CURRENT DECISIONS

ATTORNEY AND CLIENT—FEES—STATUTORY REGULATION.—The Workmen's Compensation Act provided that claims for legal services arising under that statute were enforcible only if approved by the Commision. The respondent, an attorney, entered into a contract with his client's brother whereby the latter was to pay him fifty *per cent.* of the amount awarded the client by the Workmen's Compensation Commission. Disciplinary proceedings were instituted by the bar association against the respondent. *Held,* that it is contrary to legal ethics for attorneys to charge fees of greater amount than that fixed by the Compensation Commissioner. *Matter of Fisch* (1919, N. Y.) 61 N. Y. L. J. 1234.

Generally it is not illegal or against public policy for a lawyer to prosecute an action on a contingent fee basis. See *Stevens v. Sheriff* (1907) 76 Kan. 124, 127, 90 Pac. 799, 800. However, it was the purpose and intent of the Compensation Act to prevent this in order to insure the injured workman as large a return as possible. It is therefore submitted that the court properly squelched this attempt to indirectly evade the beneficent objects contemplated by this legislation. For a discussion of the duties of attorneys, see (1911) 21 YALE LAW JOURNAL, 72.

CARRIERS—CARMACK AMENDMENT—PRESUMPTION AGAINST TERMINAL CARRIER.—In an action against the terminal carrier to recover damages for injury to goods, the plaintiff introduced evidence to show that the goods were delivered in good condition to the initial carrier and were received from the defendant in a damaged condition. The defendant contended that since the passage of the Carmack Amendment this did not make a *prima facie* case. *Held,* that the plaintiff had made a *prima facie* case, as the common-law presumption against the terminal carrier was not superseded by the Carmack Amendment. *Central of Georgia Ry. v. Scrivens* (1919, Ga. Ct. App.) 100 S. E. 233.

It is settled law that the Carmack Amendment did not deprive the shipper of his right of action against the connecting carrier, but merely gave an additional remedy against the initial carrier when the goods were taken on a "through" bill of lading. *Georgia, Fla. & Ala. Ry. v. Blish Co.* (1915) 241 U. S. 190, 36 Sup. Ct. 541. And so it did not affect the common-law presumption involved in the principal case, against the terminal carrier. *Erisman v. Chicago B. & Q. R. R.* (1917) 180 Iowa, 759, 163 N. W. 627. For a discussion of the liability of carriers under the Carmack Amendment, see Daish, *Liability of Common Carriers under the Act to Regulate Commerce* (1916) 25 YALE LAW JOURNAL, 341.

CONFLICT OF LAWS—LAPSING OF LEGACIES—"RENVOI."—One T, a citizen of the United States, whose domicile of origin was in New York, died in France, where he had acquired a domicile. He left a will in which he bequeathed his residuary estate in equal parts to an aunt and a cousin. The cousin having died before T, her share would accrue to the aunt under French law, while it would lapse under the law of New York and go to the testator's brother. The latter opposed the proposed distribution, contending that the law of the domicile (sec. 47, Decedent Estate Law) in accordance with which the New York courts would determine the

question, referred to the French law in its totality, including its rules of the conflict of laws, and as the French law would decide the case according to the law of the country to which the testator belonged (*lex patriae*) the New York court should apply New York law. *Held,* that sec. 47 of the Decedent Estate law referred to the French law relating to the lapsing of legacies, and not to the French law in its totality, including the conflict of laws. Referee's report, approved by the Surrogate of New York County. *In the Matter of the Judicial Settlement of the Accounts of Henry Overing Tallmadge, Executor of Coster Chadwick, Deceased* (1919) 62 N. Y. L. J. 215.

See COMMENTS, *supra,* p. 214.

CONTRACTS—BREACH—WAIVER—DAMAGES.—By a contract with the defendant the plaintiff obtained the exclusive selling agency, within a certain territory, of machines which the defendant manufactured. After the plaintiff entered into this business, the defendant forbade his taking orders for machines to be used in "public service," on the ground that another party had the exclusive privilege of such sales. The plaintiff continued the business for a while and then terminated the agency. He sued for the damages which resulted from this limitation of his agency. The defendant contended that the plaintiff had waived this breach of contract and therefore could not recover damages. *Held,* that he could recover, since waiver of a breach does not forfeit a right of action for the resulting damages. *Hoffer v. Hooven-Owens-Rentschiler Co.* (1919, Sup. Ct.) 177 N. Y. Supp. 720.

