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UNDUE INFLUENCE.

The case of *Finn* v. *St. Vincent de Paul Hospital*, 22 O.L.R. 381, recently before the High Court on appeal from a judgment of the County Court of the United Counties of Leeds and Grenville, presents some peculiar features.

The facts of the case were as follows. Paschal Finn, the husband of the plaintiff, had been for a number of years prior to his death a pauper inmate of the St. Vincent de Paul Hospital, a Roman Catholic institution at Brockville. The only property Finn possessed was a beneficiary certificate issued by the Catholic Order of Foresters. According to the rules of the Society, it would appear that Finn was precluded from bequeathing or transferring the certificate to the hospital, which he was desirous of doing. In order to get over this difficulty, according to the evidence, Finn conceived the curious idea that what he could not do directly, he could do indirectly, by getting married and leaving a widow on whom the certificate would devolve, and who should undertake to give half the money to the hospital. Before communicating this idea to the priest in attendance at the hospital, he is said to have proposed to the plaintiff, and secured the acceptance of her hand on these conditions; and having thus completed the bargain he desired his spiritual adviser to tie the matrimonial knot. Naturally the proposal struck the reverend gentleman with astonishment, as poor Finn was near his end, and, in fact, as the event proved, on his death-bed. It had, as he said, a commercial look and he did not care to perform the ceremony, but after due consideration, he came to the conclusion that as Finn had a right to marry, it was his duty to marry him if he so desired, which duty he accordingly performed. After

the ceremony, he said to the bridegroom, "I understand that it is your wish and intention that $500 of your insurance money goes to your wife and $500 to the hospital," to which he answered, "Yes," and then turning to the bride, he said, "You understand what is to be done," to which she replied, "Yes." Nothing therefore could be clearer than the terms on which the plaintiff had secured a husband and the prospective right to his money. The marriage took place on the 25th January, and three days afterwards the bridegroom died, and the bride of barely three days became a widow. The object of the marriage having been so speedily attained, in order to carry out the bargain between the widow and her deceased husband, she was induced to give a power of attorney to a solicitor, who was summoned by the Mother Superior of the hospital, empowering him to collect the money and pay one half to the plaintiff, and the other half to the hospital. After she had done this the widow seems to have repented of her generosity, and brought the action to recover the $500 which she had directed to be paid to the hospital.

The County Court judge dismissed her action, but the Divisional Court decided, on the authority of a great many cases, that the power of attorney had been obtained in circumstances which amounted to undue influence, the solicitor in fact being the solicitor of the hospital authorities, and paid by them, and the plaintiff having no independent advice, and having been moreover exhorted by the priest "to do her duty and not damn her soul for money," which the plaintiff declared had the effect of scaring her into executing the power of attorney.

The power was therefore declared void so far as it authorized the payment to the hospital. The ante-nuptial contract was also declared to be void under the Statute of Frauds for want of writing. Mr. Finn's ingenious efforts to benefit his benefactors therefore failed.

MUNICIPAL GOVERNMENT BY COMMISSION.

It seems to be very generally admitted in these latter days that the advantages of municipal government so far as cities are concerned are more than counterbalanced by various disadvantages and the impossibility of securing the services of men of the high standing in the business world necessary for the important duties devolving upon them in the solution of the many difficult questions constantly coming before them. As a result the suggestion for government by commission is rapidly gaining favour.

Legislation to this end may appear very shortly in the statute books of some of the Provinces of the Dominion. We are told by *Case and Comment* that this idea is likely to receive wider hospitality in the Western States of the Union to the south of us than at any previous time. It is said that the Illinois legislature passed an enabling Act last spring, and as a result twenty-five cities in that State are preparing to vote on the question. At least a half-dozen cities in Michigan are on the same road, and about all the cities in Kansas not now under the commission plan are making ready to adopt it. Nor is the movement confined to the Mississippi valley. Practically every city in western New York, it is said, will be asking next winter for new rule charters, with the commission as the underlying idea.

This subject is referred to incidentally in a review in the *Nation* of Mr. Bryce's book, "The American Commonwealth." And the extract we quote reflects the thought of that great authority on this important question. The writer says:—"States like Oklahoma and Oregon, to name the two most advanced, have met the malady of machine-politics by a virtual deposition of representative government, securing to 'the people' by means of the Referendum, Initiative, and Recall, full powers of legislation and a veto on all important acts of the executive. While many States are moving along this road towards 'primitive democracy,' as it has continually survived in the New England 'town meeting,' city government is moving in a

different direction by a swift series of equally bold changes. Here the central purpose is to place supreme control in a small Commission of able, honest, non-party men, for a considerable period of years, relying upon the concentrated responsibilty thus attained to secure efficient government and put down graft."

The condition of things in this country is as unsatisfactory as it appears to be in the United States. The scandalous and alarming state of things in the city of Toronto as regards its water supply is an illustration. Incompetence in the past and helplessness in the present has brought about a condition of things bordering on chaos, not only in reference to the water supply, but as to other public utility matters. And there is at present no remedy in sight for the inconvenience, injustice and injury resulting from the mismanagement so common in cities, arising partly from incompetence and partly from a susceptibility to improper and socialistic influences; all of which is evidence that this system of government is inappropriate to urban municipalities though in rural districts it seems to work fairly well.

OCULAR DEMONSTRATION.

It is an old saying that "seeing is believing," and of all methods of proof ocular demonstration has always been regarded as one of the most conclusive. But in applying this method of proof in ordinary litigation, difficulties arise, and particularly where the decision of one tribunal is liable to be reviewed by another, as it is obvious that unless the like demonstration is furnished to the appellate tribunal it is incapable of judging fairly of the weight proper to be attributed to all the evidence upon which the court below has proceeded.

In the proceedings for a view by a jury or a judge, provision has been made for the admission of this kind of evidence, and where that method of procedure has been resorted to an appellate court would be slow to review the finding of either a judge or a jury, based on an actual view, unless it also were en-

abled to have a view, which might in many cases be inconvenient or impossible. Rule 570 (Ontario) provides that a judge may inspect any property or thing, concerning which any question may arise in a case tried before him, or which comes before him on appeal. Rule 571 also provides for inspection by juries. In England it has been considered improper and unauthorized for a judge on the trial of an action of deceit to take a view of the property, on a question of colourable imitation—in that case the similarity of rival omnibuses was the point in question, and, of course, a couple of omnibuses would be hard to bring into court as exhibits; and it was held that the proper procedure was to take the evidence of witnesses: see *London General Omnibus Co.* v. *Lovell* (1907), 1 Ch. 135, and in an appeal from the High Court of Bombay, where an appellate court had at its own suggestion visited the locus in quo of an accident, which was the subject of the action, with the consent of the parties, and allowed an appeal, not on the evidence given at the trial, but on their own view of the facts derived from an inspection of the locality, it was held by the Judicial Committee of the Privy Council that the proceeding was irregular and the judgment based on it was reversed: *Kessowji Issur* v. *Great Indian Peninsular Ry.*, 96 L.T. 859. But the course which these cases condemn appears in Ontario to be expressly authorized by Rule 570 above referred to.

The practice of producing the offspring of an illicit intercourse in order to establish paternity was recently referred to by Mr. Justice Meredith: see *Rex* v. *Hughes*, 22 O.L.R., at p. 349, as being a practice unobjectionable in principle, notwithstanding the cold water thrown on it by Cameron, C.J., in delivering the judgment of the court in *Udy* v. *Stewart*, 10 Ont. 591: but it is quite apparent that unless the same evidence is adduced before an appellate court it has not before it all the evidence on which the court or jury have founded its verdict or judgment and are consequently to that extent not in the same position as the tribunal whose decision it is asked to review.

ADMINISTRATION OF JUSTICE IN ENGLAND AND UNITED STATES.

A writer in *Case and Comment* takes up the cudgels for the United States, in connection with a subject about which much has been said in that country, to the effect that the administration of justice is much more satisfactory in England than it is in the United States. This discussion is, of course, a little domestic matter of their own, but it is rather interesting reading to outside observers like ourselves. We confess that the article in our contemporary would rather lead an impartial observer to the conclusion that those in the United States who speak about "the superiority of English criminal procedure" and who have "written articles lauding the celerity of proceedings in English courts" are probably correct in their assertions to that effect. We note that this champion for his country makes no reference to the number of days that are often wasted in empanelling a jury, a procedure which often takes more time than the trial of the case; nor does he refer to what would be the strongest point for his contention as to the celerity of an administration in his country, viz., that the well-known jurist, Mr. Justice Lynch, is admittedly most prompt, both in trying a case and in executing sentence on the offender, in fact to ensure speed he generally omits the trial of the case. This certainly would be more to the point than the question which he asks of his fellow-countrymen who take the other side of the question—"Do the advocates of English methods think that there are no cases of *Jarndyce* v. *Jarndyce* still slumbering in Chancery?" Our readers need not be reminded that this dream of a novelist did not touch criminal procedure. Such an observation is about as much in point as his concluding argument that the "American" procedure must be the best, because the court rooms of that country are "better appointed and furnished in good taste," and are not "as cramped and stuffy as most of those in London. Many of them do not seem to be much larger than 20 x 20 feet and are poorly ventilated, dark and grimy." However, our friends can settle this little question among themselves without any assistance from outsiders.

