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MODUS ET CONVENTIO VINCUNT LEGEM.

It is proper at the outset to endeavour to understand the exact meaning of this important maxim of the law.

Taken in the strictest sense of the words used, when translated into English, it expresses a proposition essentially different from that which it is intended to affirm. The student of English law would make a very serious mistake if he accepted its meaning as that stated by Broom in the ninth chapter of his *Selection of Legal Maxims*, viz., that "the form of agreement and the convention of the parties overrule the law"(*a*). Still less does it establish the possibly more alarming rule evolved from its literality by Coke (2 Inst. 73) *i.e.*, "Custom and agreement overrule law"(*b*), although the honours of translation may fairly be divided between the two commentators.

A more correct rendering of the principle which the maxim seeks to embody is given by Ulpian: "Contractus legem ex conventione accipiunt(*c*). But, taking the maxim as couched in its familiar phraseology, it is quite obvious that a great deal of difficulty would be avoided if the word 'vincunt' were translated 'secure' or 'establish,' as it properly may. In no sense is it true that citizens may overrule the law of the State by their private agreements,—"Privatorum conventio juri publico non derogat"(*d*). But it is possible for the parties to a contract to *secure*, under certain restrictions, legal relations between each other which are unique and peculiar,—in other words, they *establish* a 'conventional law' for themselves.

(*a*) Dr. Broom's own excursus on the maxim shews this definition to be misleading.

(*b*) On the contrary, custom may make the law but not *overrule* it.

(*c*) Dig. xvi., 3, fr. 1, § 6, and see Puffendorf, De Jure, etc., v., c. x., § 5, n. 1.

(*d*) Dig. 59, 17, 45.

The restrictions or limitations upon their contractual freedom in this behalf may be generally stated to be, first: That the parties cannot agree to anything in violation of any express law; and, secondly: That the interests of the public, or of third persons, must not be prejudiced by the execution of the contract.

Then, the meaning by the maxim may not be more broadly stated than this, viz.: That where no rule of law, or principle of public policy or matter of private right is invaded, the parties to a contract may thereby make a law for themselves(*e*).

It is difficult to say just when the maxim under consideration came into use in its exact current phraseology; but its principle can be traced back clearly enough to the Corpus Juris. In the *Digest* we have Ulpian's dictum: "Contractus legem ex conventione accipiunt"—which simply means that what the parties have agreed to is the law of their contract. But by reference to Lib. II., Tit. XIV., 28, we find that this freedom of contract is restricted in these words: "Contra juris civilis regulas pacta conventa rata non habentur." Again, in Lib. L. Tit. XVII., 45, we meet with much the same sort of a limitation, purporting to be derived from Ulpian's Ad Edictum, viz.: "Privatorum conventio juri publico non derogat."

In the *Codex*, 2, 3, 6, contractual freedom is restricted in this wise: "Pacta quae contra leges constitutionesque, vel contra bonos mores fiunt, nullam vim habere, indubitati juris est"(*f*).

The principle was also crystallized into a regula of the Canon Law. In a work entitled: Les Regles du Droit Canon(*g*), we find the following rule: "Contractus ex conventione legem accipere dignoscuntur." Dantoine thus freely translates the rule into French: "On doit juger de la qualité d'un contract par les conventions qu'il contient, et qui sont autant de loix entre les parties."

(*e*) See *Knettle* v. *Newcomb*, 22 N.Y., at p. 252.

(*f*) And see Codex 2, 3, 29.

(*g*) By J. B. Dantoine, LL.D., published at Lyons in 1720, p. 465.

In the course of his commentary on this principle in the law of contract, Dantoine says: (p. 465): "C'est d'Ulpien que l'on a tiré cette Règle. Ce jurisconsulte s'en explique précisément en ces termes: "Contractus ex conventione legem accipiunt." (Leg. I. s. 6ff. de positi vel contra). Et il dit ailleurs que l'on doit exécuter fidèlement tout ce qui est arrêté entre les parties dans un contract, parce que toutes les conventions qui le composent sont autant de loix entre ceux qui contractent. "Hoc servabitur quod initio convenit, legem enim contractus didit" (Leg. 23 ff. de regul. jur.). At p. 467, he continues: "Mais nulle convention ne peut devenir une loy entre les parties qu'autant qu'elle est conforme à la justice et à la raison. C'est pourquoy tout ce qui est contraire aux bonnes moeurs, tout ce qui contient quelque turpitude, enfin tout ce qui est impossible de fait ou de droit, tout cela demeure inutile et sans effet. "Omnis conventio de re turpi et contra bonos mores facta, vel impossibilis de jure aut facto, reprobatur et nullius est momenti. "Et pour me servir de l'expression des Empereurs Sévère et Antonin—"Pactaque contra leges, constitutiones, vel contra bonos mores fiunt, nullam vim habere imdubitati juris est." Ainsi tout pacte est nul non seulement lorsque l'on a stipulé une chose illicite, mais encore quand il donne occasion au mal. Comme si l'on étoit convenu entre associez que l'on ne seroit nullement responsable de la perte des fonds et des effets de quelque cause qu'elle pût provenir: Si une pareille clause étoit valable, elle donneroit lieu à celuy qui seroit mal intentionné de pratiquer le dol et la fraude pour s'enrichir aux dépends de la société, ce que l'on ne doit point permettre." Most of which, it is hardly necessary to point out, entirely harmonizes with the modern English law of Contract. Our law, however, does not admit of a person escaping from the obligations of his contract by simply demonstrating, by means of a syllogism, that what he has engaged to do is unreasonable.

We have not been able to trace the maxim in its present terms to an earlier source than Fleta(*h*). In the ninth chapter of the

(*h*) Circa 1290. See a critical arraignment of the value of this work in Pollock & Maitland's Hist. Eng. Law, Vol. I, p. 188.

third book of this ancient commentary, entitled De Donatione Conditionali, there is the following embodiment of the maxim: "Modus enim legem dat donationi, et tenendus est etiam contra jus commune, quia modus et conventio vincunt legem," etc. This passage is inaccurately quoted in Coke's Littleton, vol. I., at p. 19a.

Fleta, a thing of shreds and patches from the garret of mediæval law, is practically of contemporaneous date with Bracton's De Legibus, etc., Angliae. Certainly not more than fifty years intervened between the appearance of the two books in the thirteenth century, no long interval in the formative period of a national jurisprudence. But Bracton, as will be seen in the passage below, does not state the maxim in its strait modern dress as Fleta does; nor indeed does he approach this dress so nearly as the Leges Henrici Primi, or Glanvill's Tractatus—both earlier works. In the former (c. 49) we read: "Pactum enim legem vincit"; and in the latter (ix. c., xiv.): "Conventio legem vincit."

Bracton(*j*) says: "Item quia conventiones, conditiones et pacta et modi diversi donationum incidunt in donationibus, si incontinenti apponantur legem dant donationi et donationem infirmant et, dant exceptionem donatori et ligant personas contrahentium et obligant ipsam rem datam, et transeunt cum ipsa re de persona in personam." Sir Travers Twiss, in his edition of Bracton (vol. I., p. 129), translates this passage as follows: "Likewise, because conventions, conditions, and pacts, and different modes of donations are incident to donations, if they are forthwith applied, they impose a law upon the donation, and they invalidate the donation and raise an exception to the donor, and bind the persons who contract, and oblige the thing itself given, and pass with the thing itself from person to person."

Treating of the old law of covenants, in Chap. VII., p. 164, of Sheppard's Touchstone, the author lays down this proposition: "If a lessor covenant with his lessee that he shall and may have houseboot, hayboot, plowboot, etc., by the assignment of the bailiff of the lessor: this is a good covenant: and yet it seems

(*j*) De Legibus et Consuetudinibus Angliae, Bk. II., c. V.

it doth not restrain the power that the lessee hath by the law to take these things without assignment. But if the lessee do covenant that he will not cut any timber, or fuel, without the leave, or without the assignment of the lessor, this is a good covenant and doth restrain him; for in this and such like cases the rule is Modus et conventio vincunt legem". The Touchstone was, however, written somewhere about the beginning of the reign of Charles I.; and so Coke's reference to the maxim in 2 Reports 73 b. is almost contemporaneous. The passage last referred to is as follows: "It is commonly said modus et conventio vincunt legem; and the covenant and agreement of the parties hath power to raise an use, etc."

In *Butt's case*(*k*), Sir Edward Coke applies the Civil Law limitation upon the freedom of contract, before mentioned, to the Common Law in this wise: "Pacta privata non derogant juri communi."

These appear to be the only authorities which throw any light upon the origin and meaning of the maxim in English law; and they establish that it is nothing more than a principle of the Roman law in an altered and more uncouth dress. In the case of this and many other maxims stolen from the Justinian treasure-house by the builders of English law, the syntactical disguise used by the plunderers has only resulted in obscuring the meaning of the principle as it stood in the original.

CHARLES MORSE.

(*k*) 7 Co. 23b.

THE CROWN AS A TRUSTEE.