The distinction between a waiver of excuse for future nonperformance and a forfeiture of a right to damages, both arising from a breach of contract by the other party thereto, is undoubtedly sound. In support of this, see (1918) 28 YALE LAW JOURNAL, 86.

MINES AND MINERALS—INTERFERENCE BY ABANDONED OIL WELL WITH LIVE WELL.—After the plaintiff had sunk a well on his premises which produced oil, the defendant sunk a well on his premises near the plaintiff's well, which proved a non-producer and was abandoned. It caused air to leak into the plaintiff's pump, resulting in loss of suction and a material reduction in the production of oil from the plaintiff's well. The defendant refused to close his well, though he could have done so without trouble or expense by putting back the plug which had been taken out. The plaintiff sued for an injunction and damages. *Held,* that the plaintiff was entitled to relief. *Higgins Oil & Fuel Co. v. Guaranty Oil Co., Ltd.* (1919, La.) 82 So. 206.

See COMMENTS, *supra,* p. 213.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.—The plaintiff's intestate negligently started across the defendant's track and was killed by an engine operated by employees of the defendant. The employees exercised due care and did all they could to avert the accident. The plaintiff sued for damages. *Held,* that she could not recover, with a dictum that where "negligence of the railroad and of the person injured are concurrent and continue up to the moment of the accident," a railroad cannot be held liable under the doctrine of "last clear chance." *Nolan v. Illinois Central R. R.* (1919, La.) 82 So. 590.

The court seems to apply the concept that "last clear chance" means sole physical power in the defendant, after he has actually obtained knowledge of the plaintiff's danger, to avoid the injury. Other authority finds the require-

ment satisfied if the defendant was in a position to have acquired such knowledge by reasonably prudent conduct. *Bond v. Baltimore & O. R. R.* (1918, W. Va.) 96 S. E. 932. For full discussion of the whole doctrine, see COMMENT (1914) 24 YALE LAW JOURNAL, 330.

NEGLIGENCE—PROXIMATE CAUSE—INTERVENING AGENCIES—INHERENTLY DANGEROUS ARTICLES.—The defendant manufactured and sold the "King air rifle," which was advertised as harmless. A rifle containing a load of shot, due to the negligence of an employee, was shipped in a consignment from the defendant's plant to a wholesale house for resale. The wholesale dealer, unaware that this rifle was loaded, sold the lot to a retail dealer, who, likewise ignorant, placed it in stock in charge of the plaintiff, a saleswoman in his store. During an examination of this rifle by a prospective customer, it was discharged, seriously injuring the plaintiff who sued for the resulting damages. *Held,* that recovery should be allowed. *Herman v. Markham Air Rifle Co.* (1918, D. Mich.) 258 Fed. 475.

The court justified its holding on three grounds: that the defendant was negligent; that such an intervention by a third party was forseeable under such circumstances; that the rifle was inherently dangerous. The effect of an intervention by a third party upon the originally negligent party's liability is discussed in (1918) 27 YALE LAW JOURNAL, 713, 1087. For a treatment of the liability of a manufacturer for damages resulting from a defective article, see (1918) *27 ibid.*, 961. See also (1918) *27 ibid.*, 713; COMMENT (1918) *27 ibid.*, 1068.

NEGLIGENCE—RIGHTS AND DUTIES OF VEHICLES AND PEDESTRIANS.—The plaintiff's intestate was struck and killed by the defendant's automobile while he was attempting to cross a street diagonally, not at a regular crossing. In an action by his administratrix to recover damages for his death, it was proved that the deceased, before starting across the street, observed the traffic and that there were no vehicles to obstruct either his view or that of the defendant, who was approaching on the same side of the street about one hundred feet away. The defendant claimed that the plaintiff's failure to show that the deceased looked to the right or left after he started to cross the street was fatal to the present claim. *Held,* that such proof was unnecessary, as the plaintiff was "entitled to the presumption that deceased did that which a prudent man would do under the circumstances, and that he continued to do so until the accident took place." *Anderson v. Wood* (1919, Pa.) 107 Atl. 658.