LAW IN LABRADOR.

Among those who in all parts of the Empire are quietly and courageously, in the face of dangers and difficulties sufficient to daunt the stoutest heart, striving to do their duty to God and their country, asking no favours, and looking for no rewards, there is no man better entitled to the love and esteem of his countrymen than Wilfrid Grenfell, C.M.G., of the Labrador Deep Sea Mission. Faintly even to understand what manner of man he is, and how great are his services, we must try to realize the importance of his work, the extent of his labours, the dangers he continually encounters, and the lofty spirit by which he is animated. Missionary, physician, magistrate, providing for the material wants of his people while ministering to their spiritual needs, he may well be given a place among such men of renown as Cromer, Milner and Curzon. It is not, however, with the missionary or the physician or the man of business, who by his wise administration has secured for the poor fisherman some fair return for his risk his labour, nor even with the hardy seaman who sails his tiny ship in the teeth of Arctic gales for hundreds of miles along the icy rock-bound coasts of Labrador and Newfoundland, guiding it on its way to succour the sick and feed the hungry, that we of this journal have to do—it is with the *magistrate* who over nearly a thousand miles of coast is almost the sole representative of law, and dispenser of justice, that we are concerned. In his capacity of justice of the peace, Dr. Grenfell has been as useful and as successful as he has been as preacher, doctor, man of business or sailor. He has settled disputes among neighbours, composed feuds of long standing, protected property when in danger, put an end to the illicit traffic in spirits, the greatest bane of the fishing community, and in all ways made the laws of the land not only respected, but obeyed.

With none of the usual machinery for enforcing his judgments, or even for the proper trying of a case, this magistrate was often driven to the use of very odd expedients. One of these we will let Dr. Grenfell describe in his own words:—

"As I was about to leave harbour in the night an appeal came for protection from assault from a quiet family man. I had perforce to try the case in the night. The cottage of the assailant was away by itself, and to go and get the prisoner and hear the case on board was out of the question. So collecting a special constable, the plaintiff, and some witnesses from their beds as we went along, we roused the prisoner and the court sat on a bench in his house and heard the case by the light of a ten cent tin lamp. The absolute nakedness of the house, not to say the ditto of the defendant, made one feel lenient. We had to dispense with one of the chief witnesses because half-dressed and half asleep he howled so unceasingly he prevented any progress. No jail to send any one to, no money to fine any one, no one after we sailed to see to the keeping of the peace, no one willing to go surety for good conduct. All these we found hindrances to the dignified administration of the law; as we did also a week later when a man whom we sought to try for breach of contract and refusing to work, simply took to the hills when he saw our heavyweight fisherman special toiling up the cliff after him. The fleetness of my Marconi operator saved the situation. He was able to outrace the fugitive, and by reasonable argument to persuade him to give himself up. Persuasion is better than force."

Many tales might be told of events connected with the administration of justice in remote places, and in early days, throughout what is now called Eastern Canada, in which the descent from the sublime to the ridiculous was by a very easy step. Some day a chronicler may be found who will relate these tales in a form which will be an interesting chapter in our history, but in that related above there is a pathos which gives it a character and distinction peculiar to itself.

APPEALS TO THE PRIVY COUNCIL AND SUPREME COURT.

By the rules and orders passed by the Judicial Committee, dated 21st December, 1908, it is provided by Rule 2, that "all appeals shall be brought either in pursuance of leave obtained from the court appealed from or, in the absence of such leave, in pursuance of special leave to appeal granted by His Majesty in Council upon a petition in that behalf presented by the intending appellant."

The Registrar of the Privy Council has, we are informed, advised the Registrar of the Court of Appeal for Ontario that the rule quoted is not intended to, in any way, interfere with what has been the practice heretofore on appeals from the Court of Appeal to the Privy Council.

As to appeals to the Supreme Court the Registrar of that court has also advised the same official that on appeals from the Court of Appeal to the Supreme Court of Canada appeal books printed as required by Rule 1305 of the Supreme Court of Judicature for Ontario will be accepted.

DEALING WITH CLIENT'S MONEY.

Our excellent contemporary *Case and Comment* has some good observations on the subject of dealing with client's money. We make some extracts which are as follows:—

The importance to a lawyer of the adoption of correct methods, and the formation and strict following of correct and safe habits of dealing with money coming into his hands, belonging to his clients, cannot be overestimated. Failure or laxity in this regard is liable to result in financial loss, in the loss of the confidence of his clients, or other members of his community who might otherwise become his clients, in possible prosecution and conviction for embezzlement or larceny, or, what is most serious of all, in his professional execution through proceedings for disbarment.

The retention by an attorney of money belonging to his client after demand therefor, or the fraudulent appropriation thereof to his own use, is universally regarded by the courts as sufficient ground for his disbarment. Nor is payment by the attorney after commencement of disbarment proceedings, of itself sufficient defence to the action, though it may in some cases be considered in mitigation of punishment. What is still more important, he may be disbarred though he used the money without actual intent to defraud his client, but in the hope of being able to pay it when demand should be made. And the fact that he has become unable to pay over the amount which he appropriated, because of the unexpected depreciation of securities deposited in a bank as collateral, is immaterial in an action for disbarment for the failure to promptly pay over the money belonging to a client.

In addition to disbarment, an attorney may be convicted of embezzlement or larceny, if he appropriates to his own use money belonging to his client, with intent to deprive the owner thereof, or without informing his client of his collection, or if he puts his client off with unfounded excuses. And he may be so convicted though the money remains in the bank in which he originally deposited it, though he acknowledges receipt of the money, or though he intended to replace it. And the demand by the client for payment is not a prerequisite to a conviction for larceny.

However, if an attorney withholds or uses his client's money without a wrongful intent—as, where he holds the money as a fund upon which he claims to have a lien for services, or believes, though mistakenly, that his client consented to his use of the money as a loan upon interest—he should be acquitted. This, it will be observed, is vastly different from the case of an attorney who misappropriates his client's money wrongfully, without any claim of right except the hope that he will be able to replace it before detection, which is the stock excuse, and probably, in the beginning, the actual belief of most embezzlers.

From the standpoint of civil liability, the failure of an

attorney to promptly pay over money due his client is a breach of implied contract, making him liable to an action in assumpsit, or, if he converts the money to his own use, to an action in trover or case. Or he may be compelled by a bill in equity to account for money collected.

While an attorney may be charged with interest on money he fails to pay over to the client, the cases fix different periods for which it is to be computed, such as from the time of demand or wrongful conversion, from the time it was actually collected, or for the time he used it. And though the Statute of Limitations will operate for the benefit of an attorney, the authorities are not agreed as to when it will begin to run, some holding that it runs from the time of demand, others from the time of collection, while still others hold that it runs from the time the client has notice of collection from the attorney, or other means of knowledge on his part that the money has been collected.

In the Code of Ethics adopted by the American Bar Association in 1909, this phase of a lawyer's duty to his client is stated in article 11, as follows: "Money of the client, or other trust property coming into the possession of the lawyer, should be reported promptly, and, except with the client's knowledge and consent, should not be commingled with his private property or be used by him." This brief but admirable statement, which is now in force in over one third of the States, would seem to afford a safe guide for the attorney in dealing with money belonging to his client, and strict adherence thereto will keep him free from the imputation of moral or professional dishonesty in this regard, though it will not necessarily insure him against financial loss in being obliged to replace money lost through the fault of others. To insure himself against the latter he should take the precautions required of any trustee.

A reference to the article of the Code of Ethics quoted above will shew that two distinct rules are there set forth to guide the conduct of the attorney. The first is to report promptly to the client the receipt of money. In addition to the ethical and professional duty involved, it is also the legal duty of an attor-

ney to give notice of collection to his client immediately, or at least within a reasonable time.

In addition to the moral and legal duty of the attorney to promptly report the collection of money, a little reflection will shew that the constant following of the practice will operate as a powerful restraint to the temptation so often felt by young lawyers who are necessarily living on the ragged edge of their resources most of the time, or of others who are living unnecessarily to the limit of their incomes, to use money coming into their hands to tide them over some temporary financial stringency which is no doubt frequently the beginning of a course of conduct which leads to serious results for the attorney.