In the recent case of *Henry* v. *The King*, 9 Ex. C.R. 417, Burbidge, J., in the Exchequer Court, had to consider the question of the enforcement of a trust against the Crown. The petition filed by the suppliants, representing the Mississaugas of the Credit, a band of Indians residing on their reserve in the counties of Brant and Haldimand, sought to obtain a declaration that a sum amounting to over twenty-nine thousand dollars, deducted by the Department of Indian Affairs from certain capital funds held in trust for the Indians, be repaid or restored to such funds. It is not our purpose to discuss the merits of the case here, but we append the following extracts from the learned judge's reasons because they appear to us to be an adequate statement of the Crown's position both as regards this particular trust and trusts in general. We quote from p. 440:—

"It does not follow that because the Crown is a trustee for the Indians in respect of such lands or moneys, that the Court has jurisdiction to enforce the trust, or to make any declaration as to the rights of the parties. That authority, if it exist, must be found in the statutes which give the Court jurisdiction. There are a number of authorities and cases in which the question as to whether the Crown may be a trustee has been considered, and there has been some difference of opinion on the subject. But the real question in any such case is not, it seems to me, whether the Crown may or may not, be a trustee, but whether the Court has any jurisdiction in respect of the execution of the trust. Where the jurisdiction to grant the relief sought is expressly given by statute no difficulty arises in respect of either question."

At p. 443 he further says:—

"The Crown does not in respect of Indian lands and moneys stand in the position of an ordinary trustee. In the first place the Crown does not personally execute the trust. Its administration thereof is vested in a department of Government, over which a Minister of the Crown responsible to Parliament presides. That has been the position of Indian affairs since the year 1860,

when by virtue of the Act 23 Vict. c. 151, s. 1, the Commissioner of Crown Lands became the Chief Superintendent of Indian Affairs. After the Union, the Secretary of State was Superintendent-General of Indian Affairs from 1868 to 1873, and since the latter year the office has been held by the Minister of the Interior. Subject to the terms and conditions of the several agreements or treaties with the Indians, or of the surrenders from them, and to the provisions of the statutes from time to time in force respecting Indians and Indian Lands, the Superintendent-General of Indian Affairs has, under the Governor-in-Council, the management and control of Indian lands, property and funds.

"For the manner in which the affairs of the Indians are administered the Government of the Dominion and the Superintendent-General are at all times responsible to Parliament; and whenever in respect of such matters any power, authority or discretion is vested in and exercised by the Governor-in-Council, or in the Superintendent-General of Indian Affairs, Parliament alone has the authority to review the decision come to or the action taken. In all such cases the Court has no jurisdiction. Then there is this further difference between the Crown as a trustee and an ordinary trustee; the Crown is not bound by estoppels; and no laches can be imputed to it; neither is there any reason why it should suffer from the negligence of its officers. In short it adds nothing to the argument to state that the Crown is a trustee. Where it is a trustee the Court has no jurisdiction to impose any obligation upon it, or to declare that any such obligation exists, unless the statute gives jurisdiction, and where the statute gives jurisdiction it is immaterial whether in the particular case the Crown is held to be a trustee or not."

RE-MARRIAGE OF DIVORCED PERSONS.

The canon on the re-marriage of divorced persons recently passed by the General Synod of the Church of England in Canada is one that has attracted considerable attention at home and abroad. The Bishop of Albany has spoken of it with unqualified approval, and has expressed regret that the principle it affirms is not the law of his own diocese. There are, of course, many Anglicans opposed to the canon; and possibly the great majority of Protestants view it with disfavour. To put it shortly the canon explicitly forbids any clergyman of the church to re-marry either party to a marriage dissolved by the civil Courts so long as the other party to such marriage is living. This is an inhibition of a very drastic nature when we consider the debatable moral ground upon which it is imposed; but there is no doubt that it has been the law of the Church of England since the time of Elizabeth at least. Canon CVII. of 1603, while recognizing the validity of divorces a mensâ et thoro by the ecclesiastical Courts, directed that sentence or decree in such cases should contain the following caution:

"That the parties so separated shall live chastely and continently; neither shall they during each other's life contract matrimony with any other person." So that the canon of the Synod of the Canadian church is merely declaratory of the old common law of the church.

Whatever may be said of the moral warrant for the re-marriage of divorced persons, it is certain that anything tending to the indissolubility of marriage in the present state of society is to be welcomed at least by the lover of his country. It has been well said that the State is founded upon the hearthstone; and the hearthstone we all know is itself founded upon the marital union of man and woman. Cardinal Manning once said, "That which makes a people is domestic life. The loss of it degrades a people to a horde." More than this, history teaches us that when laxity of the marriage tie lays hold upon a people it is one of the certain signs of national decay. Divorce was unknown in Rome down to the time of the second Punic War. In the time of Augustus marriage was a custom more honoured in the breach than in the observance.

CONTRACTS FOR DISPLAY ADVERTISEMENTS ON BUILDINGS AND OTHER STRUCTURES.

This is the age of advertising. The above title indicates one of the multitudinous modern modes. It has, of course, to come before the Courts like everything else, from "pitch and toss to manslaughter." A writer in the *Central Law Journal* thus discusses it:—

1. *Nature of Such Contracts.*—I recently had occasion to investigate this question, and I was surprised at the result of my investigation, and believe that there are others who, never having examined the question, will find this article interesting and instructive; and it may be the means of relieving some of erroneous opinions as to what the law is on this question. This class of contracts is becoming more prevalent each year, consequently the attorneys and the Courts will be called upon more frequently to consider the question. I classify the subject generally under the head of contracts for want of a better classification under the present state of the decisions on the question. I was of the opinion that such contracts were mere leases, and was proceeding on that theory; but, to my surprise, I found that the higher Courts have unanimously decided that such contracts are not leases and possess none of the characteristics of leases (*a*), but

(*a*) *Wilson* v. *Tavener*, L.R. (1901), c. 578; *Reynolds* v. *Van Beuren*, 155 N.Y. 120; *Goldman* v. *New York Advertising Co.* (N.Y.), 29 Misc. Rep. 133; *Lowell* v. *Strahan*, 145 Mass. 1; *R. J. Gunning* v. *Cusack*, 50 Ill. App. 290. In *Wilson* v. *Tavener*, *L.R.* (1901), c. 578, by the terms of a written agreement, the owner of buildings agreed to allow another to erect a boarding upon the forecourt of a building, and to use the gable wall of a building for bill-posting purposes, at a stipulated sum payable quarterly, and the court held that this was not a lease from year to year; but that it was a mere license which could be revoked on reasonable notice, and that a quarter's notice which terminated at the end of the current year was a reasonable notice. In the opinion the court said that the written agreement "did not confer on the plaintiff any right to the exclusive possession of any property or building of the defendant, and therefore I think there was no demise or lease, and that the relation of landlord and tenant was never created between them. The effect of the documents, in my opinion, was to give the plaintiff a license which was always revocable at any time, subject to the terms of the express contract."

that the right acquired by such a contract is a mere license(*b*). In other cases it is spoken of as an easement; the Court in one case saying, "both parties have argued this case upon the theory that the papers signed by Schilling were leases, and that the use of the wall under them was possession. That is a mistake. The right to use the wall "was a burden or servitude in the nature of an easement,' carrying with it the right to such access as might be necessary to make the burden of value"(*c*). And other cases hold that such a contract amounts to a simple contract or bargain for the right to place a sign upon the wall for a compensation, and is not a lease(*d*). Consequently a failure of the advertiser to erase the sign after the termination of the contract does not render him liable as a tenant holding over(*e*). Nor are the advertisers liable for injuries to third persons from the falling of a bill board used, but not erected by the advertisers, on the building

(*b*) *Lowell* v. *Strahan*, 145 Mass. 1; *Reynolds* v. *Van Beuren*, 155 N.Y. 120. In the latter case the defendants acquired from the tenants of a building the right to use a bill board erected upon the roof of the demised premises for a stipulated compensation, and in the course of the opinion the court said: "It is apparent, therefore, that the defendant's liability must be sustained, if at all, upon what must be conceded to be a very close and doubtful construction of a written license granted to them by the tenant in possession to use the sign for a limited time for a specified purpose."

(*c*) *R. J. Gunning Co.* v. *Cusack*, 50 Ill. App. 290. See also *Willoughby* v. *Lawrence*, 116 Ill. 11, 4 N.E. Rep. 356, where the right acquired was "all the surface of said fences" surrounding a race track, and the court held that the right acquired related to inside as well as the outside of the fence, and that the privileges accorded, "if not actually an easement, was a burden of servitude in the nature of an easement."

(*d*) *Goldman* v. *New York Advertising Co.* (N.Y.) 29 Misc. Rep. 133, which was an action against the defendant, an advertising company, on the theory that it was liable as a tenant holding over after termination of a year, for failure to erase the sign from plaintiff's wall, and the court said: "It is unnecessary for the determination of this appeal to decide whether the paper here in question created a license or an easement, or were merely a simple contract between the parties. It is sufficient that it is not a lease. Treated as a simple contract, there was no obligation on the part of the defendant to remove the advertisement at the end of the year."

(*e*) *Goldman* v. *New York Advertising Co.* (N.Y.) 29 Misc. Rep. 133.

of another, which the advertisers found on the building and acquired the right to use it for advertising purposes for a stipulated compensation(*f*).