The court remarks in the opinion that, although an automobile may have a "slightly superior right of way between crossings," a pedestrian cannot be held negligent, as a matter of law, when he attempts to cross a street between the regular crossings; on the contrary, if, having observed the traffic and it is so distant that one using due care would deem it safe to cross, he makes such an attempt, it is the duty of an approaching driver not to injure him; and also the pedestrian is under no "fixed duty" to look back although the circumstances may be such that in the exercise of due care it would be his duty to do so. Some of the factors and circumstances to be considered in determining whether a driver has violated his duty to exercise "greater caution in respect to children than in respect to grown up people" are stated in *Di Maio v. Yolen Bottling Works* (1919, Conn.) 107 Atl. 497. The general principle of "reasonable care" applicable to the principal case has also been recently stated by Justice Gager in *Brown v. New Haven Taxicab Co.* (1919) 93 Conn. 251, 254, 255, 105 Atl. 706, 707. *Cf.* also (1918) 28 YALE LAW JOURNAL, 91.

PERSONS — INSANE PERSONS — GUARDIAN AD LITEM — ADMISSIONS — RELIEF AGAINST JUDGMENTS.—The plaintiff's ward, while insane, conveyed land to the defendants, who knew of her disability. The conveyance was confirmed by a judgment rendered upon admissions by her guardian *ad litem* that the transaction was fair and beneficial. The guardian *ad litem* was benefited by the sale and the price was below market value. The plaintiff sued to recover this land. *Held,* that the judgment was voidable and the plaintiff was entitled to the relief sought. *Knight v. Waggoner* (1919, Tex. Civ. App.) 214 S. W. 690.

The decision seems clearly correct. Admissions by a guardian *ad litem* are generally not binding upon a ward. Policy seems to require this protection, not only against unwise admissions by honest guardians but also against statements by those who are dishonest. And, indeed, the prevailing doctrine affords such protection by requiring the adverse party to prove all the material allegations of his bill, regardless of any admissions made by the guardian *ad litem.* See 4 ANN. CASES 403, note.

PROPERTY—GAS LEASE—REGULATION—LESSOR'S FREE USE OF NATURAL GAS.—The defendant leased land to the plaintiff for the production of oil and gas, with a stipulation in the lease that the defendant should be permitted, for domestic purposes, to use gas from any well drilled upon the premises, free of charge. In accordance with this provision, gas was being furnished to the defendant. The Public Service Commission adopted a rule that all gas furnished without charge should be metered, and that reports should be made to it monthly of the quantities of gas so furnished. The defendant removed a meter which the plaintiff installed on the defendant's supply line in compliance with this order of the Commission, and the plaintiff brought suit for an injunction, asking that the defendant be restrained from interfering with the installation of a meter on the supply line and the maintenance and reading of the same at proper intervals. *Held,* that such relief should be granted. *Pittsburgh & West Virginia Gas Co. v. Richardson* (1919, W. Va.) 100 S. E. 220.

The court determined: first, that the defendant had a right under the lease to be supplied with so much gas free of charge by the plaintiff as was reasonably necessary for his domestic purposes; second, that the plaintiff was privileged to determine whether or not the defendant was using more gas than he reasonably required; third, that the defendant was under a duty not to interfere with the exercise of such privilege. The regulation of the Commission was appropriate and not only gave to the plaintiff a privilege to install the meter but also made it his duty to do so.

PROPERTY—PROFITS A PRENDRE—IN GROSS—ABANDONMENT.—In 1871 E conveyed part of his farm to the plaintiff's predecessors in title, reserving to himself, his heirs and assigns, all the waste or rubbish stones which might be obtained from working quarries on the land conveyed "and the right to remove the same at pleasure." The remainder of the farm came by mesne conveyances to the defendant, the intermediate owners having occasionally exercised the privilege given by the reservation. E died in 1887 and in 1917 his heirs and next of kin conveyed all their interest under the reservation to H who conveyed to the defendant. There was no evidence of user by E or his heirs or next of kin. The plaintiff sought to enjoin the defendant from entering to remove the stones. *Held* (two judges dissenting) that the interest reserved constituted a profit *a prendre,* that it was in gross and not appurtenant to the land retained, and hence it had been abandoned. *Mathews Slate Co. v. Advance Industrial Supply Co.* (1918, N. Y. App. Div.) 172 N. Y. Supp. 830.