It seems to be quite a general practice for attorneys to open general accounts as attorneys, or in trust, entirely separate from their private funds, in which is placed all money belonging to the clients. While it is likely that the placing of the client's money in a general fund of this kind, without designation of the particular beneficiaries, would not relieve the attorney from personal liability as debtor in case the fund was lost through failure of the depositary, yet such a course has the advantage of keeping the fund entirely separate, prevents it being used for personal purposes through accident or oversight, lessens the liability of the attorney to so use it intentionally, and insures him from the imputation of bad faith to which he is always liable if the funds of the client are commingled with his own.

REVIEW OF CURRENT ENGLISH CASES.

ADMIRALTY—TOWAGE CONTRACT—CLAIM OF TUG FOR SALVAGE OF TOW—BURDEN OF PROOF—COUNTERCLAIM FOR BREACH OF TOWAGE CONTRACT—CLAIM FOR SALVAGE BY OTHER TUGS OF SAME OWNER—CLAIMS OF MASTERS AND CREWS OF TUG ENGAGED AND OF OTHER TUGS OF SAME OWNERS.

The Maréchal Suchet (1911) P. 1. This was a claim for salvage, and a counterclaim for damages for breach of a towage contract. The circumstances being that the owners of a tug called the "Guiana" were employed to tow a sailing vessel. The tow ran aground. The owners failed to shew that this was due to any vis major or inevitable accident, or that there was no inefficiency in the tug, or want of skill on the part of the master and crew thereof. The vessel remained aground for four days during which the tug engaged to tow, and three other tugs of the same owners, and others came to her assistance. On the fourth day the vessel came off. Evans, P.P.D., held that the towing tug was not entitled in the circumstances to salvage and that it was not necessary to plead negligence in order to defeat this salvage claim. He also held that the owners of the towing tug were not entitled to salvage for the services rendered by their other tugs, as they had failed in their towage contract; as it was an implied term of the contract that the tug to be furnished should be reasonably sufficient for the work; and that the master and crew of the "Guiana" were not entitled to salvage because they performed no more than their "duties" in the towage service; but that the masters and crews of the other three tugs perform "engaged" services for which they were entitled to compensation. As regards the counterclaim, he held that there was no evidence of the inefficiency of the tug, and the point was left in doubt, and though it was necessary for the purpose of converting a towage claim into one for salvage that the owners of the tug employed, to tow should shew that their tug was efficient, it was, for the purpose of a counterclaim for breach of the towage contract, equally necessary for the plaintiffs by counterclaim to shew that the tug was inefficient, and that a special condition of the towage contract which provided that the owners of the tug were not to be responsible for damages resulting to the vessel while in tow, though not a ground for

converting the towage contract into a claim for salvage was, nevertheless, a good defence to a claim for damages for breach of the towing contract.

ADMIRALTY—TOWAGE CONTRACT—DEFECT IN TOWING GEAR—WARRANTY OF FITNESS OF TUG—EXEMPTIONS FROM LIABILITY—CONSTRUCTION.

The West Cock (1911) P. 23, was a claim for damages for breach of a towage contract. The contract provided that the defendants were not to be liable "for any damage to the ship they have contracted to tow from any perils or accidents of the seas, rivers, or navigation, collision, straining, or arising from towing gear (including consequence of defect therein or damage thereto) and whether the perils or things above mentioned or the loss or injury therefrom be occasioned by the negligence, default or error in judgment of the pilot, master, officers, engineers, crew, or other servants of the tug owners." The damage in question arose from the carrying away of the towing gear of the tug, due to the defective condition of the rivets attaching the towing gear of the tug to her bunker casing. This defect, Evans, P.P.D. held was not covered by the above conditions, which he held only applied to circumstances occurring after the commencement of, and during the towage, and not to a defect existing before the towage began, there being in his opinion an implied contract that at the commencement of the contract the tug and its equipment was reasonably sufficient for the work required to be done. In arriving at this conclusion the learned President relied on, and adopted, the reasoning of that "eminent tribunal" the Supreme Court of the United States in *The Caledonia* (1895) 157 U.S. 124, at p. 138.

SETTLEMENT—CONSTRUCTION—ANNUITY EXPRESSED TO BE PAYABLE OUT OF INCOME—GIFT OVER SUBJECT TO ANNUITY—IMPLIED CHARGE OF ANNUITY ON CORPUS.

In re Watkins, Wills v. *Spence* (1911) 1 Ch. 1. The point decided by the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) overruling Eady, J., in this case was simply this, that where by will an annuity is given to a person for life which is expressly directed to be paid out of income, and this is followed by a gift over of the corpus "subject thereto," the words "subject thereto" mean "subject to the annuity"

which constitutes the annuity an implied charge on the corpus. In arriving at this conclusion the Court of Appeal overruled the decision of Neville, J., In *Re Bigge* (1907) 1 Ch. 714 (see ante, vol. 43, p. 524).

PASSING OFF—"GET UP" OF GOODS—USEFUL COMBINATION—ARTICLE IN COMMON USE—INJUNCTION.

In *Edge* v. *Niccolls* (1911) 1 Ch. 5, the plaintiffs were manufacturers of blue and other dyes which they made up in porous bags with a little wooden stick inserted for the more convenient use of the dye without the necessity of staining the fingers of the user. For this device the plaintiffs had formerly obtained a patent, which had, however, been subsequently revoked—they had, however, continued to put up their goods in this way since 1891. In November, 1909, the defendants had registered as their own design a copy of the plaintiffs method of putting up their goods including the stick and were using it in the sale of their own goods and issuing notices calling attention thereto as being of their own registered design but their own names were on their goods. Eady, J., granted an interim injunction to restrain the defendants from imitating the "get up" of the plaintiffs, and from selling blue or dye "with the stick in it" as, or for the goods of the plaintiff. This order was reversed by the Court of Appeal (Cozens-Hardy, M.R., and Farwell, and Kennedy, L.JJ.), the Master of the Rolls remarking on the impropriety of going into such a mass of evidence on an interlocutory motion, 183 affidavits being filed in chief and 100 in reply. His Lordship also held that a mere useful part of an article as distinguished from a mere ornamental addition cannot be regarded as part of the get up of the article, that no length of exclusive use can entitle a man to a monoply in the manufacture and sale of a useful combination not protected by patent.

POWER OF APPOINTMENT—FRAUD ON POWER—BONA FIDE PURCHASER FROM APPOINTEE WITHOUT NOTICE—LEGAL TITLE—EQUITABLE TITLE.

Cloutte v. *Storey* (1911) 1 Ch. 18. This was an action by persons entitled to a fund in default of appointment to obtain a declaration, that an appointment which had been made was void as being a fraud on the power, in the following circumstances. By a marriage settlement a wife's reversionary interest in a fund of £25,000 was assigned to trustees for the

COMPANY—WINDING-UP — CONTRIBUTORY — CERTIFICATE THAT SHARES WERE FULLY PAID—ALLOTMENT TO PARTNERSHIP—PARTNER SIGNING CERTIFICATE AS DIRECTOR—ESTOPPEL—NOTICE.

In re Coasters (1911) 1 Ch. 86. In this case a firm of Clements, Knowling & Co. agreed to sell a ship to a company for £1,500, part of the consideration to be £1,000 of fully paid shares of the company. The transaction was varied and at the instance of Ellis, a promotor of the company, was carried out in the following way. Clements, Knowling & Co. mortgaged the vessel to one Constant for £1,000 which sum was paid to the company for £1,000 fully paid shares; no formal application for shares appears to have been made by Clements, Knowling & Co. The ship was transferred to the company subject to the mortgage. Without the knowledge or consent of Clements, Knowling & Co. or any of its members Ellis caused the £1,000 cash to be credited as a payment of 5s. per share on 4,000 shares for which he had applied. At a meeting of the directors the 4,000 shares, Nos. 791 to 4,790, were allotted to Ellis and he was entered on the register as owner thereof, and the purchase of the ship from Clements, Knowling & Co. for £500 subject to the mortgage was approved. Knowling, a member of the firm of Clements, Knowling & Co. was subsequently elected a director and a certificate was issued signed by him as a director certifying that his firm was the registered proprietor of £1,000 fully paid shares, Nos. 891 to 1,890. A similar certificate was on the same day issued to Ellis certifying him to be the owner of 4,000 fully paid shares numbered 791 to 4,790, and in the same month a transfer was executed by Ellis to Clements, Knowling & Co. for a nominal consideration of 1,000 fully paid shares numbered 891 to 1,890. This transfer was not dated but both certificates issued on 12th June. The company having been ordered to be wound up, Clements, Knowling & Co. were placed on the list of contributors for 15s. per share on the 1,000 shares held by them, and the question was, whether, in the circumstances, the company was estopped from disputing the certificate that the shares in question were fully paid, and it was contended on behalf of the liquidator that Knowling being one of the partners and also a director must be taken to have known that the shares were not in fact paid up, and that this constituted notice to his firm. Neville, J., who heard the application found that the firm had in perfect good faith paid over the £1,000 in respect of the 1,000 shares for which they had

his share under his father's will to his wife and children, in presumed exercise of the power appointed an annuity of £1,200 to his wife, and in case his residuary estate should prove insufficient for the payment of his debts, he directed that the trustees of his father's will should pay to his wife an additional annuity of £500 so long as any of his debts should remain unpaid or for a period of ten years from his death whichever should be the shorter period, and so long as she expended £400 every year in payment of his debts, and after the debts should be fully paid by her, or after the expiration of ten years whichever should be the shorter period, to pay her if she should have fulfilled the condition instead of the said additional £500 an additional annuity of £100 for her life and subject thereto he appointed the trust funds to his children. Joyce, J., who tried the action, came to the conclusion that though the condition imposed was not a condition precedent, and though the condition in favour of the payment of the appointor's debts applied to only part of the annuity appointed, yet that the appointment made for a purpose foreign to the power, and though there was no evidence of any bargain or prior agreement with the appointee, yet the condition could not be separated from the appointment, and he agreed with the statement in Farwell on Powers, p. 421: "The execution is fraudulent and void if made for purposes foreign to the power although such purposes are not communicated to the appointee previously to the appointment, and though the appointor received no personal benefit," and he held the appointment of the whole £500 was void.