2. *Remedies under Such Contracts.*—Where the lessees of land for fair grounds and a race-track entered into a contract with a third party whereby the latter acquired the right to use the fence enclosing the land and the buildings erected thereon for advertising purposes, it was held that the advertiser might enforce his rights in and to the land by a suit in equity for specific performance of the contract, or by a suit to restrain its violation(*g*). In one case it is intimated that an action for damages will lie for breach of such a contract(*h*); and in the same case, where the right acquired by the advertiser was for a yearly compensation payable quarterly, it was held that the right to the premises for advertising purposes might be terminated by reasonable notice, and that a three months' notice terminating at the end of the current year was a reasonable notice.

3. *In Conclusion.*—It may be noted that, almost without exception, such contracts have been drawn in the form of leases; and attorneys in instituting suit upon them, and, in the majority of cases the trial Courts have proceeded upon the theory that such contracts were leases; but without exception the higher Courts have held that they were not leases. That much is settled; but just what such contracts amount to, whether licenses, easements or merely a simple contract—is an open question, the weight of authority being that the rights acquired by them are mere licenses.

(*g*) *Willoughby* v. *Lawrence*, 116 Ill. 11, 4 N.E. Rep. 356. In *R. J. Gunning Co.* v. *Cussack*, 50 Ill. App. 290, where two rival advertising companies claimed the right to the use of a wall of a building, and each had repeatedly erased the sign of the other thereon, an injunction was held to be the proper remedy against an invasion of the alleged right. See also *Wilson* v. *Tavener*, L.R. (1901), c. 578.

(*h*) *Wilson* v. *Tavener*, L.R. (1901) c. 578.

(*f*) *Reynolds* v. *Van Beuren*, 155 N.Y. 120.

CURRENT REVIEW OF ENGLISH CASES.

INTEREST—FURTHER DIRECTIONS—DISCRETION OF COURT.

Burland v. *Earle* (1905) A.C. 590 is a case which in a previous stage has been before the Judicial Committee of the Privy Council. The action was brought to compel the defendant Burland to recoup the defendant company certain moneys which he had appropriated as compensation for his services as president and manager of the company in excess of $12,000, to which he was admittedly entitled. The plaintiff did not, in his statement of claim, claim interest on such excess. The liability to refund the excess was declared by a judgment of the Court of Appeal of November 13, 1900, and its order was affirmed by the King in Council, but neither the judgment of the Court of Appeal nor the order of Council contained any direction for the payment of interest on the sums ordered to be refunded. Although conceding that it was competent on further directions for the Court to order interest to be paid, yet their Lordships held that the plaintiff was not entitled as of right to such an order, and that it was a matter of discretion, and in the exercise of such discretion having regard to the fact that the defendant had not been found guilty of any fraud, that there was a resolution of the directors on which he assumed to act, and that the plaintiff had himself been a director of the company when such moneys were being paid and made no objection, their Lordships thought that interest should only run from November 13, 1900, the date of the judgment of the Court of Appeal declaring the defendant liable to refund, and the order of the Court of Appeal which had allowed interest for a longer period was varied accordingly.

R.S.O. (1897) c. 48, s. 1—APPEAL TO KING IN COUNCIL—APPEALABLE CASE.

Gillett v. *Lumsden* (1905) A.C. 601 was an appeal from the judgment of the Court of Appeal for Ontario, 8 O.L.R. 168, the action was to restrain the infringement of certain trade marks. The Court of Appeal affirmed the judgment of a Divisional Court dismissing the action. The plaintiffs gave security in due form for an appeal to His Majesty in Council, but in the order of Osler, J.A., allowing the security, the following proviso was added: "that this order shall not prejudice the right of the respondent to object to the competence of the appeal." The re-

spondent moved to quash the appeal on the ground that no appeal lies under R.S.O. (1897) c. 48, s. 1, except in cases where the matter in controversy exceeds the sum or value of $4,000, and in this action no sum or value is in controversy. Their Lordships (Lords Macnaghten and Davey, and Sir A. Wilson) considered that under the Act an allowance of the appeal by a judge of the Ontario Court of Appeal was necessary, and as that Court had carefully avoided expressing an opinion as to the competence of the appeal, and in the opinion of their Lordships the appeal was not competent, it was, therefore, dismissed. It is somewhat difficult to gather from the report whether the dismissal is based on the ground that the Court of Appeal had abnegated its function in not deciding whether the appeal was competent, or whether the committee proceeded on its own view of the proper construction of R.S.O. c. 48, s. 1. We are rather inclined to think the proper conclusion is that the Committee is of opinion that the Court of Appeal should determine whether the appeal is competent, and if they do not so determine the case is not appealable, but suppose the Court of Appeal were to come to an erroneous conclusion as to the appealability of a case. What is the suitor's remedy then?

CRIMINAL LAW—CONSPIRACY—OBTAINING A PASSPORT BY FALSE REPRESENTATIONS—ACTS TENDING TO PRODUCE PUBLIC MISCHIEF.

In *The King* v. *Brailsford* (1905) 2 K.B. 730 the defendants were indicted for conspiracy in obtaining a passport from the Foreign Secretary by falsely pretending it was required to be used by the defendant McCulloch, whereas the defendant intended and procured it to be used by some other person, to whom they sent it to be used by him in Russia in fraud of the foreign office regulations for the use of passports, to the injury, prejudice and disturbance of the lawful, free and customary intercourse between the subjects of the King and those of the Czar of Russia, to the public mischief of the subjects of the King and to the endangerment of the continuance of the peaceful relations between the King and the Czar and their subjects respectively. It was contended on behalf of the defendants, who were found guilty, that the indictment did not in law amount to a criminal conspiracy, but the Court (Lord Alverstone, C.J., and Lawrance and Ridley, JJ.,) held that the indictment was good in law and the conviction was affirmed.

CRIMINAL LAW—STATUTE—CONSTRUCTION OF STATUTES.

The King v. *Vasey* (1905) 2 K.B. 748, was an indictment for poisoning the waters of a stream with intent to kill or destroy the salmon therein. By 36 & 37 Vict. c. 71, s. 13, the provisions of the 32nd section of the "Malicious Injuries to Property Act" so far as they relate to poisoning any water with intent to kill or destroy fish shall be extended and apply to salmon rivers as if the words "or in any salmon river" were inserted in the said section in lieu of the words "private rights of fishery" after the words "noxious material in any such pond or water." The 32nd section referred to was in the following terms: "Whosoever shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam, flood gate or sluice of any fish pond or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water with intent thereby to destroy any of the fish that may there be or that may thereafter be put therein or shall unlawfully and maliciously cut through, break down or otherwise destroy the dam or flood gate of any mill pond reservoir or pool shall be guilty of a misdemeanour, etc., etc."

It will be seen that the words private "right of fishery" do not occur after the words "noxious material in such pond or water" consequently the amendment could not be made as intended by 36 & 37 Vict. c. 71. The prisoners were found guilty, and a case was reserved on the point of law by Grantham, J. The Court for Crown cases reserved (Lord Alverstone, C.J., and Wills, Kennedy, Channell, and Bucknill, JJ.,) held that, notwithstanding the discrepancy, the meaning of 36 & 37 Vict. was plain, and the conviction was affirmed.

LANDLORD AND TENANT—DEFECTIVE PREMISES—PROMISE BY LANDLORD TO REPAIR—ACCIDENT ARISING FROM DEFECT IN PREMISES —INJURY TO WIFE OF TENANT.

Cavalier v. *Pope* (1905) 2 K.B. 757 was an action brought by husband and wife. The defendant was the landlord of the house in which the plaintiffs resided and which was leased to the husband as a weekly tenant. The agent of the defendant in consideration of the husband withdrawing a notice to quit had promised that the defendant would repair the kitchen floor. The

repairs were not made and in consequence of the defective state of the floor the wife sustained an injury. The action was tried by Phillimore, J., with a jury who rendered a verdict for the plaintiff and assessed the wife's damages at £75, and those of the husband at £25, and judgment was entered accordingly. The defendant appealed on the ground that the defendant was under no liability to the wife, and the Court of Appeal, (Collins, M.R., and Mathew, and Romer, L.JJ.,) sustained the appeal and dismissed the action of the wife. Mathew, L.J., however, dissented, thinking the action could be supported on the ground that she was induced by the defendant to occupy the premises with her husband on the representation that he would repair the floor which he never intended to make good, and he thought the principle on which *Langridge* v. *Levy*, 2 M. & W. 519, (followed in *George* v. *Skivington*, L.R. 5 Ex. 1), was decided should apply.

CONTRACT—ILLEGALITY—AGREEMENT BY PARTIES THAT COSTS OF LITIGATION SHALL IN ANY EVENT BE PAID OUT OF AN ESTATE—INFANT CO-CONTRACTOR.

