgagee, it was held that the agreement had been abandoned and that the mortgagor retained equity of redemption and was entitled to the surplus of the purchase-money: *Rushbrook* v. *Lawrence* (1869), 39 L.J. Ch. 93, L.R. 5 Ch. 3. Where land had been sold in lots, subject to covenants with the vendor not to carry on the trade of a beer shop, and the vendor afterwards suffered beershops to be opened and himself supplied them with beer, he was held to have waived and rescinded the covenants over all the lots: *Kelsey* v. *Dodd* (1882), 52 L.J. Ch. 34.

If the party, upon discovering the fraud, affirms the contract by some unequivocal act, he cannot afterwards revoke his election; and as he cannot approbate and reprobate, he cannot elect to affirm the contract in part, and avoid it in other part, unless the two parts are so severable as to form independent contracts: *Clough* v. *L. & N.W. Ry.* (1871), 41 L.J. Ex. 17, L.R. Ex. 26; *United Shoe Manufacturing Co.* v. *Brunet*, 78 L.J.P.C. 101, [1909] A.C. 330, 18 Que. K.B. 511.

Where a person was induced to undertake work for another for a certain sum upon a fraudulent misrepresentation of the quantities, and, after discovering the fraud, continued and completed the work, it was held that he could claim payment only according to the contract price: *Selway* v. *Fogg* (1839), 8 L.J. Ex. 199, 5 M. & W. 83.

Where a person had been induced by fraudulent misrepresentations to take a lease of a mine and had continued to work the mine after discovery of the truth, he was held to have lost the right of disclaiming the lease: *Vigers* v. *Pike* (1842), 8 Cl. & F. 562.

Where the party defrauded, after full knowledge of the fraud, gave notice that he insisted on the performance of the contract by a certain time, otherwise he should consider it at an end on the ground of the delay, he was held to have affirmed the contract, though it was not afterwards performed within the time stated: *Macbryde* v. *Weekes* (1856), 22 Beav. 533.

Misrepresentation by the director of an incorporated company inducing a contract between him and the company gives the company the right, not merely to a future judicial rescission of the contract by a judgment of the Court, but to repudiate the contract by its own act: *Denman* v. *Clover Bar Coal Co.*, 7 D.L.R. 96, affirmed 15 D.L.R. 241.

Where the plaintiff was induced to buy shares of the capital stock of an insurance company upon its manifesting and expressing a "fixed intention, readiness and capacity" to commence its regular insurance business in a certain city on a fixed date, the existence or non-existence of that "intention" is a fact, and, if the plaintiff entered into the contract to buy and parted with the purchase price on the faith of the statements made in respect of such intention, and those statements were material, his right (if misled) to rescind the contract is the same as if he acted on and was misled by a representation of any other material fact. (*Per* Fitzpatrick, C.J.): *International Casualty Co.* v. *Thomson*, 11 D.L.R. 634, 48 Can. S.C.R. 167, affirming *Thomson* v. *International Casualty*, 7 D.L.R. 944.

Bench and Bar.

OBITUARY

Hon. Samuel Barker, K.C., M.P.

Mr. Barker who passed away on June 25th last at his residence in Hamilton was at one time as prominent in legal circles as he has since been in political and business lines.

Mr. Barker was born in Kingston on May 28, 1839. He received his earlier education at the London Grammar School, London, Ont., and in that city entered upon the study of the law with the late Henry C. R. Beecher, Q.C. On his admission to the Bar in 1861 he entered into partnership with Mr. Beecher, a connection which continued for many years. In 1872, W. P.

R. Street joined the firm which had one of the largest law practices in Western Ontario, Mr. Street subsequently being promoted to the Bench. In 1872 Mr. Barker became solicitor and counsel for the Great Western Railway Company, removing to Hamilton. His knowledge of railway matters acquired in his professional capacity made him so useful in that line that his services were sought in various railways and other business concerns. In 1900 he was elected to represent the city of Hamilton in the Dominion Parliament, and has since then been a member of the House, and has always occupied a prominent position in the councils of the Conservative party to which he was attached. A man of the highest character, of marked ability, genial and courteous, and a good friend, he will be much missed by an extensive circle.