PATENT—APPLICATION TO REVOKE PATENT FOR NON-MANUFACTURE IN UNITED KINGDOM—MANUFACTURE OF PATENTED ARTICLE BY INFRINGERS—PATENT ACT, 1907 (7 EDW. VII. C. 29) SS. 25, 27—(R.S.C. C. 69, S. 38).

In re Fiat Motors (1911) 1 Ch. 66. This was an appeal from the controller of patents. An application had been made to him under the Patent Act, 1907, s. 27 (see R.S.C. c. 69, s. 38), to revoke a patent for non-manufacture in England; and the single question on the appeal was whether or not the controller should take into consideration manufactures of the patented article in England by infringers of the patent, and Parker, J., decided that he should.

COMPANY—WINDING-UP — CONTRIBUTORY — CERTIFICATE THAT SHARES WERE FULLY PAID—ALLOTMENT TO PARTNERSHIP—PARTNER SIGNING CERTIFICATE AS DIRECTOR—ESTOPPEL—NOTICE.

In re Coasters (1911) 1 Ch. 86. In this case a firm of Clements, Knowling & Co. agreed to sell a ship to a company for £1,500, part of the consideration to be £1,000 of fully paid shares of the company. The transaction was varied and at the instance of Ellis, a promotor of the company, was carried out in the following way. Clements, Knowling & Co. mortgaged the vessel to one Constant for £1,000 which sum was paid to the company for £1,000 fully paid shares; no formal application for shares appears to have been made by Clements, Knowling & Co. The ship was transferred to the company subject to the mortgage. Without the knowledge or consent of Clements, Knowling & Co. or any of its members Ellis caused the £1,000 cash to be credited as a payment of 5s. per share on 4,000 shares for which he had applied. At a meeting of the directors the 4,000 shares, Nos. 791 to 4,790, were allotted to Ellis and he was entered on the register as owner thereof, and the purchase of the ship from Clements, Knowling & Co. for £500 subject to the mortgage was approved. Knowling, a member of the firm of Clements, Knowling & Co. was subsequently elected a director and a certificate was issued signed by him as a director certifying that his firm was the registered proprietor of £1,000 fully paid shares, Nos. 891 to 1,890. A similar certificate was on the same day issued to Ellis certifying him to be the owner of 4,000 fully paid shares numbered 791 to 4,790, and in the same month a transfer was executed by Ellis to Clements, Knowling & Co. for a nominal consideration of 1,000 fully paid shares numbered 891 to 1,890. This transfer was not dated but both certificates issued on 12th June. The company having been ordered to be wound up, Clements, Knowling & Co. were placed on the list of contributors for 15s. per share on the 1,000 shares held by them, and the question was, whether, in the circumstances, the company was estopped from disputing the certificate that the shares in question were fully paid, and it was contended on behalf of the liquidator that Knowling being one of the partners and also a director must be taken to have known that the shares were not in fact paid up, and that this constituted notice to his firm. Neville, J., who heard the application found that the firm had in perfect good faith paid over the £1,000 in respect of the 1,000 shares for which they had

contracted and had never in any way consented to or known of Ellis' diversion of the money, and that was all Knowling actually knew about the matter. The fact that Knowling was a director he considered did not prevent the company from being estopped by the certificate signed by him, there being no evidence that he had acted in collusion with Ellis. He thought the certificate was binding quite irrespective of the transfer from Ellis to the firm; and, in the absence of any evidence to the contrary, he thought Knowling might well have thought that the shares were issued to Ellis by mistake. He therefore struck the applicants' name off the list of contributories.

COMPANY—CONTRACT OF SERVICE—SALARY TO BE PAID OUT OF "PROFITS"—"PROFITS"—WINDING-UP—SURPLUS.

In re Spanish Prospecting Co. (1911) 1 Ch. 92. In this case an appeal was had from a decision of Eady, J. The point in controversy was comparatively simple. A claim for arrears of salary was made against a company in liquidation in the following circumstances. The claimants had been employed by the company at a fixed salary to be payable out of the "profits" of the company and not otherwise, but it was agreed that the salary was to be cumulative and that the arrears might from time to time be paid out of profits as they should accrue. In the voluntary liquidation the whole of the assets had been sold and sufficient realized to pay all creditors except the claimants to whom a sum of about £8,000 for arrears of salary was due, and the subscribed capital was returned to the shar holders in full leaving a balance of £3,328 which the claimants contended should be applied on account of their claim. Eady, J., came to the conclusion that this balance was not "profits" because at the date of the winding-up there appeared to be a debit balance of £270 on profit and loss, and that the £3,328 was the surplus of realized assets and not profits. From this conclusion the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) dissent, the surplus in question not being due to any new business carried on by the liquidator ought, in their opinion, properly to be carried to the credit of the profit and loss entirely irrespective of what appeared to be the state of that account at the date of the winding-up. Moulton, L.J., is of the opinion that "profits" are ascertainable by "a comparison of the assets of a business at two dates." He probably means "net assets" after deducting all liabilities, as it seems clear a mere comparison of gross assets would furnish no criterion for ascertaining profits.

WILL—LEGACY BY PARENT TO CHILD—INFANT—CONTINGENT GIFT—CONTINGENCY NOT REFERABLE TO LEGATEE ATTAINING MAJORITY—INTEREST—MAINTENANCE—SHARE OF RESIDUE.

In re Abrahams, Abrahams v. *Bendon* (1911) 1 Ch. 108. The facts of this case were, that a testator by his will bequeathed to each son living at his death who should attain the age of twenty-five years, £15,000, and a further sum of £15,000 to each son who should attain thirty years. He also directed his trustees to stand possessed of 3/14 parts of his net residuary estate in trust for his son Frank in case and when he attained 21 years, and provided that the said shares should not vest absolutely in him, but should be held in trust for him for life, and after his death in trust for his children. Frank was 13 when the testator died, in 1909. This was an application by the trustees to determine whether the two legacies of £15,000 to Frank carried interest and from what time. It was argued on behalf of the other parties interested in the estate that the gift of the share of the residue contingent on Frank attaining 21, the interest of which under s. 43 of the Conveyancing Act was available for his maintenance, was such a provision for his maintenance as would in any case preclude him from getting interest on the two contingent legacies of £15,000, but Eve, J., in deference to *Re Moody*, 5 Ch. D. 837, held that it was not; though, he said but for that decision, he would have held that it was. But on the main point he was of the opinion that the rule of the Court allowing interest on legacies to infants contingent on their attaining 21 when given by a parent or person in loco parentis, could not be extended to the gift of legacies given by a parent to a child, where the contingency, as in this case the attaining 25 and 30 years, had no reference to the infancy of the legatee.

WILL—DEVISE OF REAL ESTATE—TRUST TO APPLY NET RENTS IN DISCHARGE OF MORTGAGES—REMOTENESS—GIFT TO UNASCERTAINED CLASS—GIFT OF RESIDUE.

In re Bewick, Ryle v. *Ryle* (1911) 1 Ch. 116. In this case the rule against perpetuities was invoked. A testator had devised all his real estate to his executors upon trust to receive the rents, and after paying thereout rates, taxes, outgoings, and repairs, to pay off all mortgage charges existing on the real estate held by a certain building society or others, and upon trust after the mortgages were paid off to sell and divide the pro-

ceeds among his children then living, and he gave all his residuary estate to his children equally. At the time of his death in 1909, there were two mortgages on the realty, which if duly paid as they fell due according to their terms would be completely discharged in 1921 and 1927. The application was made to the Court claiming a declaration that the devise in trust to pay off the mortgages and then sell and divide the proceeds was void for remoteness as offending against the rule against perpetuities. Eve, J., said: "Unless I am satisfied that the mortgages must be paid off within the prescribed period, I do not see how I can hold the gift good. I think it is too remote, and the real estate therefore passes under the gift of residue."