Prince v. *Haworth* (1905) 2 K.B. 768 was an action to enforce an agreement for the payment of certain costs out of an estate. The agreement was made in the following circumstances: The plaintiff had brought a probate action to establish a will under which he was residuary legatee; the defendant Haworth set up an earlier will under which he was executor. During the progress of this litigation the parties agreed that whichever will was established as the true will, the costs of all parties of the litigation should be paid out of the estate whether the Court so ordered or not. One of the defendants was an infant, and the Court refused to sanction the agreement on his behalf and ordered the plaintiff to pay the defendant's costs of the probate action. The plaintiff therefore now sued the adult defendant Haworth to enforce the agreement for the payment of the costs out of the estate, and it was contended on the defendant's behalf, that the agreement was illegal and invalid, but Lawrance, J., held that there was nothing illegal in the contract and that it was no answer to the plaintiff's claim that the defendant, being merely executor, could not perform it without the authority of the Court, but that he was personally liable to make it good; and the mere fact that his co-defendant was an infant on whom the promise was not binding made no difference; and he therefore gave judgment against the defendant for the amount claimed.

NEGLIGENCE—BOARDING HOUSE KEEPER—GOODS OF BOARDER—THEFT BY INMATE OF BOARDING HOUSE.

Scarborough v. *Cosgrove* (1905) 2 K.B. 805 was an action by husband and wife to recover damages against a boarding house keeper with whom the plaintiffs boarded, for the loss of goods by theft. The defendant had refused to allow the plaintiffs to remove the key of their room from the lock on the ground that it was required to be left for the purpose of giving the servants access, and that the room would be quite safe as the people in the house were all known. The plaintiffs had also asked for a key for a chest of drawers in their room, but none was supplied. The female plaintiff having left some jewellery, in a locked hand bag in one of the drawers, it was stolen by another inmate of the house, who had been admitted without references, or introduction, and the action was brought to recover damages for the loss sustained. The action was tried by Darling, J., who nonsuited the plaintiffs, but the Court of Appeal (Collins, M.R., and Mathew, and Romer, L.JJ.,) reversed his decision and held that the plaintiffs were entitled to recover on the ground that there was a duty on the part of the boarding house keeper to take reasonable care for the safety of property brought by a boarder into his house, and evidence for the jury of a breach of that duty.

CROWN—PREROGATIVE—CHATTELS BELONGING TO CROWN—DISTRESS FOR RENT—PROPERTY EXEMPT FROM DISTRESS—LANDLORD AND TENANT.

Secretary of State for War v. *Wynne* (1905) 2 K.B. 845 was an action for illegally distraining a horse for rent, such horse being the property of the Crown. The County Court judge dismissed the action on the ground that the property of the Crown was not by law exempt from distress for rent. On the appeal of the plaintiff this decision was reversed by the Divisional Court (Lord Alverstone, C.J., and Wills, and Darling, JJ.,) that Court holding that no distress for rent can be levied against the Crown and no property of the Crown can be taken under a distress against a subject, although strange to say no direct authority could be found on the point.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

EXCHEQUER COURT OF CANADA.

Burbidge, J.] [Oct. 4, 1905.

SHARPLES *v.* NATIONAL MANUFACTURING CO.

Cream separators—Improvement on old device—Narrow construction.

The invention in question consisted in the substitution of an improved device for one formerly in use as part of a machine (in this case a tubular cream separator).

Held, that the patent must be given a narrow construction and be limited to a device substantially in the form described in this patent and specification.

Masten, for plaintiff. *White*, K.C., and *Delahaye*, for defendants.

Burbidge, J.] [Oct. 4, 1905.

BRITISH & FOREIGN MARINE INS. CO. *v.* THE KING.

Public work—Collision with entrance pier to canal—Negligence in construction—Liability of Crown.

One of the entrance piers to a Government canal was so constructed that a sub-structure of masonry rested on crib-work. The base of the pier was set back three feet from the edge of the crib-work, which left a step or projection under water between the masonry and the side of the crib-work. It was necessary for vessels to enter the canal with great care, at this point, owing to the eddies and currents that existed there. The proper course, however, for vessels to steer was marked by buoys. A vessel on entering the canal touched another pier than the one in question, and then, taking a sheer and getting out of control, swung over and came in collision with this pier.

Held, 1. Upon the facts proved the accident was caused by the vessel being caught in a current or eddy and so carried against the pier.

2. As there was no negligence by any officer or servant of the Crown as to the location and the method of construction of this pier, the Crown was not liable for damages arising out of the collision.

German, K.C., for, suppliants. *Newcombe*, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

From Teetzel, J.] MAY *v.* BELSON. [Oct. 13, 1905.

Cemetery—Family burying ground—Landlocked plot—Reservation in deed—Interference with graves—Right of descendants to restrain—Abandonment—Possessory title—Access to plot—Way of necessity.

Persons having an estate or interest in a plot of ground set apart and used as a family burying ground, in which the bodies of ancestors and relatives are interred, may maintain an action to restrain destruction of, injury to, or interference with the graves or the gravestones or monuments upon or over them. *Moreland* v. *Richardson* (1856) 22 Beav. 596 and (1858) 24 Beav. 33 followed.

Part of a farm was set apart as a family burial plot in or about the year 1827, and in 1838 a parcel of the farm was conveyed to the defendant's predecessor in title, "save and except about one-quarter of an acre of said lands used as a burying ground." In 1890 one of the family erected on the plot, or what he supposed to be the plot, a monument to two of his ancestors, and surrounded the supposed plot with a hedge.

Held, upon the evidence, affirming the judgment of TEETZEL, J., that there was a burying ground in respect of which the reservation was made in the deed in 1838; that there was not an abandonment; that the hedge planted in 1890 enclosed a portion at any rate of the original plot; that neither the defendant nor any of his predecessors in title had acquired a possessory or other title to the plot; and that the plaintiffs had shewn a sufficient interest in or title to the plot to enable them to maintain the action.

The plot being a landlocked piece of ground, reserved out of a grant of the surrounding property, there was an implied way of necessity to and from it, limited to the purposes for which the plot was expressed to be reserved.

Collier, K.C., for defendant, appellant. *DuVernet* and *Ingersoll*, for plaintiffs.

Full Court.] FERGUSON *v.* MILLICAN. [Nov. 13, 1905.

Evidence—Foreign commission—Examination abroad of defendants as witnesses on their own behalf—Terms.

The defendant, a solicitor practising his profession in Ontario, and his wife, were still in Ontario when two actions were brought against them by a former client of the husband. Shortly afterwards they removed to the North-West Territories to take up their permanent residence there. The actions were respectively for an account of moneys intrusted to the solicitor for investment and to set aside assignments of life insurance policies.

Held, reversing the decisions of a Divisional Court and of a judge and the Master in Chambers, that, in the circumstances shewn by the affidavits, the defendants should be allowed to have their evidence taken on commission in the Territories, as witnesses on their own behalf, for use at the trial of the actions, but upon terms advantageous to the plaintiff as to the expense of executing the commission.

F. E. Hodgins, K.C., for defendants, appellants. *Middleton*, for plaintiff.

Osler, J.A.—Chambers.] [Nov. 18, 1905.

ULYAKI *v.* DAWSON.

Court of Appeal—Appeal from order for new trial—Security on appeal—Stay of trial—Rule 827—Removal of stay.

A new trial having been ordered by a Divisional Court, the plaintiff gave notice of trial, but the defendants appealed to the Court of Appeal from the order directing the new trial, and gave the security required by Con. Rule 826, which was duly allowed.

Held, that the order for a new trial was "a judgment or order appealed from," within the meaning of Con. Rule 827 (1), and, the security for the appeal having been allowed, the execution thereof, by proceeding to a new trial or otherwise, was stayed pending the appeal by force of that Rule, such judgment or order not being one of the excepted cases mentioned in the Rule. The Rule is not confined to the case of a judgment or order directing the payment of money, but extends generally to all appealable judgments or orders which are to be "executed" by proceedings to be taken thereunder or in consequence thereof.

In a proper case the stay may be removed and permission given to proceed to trial notwithstanding the appeal; but as a

general rule such permission ought not to be granted; and in this case it was refused.

R. McKay, for plaintiff. *H. E. Rose*, for defendant.

From: Meredith, C.J.C.P.] [Dec. 12, 1905.

REX *v.* WALTON.

Arrest in foreign country for theft in Canada—Forcibly bringing back to Canada without extradition proceedings—Right to question habeas corpus—Remands—Verbal remands—Justice sitting for police magistrate—Jurisdiction.

The prisoner who had committed a number of thefts in Canada and had escaped to the United States was, on a telegram from Canada, arrested there Nov. 10, 1905, and, as the prisoner alleged, forcibly brought back to Canada against his will, and without the intervention of the Extradition Act. The Crown, however, alleged that the prisoner came back voluntarily. On Nov. 11, he was brought before a justice of the peace of the city where the offences were committed for preliminary investigation. The prisoner was remanded to the 13th, and on that date was remanded by one of the police magistrates of the city to the 17th. On the 13th a writ of habeas corpus was issued for the discharge of the prisoner on the ground of the illegality of his detention.

Held, that the circumstances under which the prisoner was brought back to Canada would not be enquired into on return to such writ, that being a matter to be raised by the government of the country whose laws are alleged to have been violated, or at the suit of the party injured against the person who had committed the alleged trespass against him.

Objection, also, having been taken to the validity of the proceedings before, and the remand made by, the said justice, for want of jurisdiction, in that he appeared to have acted in the absence of only one of the police magistrates of the city whereas there being two such magistrates, and on other grounds,

Held, that it was not necessary to decide this point, for, on the prisoner appearing before one of such magistrates on the 13th, the magistrate had before him a valid information previously taken by him, on which a remand was noted, and though, not stated by whom, its validity would not be questioned, so that there was then a lawful detention; but even if the detention prior to Nov. 13, was illegal, the prisoner being then before the magistrate on a valid information, he was then lawfully in custody.