See COMMENTS, *supra,* p. 218.

PROPERTY—TENANCY IN COMMON—LEASE BY TENANT AND ADMINISTRATRIX OF CO-TENANT—RATIFICATION BY SOME OF THE HEIRS.—M and his co-tenant, P's administratrix, leased a part of the joint premises to the defendant's intestate. P's estate was settled and his interest in the premises distributed to his heirs, among whom were the plaintiffs. The plaintiffs, having previously obtained a judgment against the defendants annulling the lease from the date of the final accounting of the administratrix brought ejectment for the premises. The defendants claimed to hold under M, who had accepted rent, and under P's other heirs, who had consented and approved. *Held,* that the defendants were entitled to possession jointly with the plaintiffs. Wheeler, J. *dissenting. Pastine v. Altman* (1919, Conn.) 107 Atl. 803.

This decision places Connecticut in line with the more general rule that a conveyance by a tenant in common by metes and bounds is not absolutely void, as was held in *Griswold v. Johnson* (1824) 5 Conn. 363, and other early Connecticut decisions, but will be given effect so far as not prejudicial to the co-tenants. While the grantee is not entitled, as against co-tenants, to a judgment of partition giving him the exact portion of the premises covered by his conveyance, he is entitled to the use and possession of the premises in common with the others until partition is had. *Ballou v. Hale* (1867) 47 N. H. 347; see *Stark v. Barrett* (1860) 15 Calif. 361, 368. But see *Shepardson v. Rowland* (1871) 28 Wis. 108. The decision seems correct that partition, and not ejectment, is the proper remedy for plaintiffs. See 47 L. R. A. (N. S.) 573, note. Incidentally the case shows that an administrator can lease, but only during the period of settlement of the estate.

TRIAL—VERDICT—AFFIDAVITS OF JURORS.—On a motion for an appeal, the defendant offered an affidavit signed by five of the jurors that his counter-claim had not been considered in fixing the damages. The absence of the affidavits of the other seven jurors was explained. *Held,* that the court did not have the power to grant the motion, with a dictum that the affidavits were admissible, since they "do not assail the verdict in any way; they explain it . . ." *Zunino v. Parodi Cigar Co.* (1919, Sup. Ct.) 176 N. Y. Supp. 319.

The court apparently recognized the majority doctrine that affidavits by the jurors of conduct in the jury room are not admissible to impeach their verdict. But it is difficult to see how the affidavits in the instant case would not have such an effect. See (1918) 27 YALE LAW JOURNAL, 417.

WORKMEN'S COMPENSATION—CONSTRUCTION OF STATUTES.—The plaintiff brought an action against his employer for negligence in furnishing him a defective meat grinder to work with, which caused the loss of his hand. The defendant pleaded contributory negligence. The court ruled that the defendant was deprived of that defence because of his failure to elect to come under the Workmen's Compensation Act. *Held,* that this ruling was erroneous since the business in which the defendant was engaged was not within the Act. *Williams v. Schehl* (1919, W. Va.) 100 S. E. 280.

In arriving at this conclusion, the court was guided by the principle that a statute in derogation of the common law should be construed strictly. This well established rule of statutory construction has, however, been applied infrequently in construing Workmen's Compensation Acts and it has generally been held that, being highly remedial in character, they should be construed liberally to effectuate their purpose. *Milwaukee v. Miller* (1913) 154 Wis. 652, 144 N. W. 188; *Powers v. Hotel Bond Co.* (1915) 89 Conn. 143, 146, 93 Atl. 245, 247. See (1918) 27 YALE LAW JOURNAL, 419. Few jurisdictions apply the rule of the instant case. See L. R. A. 1916A 215, note.