EXPROPRIATION OF LAND—PARLIAMENTARY DEPOSIT—ABANDONMENT OF UNDERTAKING—COMPENSATION—COLLATERAL OBLIGATION—COVENANT TO BUILD EMBANKMENT—BREACH OF COVENANT NOT NECESSARY RESULT OF ABANDONMENT OF UNDERTAKING.

In re Southport and Lytham Tramroad Act (1911) 1 Ch. 120. In this case a company had been authorized by statute to construct a tramroad "with all proper and necessary embankments" and for that purpose to expropriate the necessary land, and they were required before obtaining the Act to deposit a sum of money as a security to landowners or other persons whose property had been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the tramroad. The company in pursuance of an agreement with one Hesketh, made before the passing of the Act, subsequently thereto, entered into an agreement with him by which he agreed to convey certain lands to the company and to grant to them by way of easement the right of constructing and maintaining an embankment to carry the tramroad across certain marsh lands of Hesketh; and the company agreed to construct and maintain the embankment and to form it so as to connect certain sea banks and to be sufficient to prevent the ingress of the tidal waters of the river over marsh land belonging to Hesketh. This agreement was followed by a conveyance by which the easement was granted to the company and which contained a covenant by the company to construct the embankment as agreed. Subsequently the company abandoned the project and the embankment was never built, and

the company was ordered to be wound up. Hesketh claimed to be paid out of the deposit, compensation for breach of the agreement to build the embankment as having caused a depreciation in the value of his land. Warrington, J., held he was entitled thereto; but the Court of Appeal (Buckley and Kennedy, L.JJ.) reversed his decision holding that the breach of this collateral agreement was not necessarily a result of the abandonment of the undertaking. As Kennedy, L.J., puts it: "The question is whether an embankment within the meaning of the covenant could not be constructed although the tramroad was not constructed. In my opinion it could." . . . "The abandonment of the tramroad did, no doubt, necessitate the abandonment of the embankment as an embankment carrying a tramway, but it did not necessitate the abandonment of the embankment in the sense of rendering it impossible to fulfil the covenant for such an embankment as would prevent the ingress of tidal water over the respondent's marsh land, and so increase the value of that land." The appeal was accordingly allowed.

COMPANY—DEBENTURES—GUARANTEE—RELEASE OF GUARANTOR —MAJORITY OF DEBENTURE HOLDERS BINDING DISSENTIENT.

Shaw v. *Royce* (1911) 1 Ch. 138. In this case the plaintiff was the holder of debentures in the defendant company, forming part of an issue secured by a trust deed, and guaranteed by the Law Guarantee Trust Co. which was the trustee. By the trust deed a sinking fund for the redemption of the debentures was to be established and the company was to pay the Trust Company 10s. per cent. on the amount of the outstanding debentures. A general meeting of the debenture holders was empowered to assent to any "arrangement or compromise" proposed to be made between the company and the debenture holders, provided it was one which the Court would have power to sanction under the Companies Arrangement Act, 1870, or any statutory modification thereof, if the company were being wound up, and the requisite majority at a meeting of debenture holders had assented thereto and a resolution duly passed at a meeting of the debenture holders was to be binding on all debenture holders whether present or not at the meeting. The company was in voluntary liquidation, and at a meeting of debenture holders a resolution was passed releasing the guarantors the Trust Co. from the guarantee, increasing the interest of the debenture debt, and abolishing the sinking fund, and appoint-

ing new trustees of the deed, and a draft supplemental trust deed was prepared providing that the debenture holders should surrender their debentures, and accept new ones bearing the higher rate of interest, but no guarantee of the Trust Co. The plaintiff did not attend or assent to this arrangement, and brought this action for a declaration that he was not bound thereby, but Warrington, J., held that the arrangement was one which the debenture holders were competent to make and that the plaintiff was bound thereby, and the action therefore failed. In regard to the nature of the guarantee, he was of the opinion that though called a guarantee it was really in the nature of an insurance on which the company might have been liable to the debenture holders although the company might cease to pay the stipulated premiums.

FACTORY—EMPLOYMENT OF CHILDREN—PROHIBITION AGAINST CHILD CLEANING MACHINE IN MOTION—REMOVING BY-PRODUCT —FACTORY ACT, 1901 (1 EDW. VII. c. 22) s. 13—(R.S.O. c. 256, s. 14).

Taylor v. *Dawson* (1911) 1 K.B. 145 was a prosecution for breach of the Factory Act, 1901 (1 Edw. VII. c. 22) s. 13 (see R.S.O. c. 256, s. 14), which prohibits the employment of children to clean machinery in motion, the facts being that a child 12 years of age was employed by the defendants to watch a spinning machine and while in motion to remove from the rollers and top board certain fluff formed in the course of spinning. This fluff, if not removed, would clog and stop the machine; it was not mere refuse but had a saleable value. On a case stated by a magistrate a Divisional Court (Darling, and Pickford, JJ.) held that this constituted a breach of the Act for which the defendants might properly be convicted.

CRIMINAL LAW—TRIAL FOR MURDER—ILLNESS OF JURYMAN—TEMPORARY ABSENCE OF JUROR FROM COURT—CUSTODY OF JURY—REBUTTING EVIDENCE FOR PROSECUTION—ADMISSIBILITY.

The King v. *Crippen* (1911) 1 K.B. 149. This notorious case has furnished a legal precedent on two somewhat important points. (1) on the second day of the trial a juryman was taken ill and was taken out of court, but not out of the building, accompanied by two doctors and an usher to a part of the build-

ing to which the public had no access. After a consultation one of the doctors reported to the court when the juryman was likely to recover, and the court adjourned for a short time and the doctor was sworn to take care of the juror during the adjournment. He then returned to the juror and he and the other doctor, and the usher remained with him in the open air in rear of the courthouse enclosure for three-quarters of an hour, the usher having been with him the whole time he was absent from the rest of the jury. The usher had been sworn on the first day of the trial to take charge of the jury, but he was not sworn to take charge of the sick juror. During the whole time of the latter's absence no one spoke to him about the trial. The doctors spoke to him but no others. On the way to the open air less than a dozen persons had to be passed, but the juror was in a state of collapse and not able to communicate with anyone. The Court of Criminal Appeal (Darling, Channell, and Pickford, JJ.) held that these facts furnished no ground for quashing the conviction. (2) It was also urged on the prisoner's behalf that rebutting evidence admitted on behalf of the prosecution after the close of the defence was inadmissible; but the Court of Appeal held that was a matter of judicial discretion and that the exercise of such discretion would not be interfered with unless it was exercised in a way which obviously resulted in some injustice to the accused.

JUSTICE OF THE PEACE—INDICTABLE OFFENCE—EVIDENCE—WITNESS DANGEROUSLY ILL—DUTY OF MAGISTRATE AS TO TAKING DEPOSITIONS.

The King v. *Bros* (1911) 1 K.B. 159. This was an application against a magistrate calling on him to shew cause why he should not take the deposition of the applicant as a witness in support of a prosecution against the accused for an indictable offence. The applicant made affidavit that owing to illness he was unable to attend the Court and he claimed that the magistrate should attend at his residence to take his depositions. The magistrate objected on the ground that such applications were only entertained when made by a superior officer of the police, as it would otherwise interfere with the other proceedings of his Court. The Divisional Court (Darling, Pickford, and Coleridge, JJ.) considered that the magistrate had no right to lay down any such rule, and that in all cases of indictable offences,

if it is practicable he should go to the residence of the witness and that the question of whether it is practicable or not is for him to decide.

SALE OF GOODS—C.I.F. CONTRACT—"TERMS NET CASH"—RIGHT TO INSPECT GOODS BEFORE PAYMENT—PAYMENT ON PRODUCTION OF SHIPPING DOCUMENTS.

Biddell v. *E. C. Horst Co.* (1911) 1 K.B. 214 was an action to recover damages for breach of contract for sale of goods. Vaux & Co. had by writing agreed to buy a quantity of hops from the defendants in California, to be shipped to Sunderland, and it was agreed that the buyers "shall pay for the hops . . . c.i.f. to London, Liverpool or Hull; terms net cash." Vaux & Co., assigned the benefit of the contract to the plaintiffs. The defendants notified the plaintiffs that they would ship the goods and would draw on the plaintiff for the price at sight with "negotiable bills of lading and insurance certificate attached to draft," and also offered to attach certificates of quality of the merchant exchange of San Francisco. The plaintiffs then notified the defendants that they would not accept the certificates as to quality and declined to pay the bill until they had had an opportunity of inspecting the goods. On receipt of this information the defendants declined to forward the goods, and the action was brought—Hamilton, J., who tried it, came to the conclusion that on a cost insurance and freight contract such as this, it was well settled that the seller was entitled to payment of the price against the bill of lading and insurance certificate and that the buyer could not claim a right to inspect the goods as a condition precedent to payment. "A seller under a contract of sale containing such terms has firstly, to ship at the port of shipment goods of the description contained in the contract; secondly, to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated in the contract; thirdly, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly, to make out an invoice as described by Blackburn, J., in *Ireland* v. *Livingston*, L.R. 5 H.L. at p. 406, or in similar form; and finally to tender these documents to the buyer, so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss, if they are lost on the voyage.

Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery on board ship at the port of shipment. It follows that against tender of these documents, the bill of lading, invoice and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price. In this case payment before the arrival of the goods in this country was involved." But, notwithstanding this, the buyer's right to a reasonable opportunity to examine the goods was considered to remain unimpaired. The action therefore failed.

NEGLIGENCE—CAUSE OF ACTION—INJURA SINE DAMNO—TOWAGE—TOW SUNK BY NEGLIGENCE OF THIRD PARTY—LOSS OF TOWAGE.

La Société Anonyme de Remorquage v. *Bennetts* (1911), 1 K.B. 243. The question involved in this case was very simple. The plaintiffs' tug was under contract towing another vessel, when through the negligence of the defendants' vessel the tow was sunk, and the plaintiffs were unable to complete their contract, and they claimed to recover from the defendants the amount they had thus lost by reason of their non-completion of their towage contract. Hamilton, J., who tried the action, came to the conclusion that the plaintiff's loss of the profits of the contract of towage was not the direct consequence of the defendant's negligence, and therefore was not recoverable at law. In his opinion, it was a case of injuria sine damno. It would have been different if the tow itself had been damaged. The towage contract provided that "sea towage interrupted by accident to be paid pro rata of distance towed." This, the learned judge considered, gave the plaintiffs a right to recover on their contract against the owners of the lost vessel a pro rata proportion of the price agreed to be paid for towing.

CRIMINAL LAW—LARCENY—STEALING FIXTURES BY TENANT—TAKING POSSESSION WITH INTENT TO STEAL FIXTURES—LARCENY ACT, 1861 (24-25 VICT. C. 96) S. 31—(CR. CODE S. 372).

The King v. *Richards* (1911) 1 K.B. 260. In this case an appeal was had from a conviction for larceny in the following circumstances. The accused entered into an agreement with

one King, who was the lessee for a long term of years of fifteen dwelling houses, five of which were unoccupied and the rest being let to weekly tenants, whereby the accused was to have possession and to be entitled to the rents payable in respect thereof and he was within three months at his own cost to put the houses into substantial repair; and upon completion of the work he was to receive a lease of the premises for twenty years at a yearly rent, but if he failed to commence the repairs within seven days, King was to be entitled to re-enter and the agreement was thereupon to be determined. The repairs required to be done were papering, painting and whitewashing, but the accused when he went into possession removed and carried away zinc guttering and lead piping, iron stoves, flush tanks, and wood cisterns lined with zinc, all of which were in good repair. The Court of Criminal Appeal (Lord Alverstone, C.J. and Pickford, and Avery, JJ.) held that the accused had been properly convicted under the Larceny Act, 1861, s. 31 (see Cr. Code, sec. 372), following *Rex* v. *Munday*, 2 Leach C.C. 850.

SHIP — CHARTER-PARTY — CONSTRUCTION — "WORKING DAY"— CUSTOM OF PORT—"SURF DAY."

British & American Shipping Co. v. *Lockett* (1911) 1 K.B. 264. In this case a simple point of law was determined on a preliminary motion on the pleadings. The action was for demurrage by shipowners against assigns of a bill of lading of a cargo of lumber to be carried by the plaintiffs' ship from Vancouver to Iquique and there delivered to the charterers or their assigns on payment of freight "and all other conditions as per charter-party." The charter-party provided that "discharge was to be given with dispatch according to the custom of the port of discharge (but not less than thirty mills per working day) at such wharf, dock, or place as charterers or their agents shall designate." According to the custom at the port of Iquique vessels had to be unloaded by lighters which carry the cargo from the vessel to the beach, and the defendants set up that according to the custom of that port, days on which the surf is rough so as to prevent the operation of unloading vessels are called "surf days" and are not reckoned as working days and that taking such days into account there had been no delay—as on such days the defendants were not bound to take delivery:

and that whether a day is a "surf day" is determined by the captain of the port, who makes an entry to that effect in the register of the port, and which is considered binding on all vessels being unloaded there. Hamilton, J., held, that this being proved would not be a good defence in law, and that in the circumstances "surf days" were to be reckoned as "working days," but the Court of Appeal (Williams, Buckley, and Kennedy, L.JJ.) reversed his decision, being of the unanimous opinion that "surf days" were not to be reckoned as "working days," and that the alleged custom of the port to that effect was reasonable and one which was known to both parties and with reference to which they must be presumed to have contracted.

INFANT—APPRENTICESHIP DEED—COVENANT NOT TO PRACTISE WITHIN CERTAIN AREA AFTER APPRENTICESHIP CEASED—BREACH OF COVENANT—INJUNCTION.

Gadd v. *Thompson* (1911) 1 K.B. 304 was an action to restrain the defendant from committing a breach of a covenant contained in an apprenticeship deed, whereby the defendant being then an infant had bound himself to the plaintiff to learn the business of an architect and had covenanted not to practice as an architect within a specified area after the termination of his apprenticeship for a certain number of years. The action was tried in the County Court, and the Judge held that the covenant was fair and reasonable and that the deed was for the benefit of the apprentice and that he was bound by the covenant. On appeal to the Divisional Court (Phillimore and Coleridge, L.JJ.) it was held that though no action can be brought on a covenant in an apprenticeship deed against an infant, yet that rule only applies during the infancy of the covenantor, and that a covenant made by an infant, when fair and reasonable, may be enforced against the covenantor after he has ceased to be an infant. And it appearing that no architect in the town would accept a person as apprentice who refused to enter into a similar restrictive covenant, the covenant in question was held to be fair and reasonable and therefore enforceable by injunction.

BANKRUPTCY—LEAVE TO ISSUE EXECUTION—ORDER TO CONTINUE PROCEEDINGS—RULE 181—(ONT. RULE 396).

In re Bagley (1911) 1 K.B. 317, may be briefly noticed for the fact that the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) decided inter alia that where a judgment creditor becomes bankrupt, the trustee in bankruptcy may obtain leave to issue execution on the judgment, without first obtaining an order to continue the proceedings under Rule 181 (Ont. Rule 396) or otherwise making himself party to the action. The Court of Appeal had to consider two opposing dicta, that of Cotton, L.J., *In re Woodall*, 13 Q.B.D. 479, 483, and that of Wright, *In re Clements* (1901), 1 K.B. 260, 263, and while the Master of the Rolls and Moulton, L.J., preferred the former, Kennedy, L.J., intimated his preference for the dictum of Wright, J.

CRIMINAL LAW—PRACTICE—CONVICTION—ADMISSION BY PRISONER OF ANOTHER OFFENCE—REQUEST BY PRISONER TO COURT TO TAKE OTHER OFFENCE INTO ACCOUNT WHEN PASSING SENTENCE.

The King v. *McLean* (1911) 1 K.B. 332 was somewhat unusual in its circumstances. A prisoner was indicted and convicted for housebreaking, and he then requested the Judge in passing sentence to take into account a charge of arson for which he was to be tried in another county and to pass a sentence for both offences. The judge acceded to his request and passed a sentence of 3 years' penal servitude. This was done without consultation with the prosecutors in the other case which was duly brought on and tried and the prisoner was convicted before another judge, and a sentence of 5 years' penal servitude was passed. On appeal the court (Lord Alverstone, C.J., and Pickford and Avory, JJ.) discussed the practice to be pursued in such a case and came to the conclusion that where a prisoner convicted admits that he is also guilty of another offence of the same character as that for which he has been convicted the court may take both offences into account in passing sentence, but if there is a committal for the other offence the judge should ascertain whether the prosecution agrees that he should do so. If the committal is in another county and the

prosecution does not consent the judge should leave it to be dealt with in due course, and even if the prosecutors in that case do consent the judge should consider whether or not a separate investigation of the other crime should take place. But where the charge is of a different character in another county, the judge should not take it into consideration at all. In the present case the sentence was reduced to three years to run from the date of the first conviction.

PRACTICE — STRIKING OUT PLEADINGS — REASONABLE CAUSE OF ACTION—RELIEF AGAINST CROWN—DECLARATORY JUDGMENT—ATTORNEY-GENERAL DEFENDANT.