Judgment of Meredith, C.J.C.P., refusing to discharge the prisoner and remanding him to custody, affirmed.

J. B. MacKenzie, for prisoner. *Cartwright*, K.C., for Crown.

Case reserved—Co. Carleton.] [Dec. 13, 1905.

REX *v.* LACELLE.

Criminal law—Seduction—Girl under 16—Indictment for offence committed on named date—Election to be tried summarily —Amendment to prior date—Right of election on new charge.

The offence under s. 181 of Criminal Code of having seduced a girl of or above the age of 14 and under that of 16 years can only be committed once, namely, on the first occasion on which the connection takes place, and on no subsequent occasion, for only on such first occasion can the requisite of the statute be complied with that she was of previously chaste character.

A prisoner having been indicted for having committed the said offence on Jan. 9, 1905, elected under s. 767 of the Code to be tried summarily by a county judge. On the evidence disclosing a prior connection six days previously, the charge was amended by setting up the offence as having been committed on such prior date, and without giving the prisoner the privilege of electing whether or not he would be tried summarily thereon, he was tried and convicted.

Held, that the conviction could not be supported and must be quashed, for that the date being material to the charge, an amendment could not be made substituting a new date, and in effect a new charge, without the prisoner being given an opportunity of electing under s. 767 how he should be tried thereon.

Cartwright, K.C., for Crown. No one appeared for the prisoner.

HIGH COURT OF JUSTICE.

Teetzel, J.] [July 25, 1905.

RE CALDWELL AND TOWN OF GALT.

Municipal corporations—By-law limiting number of tavern licenses and prescribing accommodation—"License year"— Liquor License Act—Objections to procedure—Validity of by-law.

A by-law passed by the council of a town before the 1st March, 1905, limiting the number of tavern licenses, prescribing

the accommodation to be possessed by taverns, and fixing the amount of license duties, was *held* not to be invalid because it omitted the words "beginning on the first day of May," after the words "license year," in prescribing the number of tavern licenses for the "ensuing license year."

In prescribing the accommodation for taverns the by-law did not limit its provisions to the ensuing license year, but was so general that it might apply to all future years:—

Held, that the scope of the by-law being limited on its face to the license year 1905-1906, the general words of the clause dealing with accommodation were limited to that year.

Sections 20 and 29 of the Liquor License Act, R.S.O. 1897, c. 245, considered.

Objections to the procedure of the council in relation to the passing of the by-law were overruled, the by-law being valid on its face, none of the objections having been raised by any member of the council, and the matters objected to being matters of internal regulation.

J. Bicknell, K.C., for applicant. *W. H. Blake*, K.C., for respondents.

Magee, J.] WOODS *v.* FADER. [Sept. 2, 1905.

Contempt of Court—Disobedience of subpœna—Service—Necessity for shewing original.

To bring a person into contempt for disobedience of a subpœna, it must be proved that the original writ was shewn at the time of service, as well as that a copy was delivered to and left with the person.

J. E. Day, for plaintiff. *G. Grant*, for defendant Fader.

Cartwright, Master.] , [Oct. 7, 1905.

MCWILLIAMS *v.* DICKSON CO., OF PETERBOROUGH.

Discovery—Examination of officer of company—Refusal to answer—Remedy—Master in Chambers.

The Master in Chambers has no power to strike out the defence of a company defendant for refusal of an officer to answer questions upon his examination for discovery, nor to order him to attend again to make answer; the plaintiff's remedy, if he wishes to have the questions answered, is by motion to commit the officer.

Badgerow v. *Grand Trunk R.W. Co.* (1889) 13 P.R. 132 and *Central Press Association* v. *American Press Association* (1890) *ib.* 353 applied and followed.

Clute, for plaintiff. *Grayson Smith*, for defendants.

Anglin, J.] [Oct. 9, 1905.

RE JAMES BAY RY. CO. AND WORRELL.

Railway—Expropriation—Trustee—Notice.

A bare trustee of land is not "the owner of the land or the person empowered to convey the land, or interested in the land sought to be taken," within the meaning of s. 71 of the Dominion Railway Act, 1903; and notice under that section must be served upon all the cestuis que trust.

R. B. Henderson, for company. *Worrell*, K.C., for trustee. *Ballantyne*, for beneficial owners.

Anglin, J.] ADAMS *v.* SUTHERLAND. [Oct. 9, 1905.

JOSH *v.* SUTHERLAND.

Arrest—Ca. re.—Special bail—Waiver—Discharge of bail.

The defendant was arrested under an order in the nature of a ca. re., and was released from close custody upon giving special bail by the deposit of a sum of money with the sheriff.

Held, that he had not thereby waived his right to be relieved under Con. Rule 1047: and, it appearing, upon the material filed upon a motion under that Rule, that the order for arrest should not have been made, an order was made for the return to him of the sum deposited.

Grayson Smith, for defendant. *R. McKay*, for plaintiffs.

Cartwright, Master.] C. *v.* D. [Oct. 9, 1905.

Executors and administrators—Action—Crim. Con.—Death of plaintiff—Revivor—Appeal to Court of Appeal—Issue of order from High Court—Indorsement—Rule 399.

The provisions of Trustee Act, R.S.O. 1897, c. 129, s. 10, apply to an action for criminal conversation; and where the plaintiff dies pendente lite the action may be continued in the name of his personal representative.

Where at the time of the abatement an appeal to the Court of Appeal is pending, an order of revivor may, nevertheless, issue from the High Court of Justice.

The absence of the indorsement on the order of revivor required by Con. Rule 399, notifying the opposite party of the time within which to apply to discharge the order, will not be regarded as a ground for setting aside the order upon a motion for that purpose made within the proper time.

C. W. Kerr, for defendant. *W. R. Smythe*, for plaintiff

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [Oct. 13, 1905.

SLATTERY v. LILLIS.

Mechanics' lien—Material supplied—Request, privity and consent, and credit of owner.

In a mechanics' lien action it was shewn that the contractor for the building of a house had become embarrassed while the work was in progress and a material man had refused to supply him with lumber on credit. The owner then assured the latter that he "need not be afraid there will be no trouble about that" or that he would see him paid. Upon that assurance the lumber was supplied to the contractor, and, although it was charged to him in his general account in the lumberman's books the name of the owner was placed in brackets opposite the items of the lumber. The owner also paid the first bill delivered and promised to call and pay the second but died before doing so.

Held, that there was a request by the owner that the lumber should be furnished: that his credit was intended to be pledged: that it was supplied upon his promise to pay and that he received the benefit of it.

Held, also, that under the provisions of s. 2, s-s. 3, and s. 4. R.S.O. 1897, C. 153, as expounded in the cases there is given to the material man under the circumstances of this case a direct lien upon the property as against the owner and not a sub-lien upon the moneys payable by the owner to the contractor or the 20 per cent. which the statute requires to be set apart for the payment of lien holders.

Held, also, that the evidence here shewed a request by the owner: that the lumber was supplied with his privity and consent and perhaps upon his credit, and that the lumberman was entitled to a lien upon the interest of the owner for the price of the lumber supplied.

Graham v. *Williams* (1884) 8 O.R. 478; (1885) 9 O.R. 458; *Blight* v. *Ray* (1893) 25 O.R. 415; *Gearing* v. *Robinson* (1900) 27 A.R. 364, considered.

Baird, for appeal. *Heyd*, K.C., contra.

Meredith, C.J.C.P., Britton, J., Teetzel, J.] [Oct. 25, 1905.

BUTLER *v.* THE TORONTO MUTOSCOPE CO., LTD.

Evidence—Of opinion—Experts—Obligation to testify—Witness fees—Tariff allowance—Fees for opinion evidence demanded.

It would be a serious hindrance to the proper administration of justice if an "expert witness," whether of the learned professions or not, were at liberty to refuse to testify as a witness unless upon the condition of being paid for the opinion he is called upon to give.

In an action for damages caused by an electric machine two medico-electric experts were called as witnesses and although they admitted they were qualified to form and had the materials before them on which they were able to give their opinion as to the possibility of the electric machine having caused the injury, they declined to state their opinion unless paid a higher fee for giving it than that provided for by the tariff.

Held, that an "expert witness" whether coming within either of the classes mentioned in items 119 and 120 of the tariff "B" or not is not entitled to refuse until he has been paid his fee for the opinion he is to give to testify as to any matter relevant to the issues as to which he is competent to speak though it be requisite for him to use his technical knowledge or skill in order to answer the questions put to him, and a new trial was ordered. Judgment of the County Court of the county of York reversed.

D. O. Cameron, for appeal. *W. N. Ferguson*, contra.

Meredith, C.J.C.P., Falconbridge, C.J.K.B., Street, J.] [Oct. 30, 1905.

JOHNSTON *v.* BARKLEY.

Judgment—Procurement by fraud and perjury—Right to attack, in subsequent action—Fraudulent assignment—Action to set aside—Res judicata—Garnishing proceeding in Division Court.