Robert Edward Harris, of the City of Halifax, Nova Scotia, K.C., to be a Puisne Judge of the Supreme Court of Nova Scotia, vice Hon. James Johnstone Ritchie, who has been appointed Judge in Equity. (June 28.)

War Notes.

WHAT BRITAIN IS DOING FOR CIVILIZATION.

The Chicago *Daily News* contains a striking tribute to the part Great Britain has played in the war, and shews how she is bending her energies to a colossal task.

Here are some of the things Britain is doing:—

1. Holding the seas for the ships of her Allies as well as for her own.

2. Protecting the coasts of her Allies as well as her own.

3. Struggling in co-operation with the French, to smash the Turks and win the Balkans for the Allied cause.

4. Rendering great aid to French and Belgian troops in resisting the terrible onslaughts of the Germans on the Allied left wing in the West.

5. Making loans and supplying munitions to nearly all her partners in the war.

6. Pursuing a financial policy in Southeastern Europe likely to promote the cause of the nationalities.

7. Putting into the field more than ten times as many men as she ever promised.

8. Guarding her own soil and people against an invasion, which, if it came—and it is believed to be far from impossible—doubtless would be the most savage, the most unsparing, ever known. With how many men? Well, with enough. To hear some people talk, one would suppose that upon Britain were laid the duty of defending every land but her own.

Britain's wealth and sea power and military power are the one sure safeguard against the triumph of Germany's unparalleled war machine. Without Britain's help, France and Russia certainly must have been crushed. Without Britain's whole-hearted participation in the war, who will say that Italy would have ventured to challenge the mighty and merciless Germanic coalition? With Britain out of the struggle, would there have been any hope of the Balkan States daring to move?

And Britain—never forget it—was not compelled to go to the aid of France. Come what might, the most that ever Britain promised France were six divisions—120,000 men. She was not in honour bound to send a single soldier more. She could have stayed out of the war. Germany had begged her to stay out of the war. Disgraced she might have been—as Britons think, must have been—if she had left Belgium and France and European liberty to their doom.

But she could have done this. Few nations are without disgrace, without historical pages they fain would obliterate. Britain was not attacked. France and Russia were attacked. Britain might have awaited the onset—as America is awaiting the onset. Britain might have stood clear, might have husbanded her resources of men and money, might swiftly have prepared, even might have loomed over the stricken adversaries in the end and claimed the hegemony of Europe for herself.

Britain did not do so.

She threw her trident into the scale. She threw her sword into the scale. She threw her gold into the scale—and she is incalculably rich.

She threw into the balance her impressive racial record, her prestige, her unrivalled diplomatic skill. She threw—is throwing—will throw into the balance the whole puissance of her Empire.

And all for what? For the principle—the fruits of the prin-

ciple—of the liberty of the individual against the despotism of the State.

Britain, one can believe, may be the author of some acts of which she is not proud—may have done some things to cause her, looking back upon them with full light, to wish they had never been done. But in this war this old and proud democracy is unfolding, applying, a material strength and a moral splendor that for countless ages after this conflict is stilled will be shining undimmed amid the first glories of history.

Flotsam and Jetsam.

THE PRESS AND THE PUBLIC.—It must now be taken to be the law that any agreement by a newspaper not to publish any comment upon individuals or companies is invalid, and such a contract will not be countenanced in a court of law. This is the decision of the Court of Appeal in *Neville* v. *Dominion of Canada News Company* (*post*, p. 229), upholding the decision of Mr. Justice Atkin, who held such an agreement contrary to public policy. Lord Cozens-Hardy's principal ground for holding that such an arrangement was invalid was that such a covenant was in restraint of trade, but he certainly made it clear that, in his opinion, it would also be against public policy. Both Lord Justice Pickford and Lord Justice Warrington based their judgments on the ground of public policy. No one will regret this decision, for agreements for consideration by a newspaper to sell its right of free and unrestricted comment on matters of public concern are reprehensible in the highest degree. It is difficult, however, to see the true distinction, quite apart from questions of conspiracy, between a newspaper selling its right to comment upon particular individuals and a tradesman refusing to sell to particular customers, so far as questions of restraint of trade are concerned. As to the point of public policy, the case seems an extension of that "unruly horse," in order to cover a case where no illegality is alleged or proved.—*Law Times*.