Dyson v. *Attorney-General* (1911) 1 K.B. 410. One effect of recent fiscal legislation in England has been that inquisitorial inquiries are made regarding property, and for the purpose of such inquiries forms are required to be filled up by property owners for the purpose of assessment. One of these forms was delivered to the plaintiff which he was required to fill up and return to "the appointed officer," within thirty days, the appointed officer being a village blacksmith at the plaintiff's place of residence and who, as the plaintiff alleged, was not in the employment of the Commissioners of Inland Revenue. The plaintiff desired to obtain a declaration that he was not bound to send the return to the blacksmith, and also that certain information demanded by the notice could not lawfully be required of him, and for that purpose the action was instituted. An application was made by the Attorney-General to strike out the statement of claim as disclosing no reasonable cause of action and Lush, J., affirmed an order made by the Master granting the application. The Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Farwell, L.JJ.), however, held that the statement of claim raised a fair question and could not properly be struck out on a summary application and that the action was properly instituted against the Attorney-General as representing the Crown.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [Jan. 17.

ROSS v. TOWNSHIP OF LONDON.

Public Health Act—Employment of physician by local Board of Health.

Appeal by plaintiff from the judgment of MEREDITH, C.J.C.P., 20 O.L.R. 578. The action was for a mandatory injunction directing the defendants, other than the corporation of the township of London, who were members of a local Board of Health, to issue an order for $2,300 in favour of the plaintiff, as payment for medical services in a small-pox outbreak in the township of London, and directing the township corporation to pay the same. The Board had issued an order for $350 for these services, but the plaintiff declined to receive that amount as in full of his demand. He claimed a larger sum under an alleged agreement made by him with the Board before the services began. This the defendants denied and the trial Judge found in favour of the defendants, so that if the plaintiff could recover it would have to be on a quantum meruit. The local Board of Health was not as such a party to the suit.

Held, 1. No order could be made against the individual members of the Board of Health who were co-defendants in the action. See R.S.O. 1897, s. 248, s. 48.

2. The Board being a quasi corporation might be sued and the plaintiff's remedy, if any, would be against the Board, notwithstanding s. 58 of the same Act.

3. There was no right of action against the township or corporation. It was not in default in any way. Appeal dismissed.

Johnston, K.C., and *McEvoy*, for plaintiff. *G. Meredith*, K.C., for defendants.

HIGH COURT OF JUSTICE.

Riddell, J.] [Feb. 3.

JONES *v.* TORONTO AND YORK RADIAL R.W. Co.

Negligence—Causal, contributory and ultimate negligence defined.

RIDDELL, J.:—The rules as to contributory and "ultimate" negligence are, it seems to me, based upon nothing more than the proposition that the fact that one acts negligently does not disentitle him to demand that others shall not be negligent toward him.

If, for example, one leave a donkey tied in the road, though that act be negligent or careless, others are not entitled to act negligently toward him or his property: *Davies* v. *Mann*, 10 M. & W. 548. And the inquiry must, in all cases in which both parties have been negligent, really be, what was the actual cause of the accident, as distinguished from a mere condition sine qua non?

Where "there has been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendants' negligence, he is entitled to recover:" per Parke, B., in *Budge* v. *Grand Trunk R.W. Co.*, 3 M. & W. 248; *Davies* v. *Mann*, 10 M. & W. 548, But, if he could by the exercise of ordinary care have avoided the consequences of the defendants' negligence, he cannot recover. If he continue his causal negligence up to the very moment of the accident, being able to discontinue it, and if the cessation of such negligence would have avoided all the consequences of the defendants' negligence, his negligence is the causal negligence, and he has no right of action. "The mischief is an instantaneous result of the operation of the joint negligence of the defendant and the plaintiff; in such cases no question of ultimate negligence arises:" per Anglin, J., in *Brenner* v. *Toronto R.W. Co.*, 13 O.L.R. 423, at p. 439.

MacGregor, for plaintiff. *C. A. Moss*, for defendants.

Master in Chambers.] [Feb. 4.

REX EX REL. WARNER *v.* SKELTON AND WOODS.

Municipal elections—Quo warranto—Parties—Joinder of respondents—Grounds of objection common to both—Municipal Act, 1903, *s.* 225—*Form of recognizance.*

Motion by the relator, in the nature of a quo warranto, to

void the election of the two respondents as reeve and councillor respectively of the village of Mimico.

THE MASTER:—The respondents relied on the construction of s. 225 of the Municipal Act, 1903 (9 Edw. VII. c. 19), given by Street, J., in *Reg. ex rel. Burnham* v. *Hagerman and Beamish*, 31 O.R. 636. It is there laid down that it is only where a joint offence or ground of disqualification is alleged that there can be a joinder of respondents. While holding that the respondents were both duly qualified, the learned Judge is careful to add at the close: "The motion must therefore, *upon all grounds*, be dismissed with costs."

It cannot, therefore, be said that the decision on the point in question was merely obiter. Even if it were, such a considered and definite expression of opinion could not properly be disregarded by me. To do so would be a violation of the principle laid down in *Cruso* v. *Bond*, 9 P.R. 111 (at a later stage see report in 1 O.R. 384).

It was also said that in the earlier case of *Reg. ex rel. St. Louis* v. *Reaume*, 26 O.R. 462, it had been decided that s. 225 did not bear this interpretation, and that this case was not cited in the *Burnham* case. But it is not to be supposed that this latter case was unknown to the late Mr. Justice Street, and it is clear that this decision does not conflict with his. All that was decided by the St. Louis case was that where different respondents are attacked in the same proceeding and on the same ground, the section in question does not require that the same judgment must be given as to all. There, as in all the other cases that I can recall, where there was more than one respondent, there has been one main ground of attack against all. When separate grounds have been considered, the present objection was not taken, or, if taken, was not pressed, nor was it ever necessary to decide it.

It is also to be observed that in the present case the recognizance provides only for "such costs as may be adjudged and awarded to the said defendants against the relator." This may be held to mean jointly only, and not to be enforceable in favour of one only. It follows the form given in Biggar's Municipal Manual (1900), p. 240. In some cases the recognizance is made in favour of the defendants "or any of them;" but it is not clear that there is any authority for this change.

However that may be, it seems better to follow the decision in the *Beamish* case, and leave it to the relator, if dissatisfied,

to have this point settled on appeal, so that it may be made clear what s. 225 really means.

At present, in my opinion, the motion must be confined to such grounds of objection (if any) as are common to both parties, and in which they jointly participated, assuming that this can be done. Otherwise the motion must be dismissed with costs. This would not prevent new proceedings being taken if brought within the statutory period, which has still at least a week to run.

Meek, K.C., for relator. *Godfrey*, for respondents.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Feb. 18.

ST. CHARLES & CO. *v.* VASSALO.

Intoxicating liquor—Sale through agent—Knowledge of intention to violate law.

Where a sale of intoxicating liquor is made by a principal through an agent to a purchaser who, to the knowledge of the agent acting in the course of his employment and within the scope of his authority, intends to dispose of the same in violation of law, the contract is void for illegality and the principal cannot recover the purchase-price.

In such a case the knowledge of the agent is attributed to the principal and it makes no difference that the principal reserves to himself a discretion as to whether he will accept the order or not. *Craigellachie* v. *Bigelow*, 37 N.S.R. 482, 37 S.C.R. 55, distinguished.

DRYSDALE, J., dissented on the ground that the agent in question only had a limited authority to solicit and transmit orders and had no authority to make sales, and his knowledge (as to which he thought the evidence insufficient) was therefore not sufficient to bind the principal.

F. McDonald, for appeal. *J. J. Ritchie*, K.C., contra.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] KELLY *v.* KELLY. [Feb. 13.

Partnership—Profits made by one partner in private speculations with partnership funds—Partnership Act, R.S.M. 1902, *c.* 129, *ss.* 22, 24, 32.

Appeal from judgment of MACDONALD, J., noted vol. 46, p. 36, allowed with costs, CAMERON, J.A., dissenting.

The defendant was the master-mind of the partnership, a firm of builders and contractors. He possessed great executive and organizing ability and contributed from time to time nearly all the capital with which in a period of 25 years large profits were made in carrying on that business. The plaintiffs were his brothers, men with little education or ability, competent only to act as foremen on the works. They always acted on the defendant's orders, and only drew money from the firm for their own use, when and as permitted by the defendant. He allowed Martin Kelly to share equally with him in the profits and Michael got one-fourth, but this was because they were his brothers, and from motives of generosity and ties of affection. There had never been any written articles of the partnership, which was one at will; but after its dissolution, the plaintiffs claimed to share in the profits made by the defendant in speculations, mostly in real estate with moneys drawn by him from the partnership funds before any ascertainment of the respective shares of the partners in, or any division of, the profits. The total amount so drawn out by the defendant was much less than he would have been entitled to had such division been made. Entries were made from time to time in the books of the firm by direction of the defendant shewing particulars of the transactions in question. The plaintiffs, though they were aware of some of the speculations, made no inquiries about them and appeared to have taken at the time no interest in them. The defendant never made the firm liable for postponed payments on his purchases, but gave his own covenants only; and, in cases where he made losses, they were never charged to the firm. Each of the plaintiffs had on several occasions, without the knowledge of the other, obtained the defendant's consent to draw out money for private speculations on his own

account. The defendant had, from the beginning, followed the practice of paying his own money into the firm so as to improve its position financially and to allow it the use of the money.