When it can be shewn that a judgment, whether foreign or domestic, has been obtained by fraud, it cannot be held binding upon the party against whom the fraud has been practised;

and such fraud may be shewn, although it may involve a reconsideration of the very facts upon which the former judgment was recovered, and although it may consist in the presentation to the Court of evidence that the judgment impeached was obtained by perjured evidence to which the Court upon the first trial gave credit. There is no distinction between the fraud which consists in presenting perjured evidence to the Court, and that which is collateral to the merits of the case.

In an action to set aside as fraudulent and void an assignment of salary by one defendant to the other, the defendants pleaded res judicata, upon which the plaintiff joined issue. At the trial the defendants proved a judgment of a division court, in a garnishee proceeding, to which the plaintiff and defendants were parties, and in which the validity of the same assignment was the question for determination. The trial judge found that by suppressing material facts and by giving evidence that was wilfully false, the claimant in the division court proceeding, who was one of the defendants in the action, procured from the judge in the division court an adjudication that the assignment was valid.

Held, that the plaintiff was entitled to impeach the judgment in the division court, though he had not directly attacked it, as he should have done by amendment when res judicata was pleaded; and, upon the evidence, that the assignment was fraudulent and void.

Abouloff v. *Oppenheimer* (1882) 10 Q.B.D. 295 and *Vadala* v. *Lawes* (1890) 25 Q.B.D. 310 followed. *Woodruff* v. *McLennan* (1887) 14 A.R. 242 and *Hilton* v. *Guyot* (1895) 159 U.S. 115 not followed.

Judgment of ANGLIN, J., reversed.

J. Milden, for plaintiff. *Watson*, K.C., for defendants.

Falconbridge, C.J.K.B., Britton, J., Clute, J.] [Oct. 31, 1905.

CUTTEN *v.* MITCHELL.

Discovery — Production — Affidavit — Partnership—Master and servant—Agreement to share profits—Statement furnished by master—Fraud.

Held, by ANGLIN, J., in Chambers, that, notwithstanding the language of s. 3 of R.S.O. 1897, c. 157, a statement of profits furnished by a master to his servant, where there is an agreement to share profits, is impeachable for fraud; and fraud being

alleged by the plaintiffs (servants) in an action (inter alia) for an account of profits, the plaintiffs were entitled to discovery of a document in the possession of the defendant (master) shewing the basis of the statement of net profits furnished by the defendant.

Held, upon appeal, not passing upon the questions with regard to the statute, that production of the document was properly ordered, having regard to the general rules relating to discovery and the other claims made in the action.

H. Guthrie, K.C., and *C. A. Moss*, for defendant Mitchell. *R. McKay*, for plaintiffs.

Meredith, C.J.C.P., Anglin, J., Clute, J.] [Nov. 4, 1905.

CITY OF TORONTO v. TORONTO RY. CO.

Street railways—Operation of cars—Fender in "front" of motor car—Penalty.

By 1 Edw. VII. c. 25, s. 1 (O.), it is provided that a street railway company, when operating any portion of their line by means of electricity, shall use "in the front of each motor car a fender."

Held, that what is meant by the "front" of the car is that end of it which when the car is in motion is the furthest forward, that is to say, furthest forward in the sense that it would first meet a person or an object moving in the opposite direction; and the defendants operating a car for a distance of twelve hundred feet with the fender at the back instead of the front, as so defined were liable to the penalty prescribed by the statute.

Judgment of County Court of York affirmed.

James Bicknell, K.C., for defendants, appellants. *Fullerton*, K.C., for plaintiffs, respondents.

Cartwright, Master.] [Nov. 10, 1905.

BAINES v. CITY OF WOODSTOCK AND PATRICK.

Parties—Election as to which defendant, plaintiff should proceed against—Joint tort feasors—Con. Rule 186.

In an action for damages against the corporation of a city for allowing planks and lumber to remain on one of its streets which had been negligently piled and wrongfully left there by the other defendants and which fell on the plaintiff and injured him.

Held, on an application to compel the plaintiff to elect against which defendant the plaintiff would proceed, that the defendants were not joint tort feasors and that Con. Rule 186 was not so amended by 3 Ed. VII. c. 19, s. 609 (O.) as to authorize the action as constituted, and plaintiff was ordered to elect.

Hinds v. *Town of Barrie* (1903) 6 O.L.R. 656; *Rice* v. *Town of Whitby* (1898) 25 A.R. 191, and *Chandler and Massey* v. *Grand Trunk Ry. Co.* (1903) 5 O.L.R. 589 followed. *Tate* v. *Natural Gas and Oil Co.* (1898) 18 P.R. 82 and *Langley* v. *Law Society of Upper Canada* (1902) 3 O.L.R. 245 distinguished.

Douglas, K.C., for the Patricks. *C. A. Moss,* for the City of Woodstock. *Holman,* K.C., for plaintiff.

Teetzel, J.] [Nov. 14, 1905.

BUSKEY *v.* CANADIAN PACIFIC R.W. CO.

Railway—Carriage of goods—Contract limiting liability for loss —Validity—Order of Board of Railway Commissioners—Judicial proceeding—Fraction of day.

On the 17th October, 1904, the plaintiff shipped three packages of household goods on the defendants' railway, and signed a special contract by which he undertook that no claim in respect of injury to or loss of the goods should be made against the defendants exceeding the amount of $5 for any one of the packages. On the same day the Board of Railway Commissioners by order approved of the form of special contract signed by the plaintiff, under s. 275 of the Dominion Railway Act, 1903, providing that no such contract shall be valid unless "such class of contract" shall have been first authorized or approved by the Board. In an action to recover the value of the goods, which were lost by the defendant,

Held, that under ss. 23, 24, 25, and 275 of the Act, the Board had jurisdiction to make the order, the making of it was a judicial proceeding, and the order must be regarded as in full force during the whole of the 17th October, 1904; and, therefore, the contract was valid, and the plaintiff entitled to recover only $15.

Review of cases bearing upon the rule that in judicial proceedings fractions of a day are not regarded.

A. D. Meldrum, for the plaintiff. *W. R. White,* K.C., for defendants.

Meredith, C.J.C.P.] [Nov. 20, 1905.

RE PROVINCIAL GROCERS, LIMITED.

CALDERWOOD'S CASE.

Company—Winding up—Contributory—Subscription for shares—Contract under seal—Offer—Acceptance—Allotment—Notice.

The respondent by a writing under seal dated July 29, 1903, subscribed for one share in the capital stock of the company, and agreed to pay $100 for it, 10 per cent. on application, 15 per cent. on allotment, 25 per cent. two months thereafter, and the balance as the directors might deem advisable. It was arranged that the company should draw upon the respondent for the amount payable on application. On the next day, and before anything had been done by the company, the respondent wrote to the company cancelling his subscription. The company drew on the respondent for the 10 per cent., but he refused to accept the draft, and, being pressed by the company by letter of the 16th September, 1903, to accept the draft, again declined to do so. On the 8th September, 1903, a resolution was passed by the directors "that the stock now subscribed be allotted and notice sent to each subscriber that we are drawing on them for their second payment." The company did not draw on the respondent for the second payment, and he was not notified of the allotment, but his name was recorded in the book required by s. 71 of the Ontario Companies Act to be kept by the company, as a shareholder holding one share. He was not afterwards in any way treated or dealt with as a shareholder. In a proceeding for the winding-up of the company, it was sought to make him liable as a contributory.

Held, following *Nelson Coke and Gas Co.* v. *Pellatt* (1902) 4 O.L.R. 481, that the instrument signed by the respondent was not a mere offer which he could withdraw before acceptance; but that the company never accepted or intended to accept him as a shareholder unless the down payment of 10 per cent. was made, and, after the refusal to make that payment, they made it evident that they had not accepted him; and, even if they had accepted him, it was not shewn that the acceptance was communicated to him: and he was not, therefore, liable as a contributory.

G. M. Clark, for liquidator. *J. E. Jones*, for respondent.

Anglin, J.] REX v. COLLETTE. [Nov. 21, 1905.

Criminal law — Vagrancy — Conviction — Evidence — Criminal Code, s. 207 (1)—Habeas corpus—Discharge.

The evidence upon which a magistrate's conviction of the defendant under s. 297 (1) of the Criminal Code for vagrancy was based, was, that, though never convicted, he was an associate of pickpockets, and was "known to the police authorities of Montreal as a professional pickpocket." There was no further material evidence against the defendant, though a number of circumstances were shewn which would create suspicions of his honesty. There was no evidence offered by the Crown that he had no means of earning a livelihood; and evidence of his being recently employed as a hostler was given on his behalf. He had $40 on his person when arrested.

Held, that, if there was some evidence that the defendant "for the most part supported himself by crime," there was no evidence to warrant a finding that he had "no peaceable profession or calling to maintain himself by"; and he was discharged upon the return of a habeas corpus.

W. S. Brewster, K.C., for defendant. *J. R. Cartwright*, K.C., for Crown.

Anglin, J.] RADFORD v. BARWICK. [Nov. 25, 1905.

Practice—Close of pleadings—Lapse of time—Direction of Court —Rules 263, 612.