Held (CAMERON, J.A., dissenting), applying s. 22 of R.S.M. 1902, c. 129, that the course of dealing between the partners had been such that there should be inferred from it a consent of all the partners that their mutual rights and duties, as defined in sections 24 and 32 of the Act, should be varied so as to allow the defendant full liberty of action in respect of any funds which he would have been entitled to withdraw on a division of the profits, that the entries in the books had been made as they were only for convenience and not as shewing partnership transactions, and that the plaintiffs had no right to share in the profits of speculations clearly intended by the defendant as private ones of his own. *Ex parte Harris*, 2 V. & B. 210, followed. *Helmore* v. *Smith*, 35 Ch. D. 456, distinguished.

The contrary intention, which, by s. 24 of the Act, would prevent property bought with money belonging to the firm from being deemed to have been bought on account of the firm, sufficiently appeared from the evidence.

Per PERDUE, J.A.:—1. The intention to be considered in this case is that of the defendant alone, and it is not necessary to shew that it must be that of all the partners. *Ex parte Hinds*, 3 De G. & Sm. 613, followed.

2. The plaintiffs had constructive notice or means of knowledge of what the defendant was doing and their consent may be implied from that: *Ex parte Yonge*, 3 V. & B., p. 36.

Minty and *C. S. Tupper*, for plaintiffs. *O'Connor* and *Isbister*, for defendant.

Full Court.] [Feb. 13.

TORONTO GENERAL TRUSTS CORP. *v.* DUNN.

Automobile—Negligence—Liability of driver for injury to pedestrian—Burden of proof—Contributory negligence.

The administrator of the estate of Andrew McKay brought this action under the Act respecting Compensation to Families of persons killed by accident (R.S.M. 1902, c. 31), claiming damages on behalf of certain relatives of McKay who, when walking across a public street at night, was killed by being run

over by an automobile driven by the defendant, as it was alleged, negligently. The lights carried by the machine at the time, although perhaps sufficient to comply with the requirements of the Motor Vehicle Act, 7 and 8 Edw. VII. c. 34, s. 12, were not strong enough to enable the defendant to see clearly a person walking over the crossing in front, which was in a dense shade cast by overhanging trees, and the evidence did not satisfy the trial judge that the horn had been sufficiently sounded, either to comply with section 13 of the Act or as careful conduct in the circumstances required. As to the speed at which the car was going, according to the defendant's witnesses, it was at least eight or nine miles an hour.

Held, that, the burden of proof that the defendant was not guilty of negligence in the matter was thrown upon him by s. 38 of the Motor Vehicle Act and that he had not satisfied it; also that the evidence shewed negligence on his part. The fact that it was so dark at the crossing and that he went over it at such a rate of speed that his lights did not enable him to see a reasonable distance ahead, itself constituted negligence in the defendant.

The defendant urged that the deceased had been guilty of negligence in that, if he had looked to the east, he would have seen the lights on the car approaching and avoided the accident.

Held, that, the principle that persons lawfully using a highway are entitled to rely on warnings required by statute is applicable under such circumstances, and that the usual rule of ordinary care does not impose on travellers the burden of being constantly on the lookout for automobiles and they have a right to presume that those who may be lawfully using the highway with himself will exercise a proper degree of care.

Vallee v. *G.T.R. Co.*, 1 O.L.R. 224, *Pedlar* v. *C.N.R. Co.*, 18 M.R. 525, and *Hennessey* v. *Taylor*, 189 Mass. 583, A. and E. Ann. Cas. 396, followed. Verdict for plaintiff sustained.

Bergman and *Blake*, for plaintiffs. *Whitla* and *Higgins*, for defendant.

Full Court.] [Feb. 15.

VULCAN IRON WORKS CO. *v.* WINNIPEG LODGE No. 174.

Trades unions—Strikes—Combined action—Conspiracy to injure employers—Picketting and besetting—Damages—Injunction—Principal and agent—Criminal Code, s. 523.

Appeal by plaintiffs from judgment of MATHERS, J., noted vol. 45, p. 335, dismissing the action as against two of the de-

fendant lodges, and appeal by defendants from the judgment in so far as it condemned them, both dismissed with costs.

Full Court.] [Feb. 17.

PATTERSON *v.* CENTRAL CANADA FIRE INS. CO.

Fire insurance—Gasoline "stored or kept"—Arbitration.

Appeal from the judgment of MACDONALD, J., noted vol. 46, p. 703, dismissed with costs.

KING'S BENCH.

Mathers, C.J.] [Jan. 31.

RE STURGEON.

Infant—Permission to sue by next friend in forma pauperis—Practice.

An infant cannot sue in forma pauperis by next friend, unless it is shewn that he cannot procure as next friend a person who is willing to assume responsibility for costs, and unless the proposed next friend is also a pauper. *Lindsay* v. *Tyrrel*, 24 Beav. 124, followed.

The court will not appoint the official guardian of infants to bring an action as next friend of a pauper infant without his consent to assume the ordinary responsibility attaching to that position.

Wright, for applicant.

MacDonald, J.] STIKEMAN *v.* FUMMERTON. [Feb. 13.

Landlord and tenant—Landlord's claim for rent when goods seized under execution—8 Anne c. 14, s. 1—Lease by mortgagee to mortgagor in possession as additional security not a bona fide tenancy.

Interpleader issue as to the crops grown on the lands of Stevenson the execution debtor which had been seized by the sheriff under the defendant's writ of execution. The plaintiff was a mortgagee of the land and had taken from Stevenson, the mortgagor in possession, a lease reserving a rent of two-thirds

of the crops to secure past indebtedness and a further advance, and he claimed the right, under 8 Anne c. 14, s. 1, to have the year's rent paid by the sheriff out of the crops seized.

Held, that to entitle a landlord to such right, there must be a real lease and the rent reserved must be a real bona fide rent and not an excessive one and there should be shewn an intention of the parties to create a real tenancy at a real rent and not merely, under colour and pretence of a lease, to give the mortgagee additional security, and that the verdict should be against the plaintiff on the issue in this case.

Hobbs v. *Ontario Loan and Debenture Co.*, 18 S.C.R. 483, and *Imperial Loan* v. *Clement*, 11 M.R. 428, followed.

Curran, K.C., and *Blanchard*, for plaintiff.

Henderson, K.C., and *Matheson*, for defendant.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] REX *v.* BAXTER. [Jan. 24.

Post Office Act—Infringement.

The defendants contracted with an association to transmit to every voter in British Columbia a certain circular of a political nature. They made up a number of parcels for various city centres and sent them by express, consigned to the express company's agents in the respective places with instructions to mail them in the local post offices. The drop letter postal rate of one cent on each letter was affixed.

Held, setting aside the finding of the magistrate, that this procedure of reaching the addresses was an infringement of the rights of the Postmaster-General under the Post Office Act.

Langley, for Post Office Department. *Aikman*, for respondents.

Full Court.] [Feb. 22.

BRYDONE-JACK *v.* VANCOUVER PRINTING AND PUBLISHING CO.

Practice—Discovery—Company—Examination of officer—Order XXXIA.

A witness, an officer of a company, being examined under Order XXXIA may not be ordered out of the witness stand to

inform himself of the knowledge of his fellow-servants or agents touching matters in question in an action.

IRVING, J.A., dissented.

Davis, K.C., and *Pugh*, for defendants (appellants). *Woods*, for plaintiff.

Law Societies.

BELLEVILLE LAW LIBRARY.

The report of Mr. Duncan Donald, Inspector of Law Libraries for Ontario, claims that the Belleville Law Association have the best accommodation of any in the province and made some suggestions as to possible development.

Colonel Ponton, the president, reported that 135 new books were added last week, and that portraits of Judge Fraleck and Judge Deroche are to be added to those of Judge Smart, Judge Sherwood, Chief Justice Wallbridge and Mr. A. G. Northrup, now in the library.

Flotsam and Jetsam.

Municipal ownership and the way it operates in this country is beginning to afford amusement to some wags in the United States, and they treat it in their usual breezy style. According to one writer:—

"Toronto water, provided by the civic authorities, is so bad that they have to strain it through a ladder to separate it from the debris. Citizens take it out of the tap with a gimlet, and treat it with a solution of chloride of lime and sulphite of copper to remove the germs. Any germs that are too big for this treatment they take out to the back alley and kill with a club."

This puts in jocular form a probable condition of things too ghastly to contemplate with composure.