The noting of the pleadings as closed being a mere preliminary step to a motion for judgment or other kindred relief to ensue thereupon, by analogy to the practice prescribed by Rule 612, the officer of the Court should not, notwithstanding the terms of Rule 263, in any case in which more than a year has expired since the time at which the party seeking to have the pleadings noted became entitled to that relief, note the pleadings closed without the direction of the Court or a judge; and, unless in exceptional circumstances, that direction should not be given without notice to the party to be adversely affected by such noting.

John MacGregor, for plaintiff.

Anglin, J.] MANN *v.* CRITTENDEN. [Nov. 29, 1905.

Appeal—Ruling of taxing officer—Costs of interlocutory examinations—Right of appeal—Time—Extension.

Semble, that no appeal lies from the decision of the senior taxing officer at Toronto under Con. Rule 1136, as amended by Con. Rule 1267, as to the allowance of the costs of interlocutory examinations.

Held, that if an appeal lies, it must be either under Con. Rule 774 or 767—probably the latter—and, under either, notice of appeal must be given within four days and made returnable within ten days after the decision complained of; and notice in this case not having been given in time, an extension should not be granted, having regard to the character of the decision complained of—a ruling against allowing the costs of examining more than one of the plaintiffs for discovery.

Gunn, K.C., for plaintiffs. *A. McLean Macdonell*, for defendant.

Anglin, J.] [Dec. 8, 1905.

HANLEY *v.* TORONTO, HAMILTON AND BUFFALO RY. CO.

Railways—Damage to lands—Trespass—Compensation.

The foundation of proceedings under s. 146, etc., of the Railway Act, 1888, 51 Vict. c. 29 (O.), to determine the compensation to be paid a landowner for land taken or injuriously affected by a railway company in the exercise of their statutory powers, is the notice to be served on the landowner thereunder; and in the absence thereof the railway company is, as to lands damaged by its construction, a trespasser, and like any other trespasser responsible to the person injured in damages to be recovered in the ordinary Courts of the country.

Where, therefore, without taking any proceedings under said sections, the defendants, a railway company, for the purposes of their railway, made a cutting, adjoining the plaintiff's lands, which caused a subsidence thereof, whereupon the plaintiff brought an action, claiming a mandatory order to compel the defendants to support his lands and prevent further subsidence, and recovered damages for the actual loss then sustained.

Held, that the plaintiff was entitled to the order and to the damages thus recovered; but as the plaintiff would be entitled to maintain actions for the recovery of damages as further loss was sustained, leave was given to the defendants to take proceedings

under said sections for the assessment of compensation so as to have the damages settled for all time, with a limited stay of the judgment.

W. T. Henderson (of Brantford), for plaintiff. *Carscallen*, K.C., for defendants.

Magee, J.] [Dec. 8, 1905.

KELLY *v.* TOWNSHIP OF WHITCHURCH.

Municipal corporations—Accident—Negligence—Lumber remaining on highway.

On the side of a road allowance in front of a saw mill, large quantities of logs, bark and rubbish were allowed to be piled and to be left there. The plaintiffs were driving with their horse and buggy along the allowance, while passing the place in question, when the horse became frightened and swerved from the beaten track in the direction of the said pile, and, in attempting to turn back again on to the road the front wheel of the buggy came in contact with a log lying about two or three feet from the said travelled way, whereby the buggy was over-turned, and the plaintiffs thrown out and injured.

Held, that the defendants were liable therefor.

Fitch, for plaintiffs. *Watson*, K.C., and *J. McCullough*, for defendants. *Boultbee* and *Macdonald*, for third party.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] THE KING *v.* HOPE YOUNG. [Dec. 2, 1905.

Criminal law—Police officer—Admission secured without preliminary warning—Repetition to others—Burden on Crown as to influence—Waiver by counsel.

Defendant while confined in jail awaiting trial on a charge of murder was visited by a detective who had been sent by the Provincial Government to enquire into the case and who, without preliminary warning or caution of any kind, succeeded in obtaining from defendant an admission that a statement made by her previously was untrue. Shortly afterwards the same admission was made to the prosecuting officer in the presence of defendant's counsel.

Held, 1. In the absence of evidence to rebut the presumption that the second statement was made under the operation of the same influence as the former one the trial judge erred in receiving evidence of it, and the defendant, who had been convicted, was entitled to a new trial.

2. The burden of shewing that the influences under which the first statement was made had been dispelled when the second statement was obtained rested upon the Crown.

3. The prisoner's counsel who was present when the second statement was made could not assent to or waive anything to the prisoner's prejudice, and that in a case where the prisoner herself could not make a waiver or admission such waiver or admission could not be made through the agency of her counsel.

R. G. Monroe, for prisoner. *Drysdale*, K.C., Attorney-General, for Crown.

Full Court.] THE KING *v.* BLANK. [Dec. 18, 1905.

Intoxicating liquor—Offence against Act—Form of conviction—Imprisonment in default of payment.

Defendant was convicted before the Stipendiary Magistrate for Sydney, for a first offence against the second part of the Canada Temperance Act, and it was ordered that defendant in default of payment of the fine and costs in the conviction mentioned should be imprisoned in the common gaol of the county of Cape Breton for three months, unless the sums in conviction mentioned were sooner paid. The Court being moved to quash the conviction,

Held, dismissing the application with costs, that the case was concluded by *The Queen* v. *Horton*, 31 N.S.R. 217; 3 Can. Cr. Cas. 84.

Per GRAHAM, E.J. (delivering the judgment of the Court):—That case was a conviction under s. 501 of the Code and there as here there was provided a pecuniary penalty or a term of imprisonment, and it was held that the term of imprisonment was imposed by way of punishment and not as a term of imprisonment inflicted in default of payment of the penalty, and recourse was to be made to s. 872, for the term of imprisonment.

Maddin, in support of application. *H. Ross*, contra.

Held, that the evidence of search coupled with the provisions of the Act R.S. (1900) c. 100, s. 165, sub-s. 2, was ample to justify the conviction unless displaced. That defendant had to overcome the presumption raised against him and to explain the circumstances to the satisfaction of the judge, and, having failed to do so, the judge could properly find as he did and the Court would not disturb the conviction.

Bigelow, for appellant. *S. D. McLellan,* for respondent.

Full Court.] THE KING *v.* CRAIG. [Dec. 26, 1905.

Intoxicating liquors—Sale at retail without license—Conviction in absence of defendant—Reasonableness of service.

Information was laid before the Stipendiary Magistrate for Truro charging defendant with having sold liquor at retail without license, defendant having been previously convicted of first and second offences of the same nature. A summons was issued on June 20, 1905, requiring defendant to appear at the Court room at 10 o'clock on the following morning to answer the charge against him, and to be further dealt with. A copy of the summons was served by a constable on the defendant personally on the same day on which the summons was issued and defendant failing to appear was convicted in his absence. The conviction was attacked on the ground that defendant was not served until the night of the day on which the summons was issued, and that he had no time to consult counsel.

Held, that the question of the reasonableness of the service was one for the justice under all the circumstances of the case, and that on the facts stated there was evidence to justify him in coming to the conclusion that a reasonable time had elapsed between the time of service and the time fixed for the trial, and in proceeding with the case in defendant's absence.

Per RUSSELL, J.:—That if defendant required further time it was his duty to have appeared and to have made his application to the justice, and that it was not permissible for him to ignore the summons and afterwards ask the Court to quash the conviction.

Bigelow, in support of motion. *S. D. McLellan,* contra.

Full Court.] THE KING *v.* MCNUTT. [Dec. 26, 1905.

Intoxicating liquors—Illegally keeping for sale—Presumptions —Duty of defendant to rebut.

Appeal from the judge of the County Court, District No. 4 affirming a conviction made by the Stipendiary Magistrate for Truro for keeping liquor for the purpose of sale without a license therefor by law required. The evidence shewed that defendant occupied a house in Truro opposite a building occupied by his son-in-law as an hotel where liquor was believed to be sold illegally. Defendant had previously occupied the hotel himself, and had been convicted of unlawful selling, and was believed to be selling in collusion with his son-in-law to whom he had rented the premises, the liquor being kept on defendant's premises and carried across the street to the hotel as required. On making a search of defendant's premises the inspector found a quantity of liquor concealed in a hole below the floor of a room occupied as a bed room, and also in a valise in a wood shed back of the house which was found to be locked at the time of the search and which defendant declined to open. In both places he found a large quantity of straw wrappers such as are used for packing bottles, and in the wood house some empty liquor cases. There was also evidence that as the inspector left defendant said there was a barrel that he had not got, though this remark was not heard by the inspector and was denied by defendant.

Province of Manitoba.

KING'S BENCH.

Perdue, J.] [Oct. 23, 1905.

SCHWEIGER CO. *v.* M. VINEBERG CO.

Pleading—Embarrassing defences—Striking out pleadings.

Application to strike out parts of the statement of defence as embarrassing. The plaintiff sued for the price of goods alleged to have been sold and delivered to the defendant, and, in the alternative, claimed damages for non-acceptance of the goods and non-payment for same. By the third paragraph of the defence the defendant denied that she had purchased or received the goods referred to in the statement of claim, and then proceeded as follows:—"And the defendant is informed that the

alleged claim of the plaintiff's for the said brushes (part of the goods), if any, arose prior to the time when the defendant started in business, and if the same exists at all, which the defendant does not admit, it is against the estate of the defendant's late husband and not against the defendant."

Held, that the part of the paragraph quoted was embarrassing and should be struck out, because it was not stated positively but only on information, and also because it sought to raise an immaterial issue: Odger, pp. 103, 106; *Jones* v. *Turner* (1875), W.N. 239.

Par. 5 was as follows:—"The defendant says that she never agreed to purchase mufflers from the plaintiffs for the price and sum of £129 15s. 1d. as alleged by the plaintiffs, and that she never received the same from the plaintiffs or any part thereof."

Held, 1. This was an evasive or ambiguous denial containing a "negative pregnant" and was not in compliance with Rule 290 of the King's Bench Act which requires a specific denial, if any is made, as the statement would be true even if the fact was that the defendant had purchased the goods for a penny less than £129 15s. 1d., and that this paragraph must be amended or in default struck out.

2. A paragraph of the statement of defence alleging that the goods referred to in the statement of claim, if ordered at all, were ordered under a contract set out in another paragraph setting up a counterclaim, or contract which was in no way identified with that sued upon, and alleging a breach of such other contract, which paragraph also apparently involved two defences quite different, was embarrassing, and should be amended or, in default, struck out.

Phillips, for plaintiffs. *Hoskin*, for defendant.

Mathers, J.] CHRISTIE *v.* MCKAY. [Oct. 30, 1905.

Parties to action—Mechanics' lien—Suit by sub-contractor against contractor.

The plaintiff was employed by the defendant McKay, who had built a house for the defendant Collins under contract. The plaintiff filed a lien under the Mechanics' and Wage Earners' Lien Act for his unpaid claim against McKay, but before the lien was filed Collins had sold and conveyed all his interest in the land to the defendant George.

Held, that Collins should not have been made a party defen-

dant in the action as the plaintiff did not seek and could not have any relief as against him. Although the plaintiff's claim would be limited to the amount due by Collins to McKay, and he would have to prove what that indebtedness was, yet that would not justify making Collins a party, as the plaintiff could prove that indebtedness at the trial or on a reference to the master like any other fact without having Collins before the Court.

Order striking out the name of Collins as a party defendant with costs.

Haney, for plaintiff. *Hoskin*, for Collins.

Mathers, J.] [Nov. 20, 1905.

CAMPBELL *v.* IMPERIAL LOAN CO.

Parties—Mortgage—Redemption—Purchasers from mortgagee.

Where, after default in payment of a mortgage of lands, the mortgagee has sold some of the land under the power of sale in the mortgage, the purchasers must be made parties to the action unless the plaintiff is satisfied with judgment for redemption subject to the several agreements of sale, as the sales could not be set aside or inquired into without having the purchasers before the Court.

It would not be sufficient to make the purchasers parties in the master's office under Rule 40 of the King's Bench Act, as that rule applies only to cases where no direct relief is sought against the parties to be added: *Rolph* v. *Upper Canada Building Co.*, 11 Gr. 275, and *Hopper* v. *Harrison*, 28 Gr. 22.

A. J. Andrews, and *Noble*, for plaintiff. *Howell*, K.C., and *Coldwell*, K.C., for defendants.

Mathers, J.] SLOUSKI *v.* HOPP. [Nov. 20, 1905.

Mistake—Rescission of contract—Election to affirm.

Action for the rescission of contract to purchase lot 17 having a cottage on it, on the ground that plaintiff thought his purchase included the adjoining lot 18 being a vacant corner lot. The trial judge found that the plaintiff had entered into the contract under the mistaken belief that he was getting both the lots; but that the defendants had in no way contributed to that mistake and had not been guilty of any fraud or misrepresentation in connection with the sale, and did not know until afterwards that the plaintiff had made such mistake; also, that the purchase

money agreed on was only about the fair value of lot 17 with the cottage.

Held, 1. Following *Miller* v. *Dahl*, 9 M.R. 444, and *Tamplin* v. *James*, 15 Ch. D. 215, that the plaintiff was not entitled to have the contract rescinded.

2. The plaintiff had elected to affirm the contract by paying two monthly instalments of the purchase money and by entering into and retaining possession of the property after he had found out his mistake. *Campbell* v. *Fleming*, 1 A. & E. 40, and *Dall* v. *Howard*, 11 M.R. 577.

Bradshaw, for plaintiff. *E. L. Taylor*, and *Laidlaw*, for defendants.

Province of British Columbia.

SUPREME COURT.

Irving J., Martin, J., Duff, J.] [Nov. 3, 1905.

SAYWARD *v.* DUNSMUIR.

Mechanics' lien—Time for filing—Principal and agent—Authority of agent—General particulars—General authority conferred verbally—Subsequently limited by writing—Notice thereof to third party—Judgment in personam—Evidence.

Whether material is supplied in good faith for the purpose of completing a contract, or as a pretext to revive a right to file a lien, is a question of fact for the trial judge and his decision on such fact should govern.

Where an agent is vested with general authority, and such authority is subsequently sought to be limited by writing, notice of such subsequent limitation must be conveyed to third parties having dealings with the agent. In the absence of such notice the principal is estopped from setting up the limitation as against a third party acting bona fide.

Whether authority has been conferred on an agent is a question of fact, which may be proved by shewing that it was expressly given; or the acts of recognition by the principal may be such that the authority may be inferred.

When the relationship of debtor and creditor is established on the hearing of a claim for a Mechanics' Lien, the jurisdiction of the County Court judge to give a judgment in personam arises under Mechanics' Lien Amendment Act, 1900, c. 20, s. 23.

Per DUFF, J:—A finding of fact, based entirely upon the inference which the trial judge has drawn from the evidence before him, may be freely reviewed by the Court of Appeal. (*Hood* v. *Eden* (1905) 36 S.C.R. 476, at 483.) A principal who, knowing that an agent with a limited authority is assuming to exercise a general authority, stands by and permits third persons to alter their position on the faith of the existence in fact of the pretended authority, cannot afterwards, against such third party, dispute its existence.

Decision of Harrison, Co., J., affirmed.

R. T. Elliott, for plaintiff. *Barnard,* for defendant Dunsmuir. *Helmcken,* K.C., for Harrison.

Hunter, C.J., Martin, J., Morrison, J.] [Nov. 16, 1905.

LASELL *v.* THISTLE GOLD COMPANY.

Agreement—Corrupt or illegal consideration—Promise of benefit to employee—Fraud on company by its manager.

L. being manager and part owner of a mining company, which was in financial difficulties, and owing him some $1600 on account of salary, agreed with H. that the latter should acquire the outstanding debts of the company, obtain judgment, sell the property at sheriff's sale and organize a new company, in which H. was to have a controlling interest. L. was to refrain from taking any steps towards winding up the company, and in consideration therefor he was to be given in the new company a proportionate amount of fully paid-up and non-assessable shares to those held by him in the old company. He also agreed not to reveal this understanding to certain of the shareholders.

Held (Morrison, J., dissenting), that if there was any consideration for H.'s promise it was an illegal consideration, a fraud on the shareholders, and a breach of trust on the part of the manager. A man who occupies the position of superintendent or manager of a mine is not to facilitate the remedies of creditors but to protect the interests of the company.

Bloomfield, for plaintiff (respondent). *Belyea,* K.C., and *Morphy,* for *Hannah,* defendant (appellant).

Courts and Practice.

Judicial Committee of the Privy Council.

RULES AS TO APPEALS.

The following rules of the Judicial Committee making a change in the practice in some particulars are not easy of access. We therefore reproduce them for the benefit of those concerned:

1. Where a respondent . . whose name has been entered on the record of the appeal by the Court admitting the appeal, fails to enter an appearance to the appeal in the registry of the Privy Council, and it appears from the transcript record in the appeal, or from a certificate of the officer of the Court transmitting the said transcript record to the registrar of the Privy Council, that the said respondent has received notice of the order admitting the appeal . . . or of the order . . . giving the appellant special leave to appeal . . . and has also received notice of the despatch of the said transcript record to the registrar of the Privy Council, the appellant shall not, subject to any direction by their Lordships to the contrary, be required to take out appearance orders calling upon the said respondent to enter an appearance in the appeal, and the appeal may, subject as aforesaid, be set down for hearing ex parte as against the said respondent, at any time after the expiration of three calendar months from the date of the lodging of the appellant's petition of appeal, in like manner as if the said appearance orders had been taken out by the appellant and the times thereby respectively limited for the said respondent to enter an appearance had expired.

Rule 2 makes a similar provision in regard to a case where a respondent to the appeal, whose name has been brou ht on the record of the appeal by an order of the Privy Council, fails to enter an appearance.

3. Nothing herein contained shall be deemed to affect the power of their Lordships to order the appellant in an appeal referred . . . to their Lordships to take out appearance orders, or to be excused from taking out appearance orders in any case in which their Lordships shall think fit so to order, and gener ally to give such directions as to the time at which, and the conditions on which an appeal so referred as aforesaid shall be set down as, in the opinion of their Lordships, the circumstances of the case may require.

4. This order shall apply to all appeals in which the petition of appeal shall be lodged after the date hereof.