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HON. C. J. DOHERTY, MINISTER OF JUSTICE.

Under the new government at Ottawa the position of Minister of Justice and Attorney-General of Canada goes to the Province of Quebec, in the person of Hon. C. J. Doherty, K.C. The appointment has met with general acceptance, not only in his own province, but elsewhere.

The new minister was born in the city of Montreal in the year 1855. He graduated from St. Mary's College there; took his law course at McGill University, and received the gold medal for his year. His examinations shewed that he had a legal mind, and had well grasped the principles of the law. He was subsequently made a D.C.L. by his alma mater, where later he occupied the chair of Civil Law. Dr. Doherty practised law in his native city, where he held a prominent position at the Bar, and he was also a member of the Council of the Bar.

In addition to Dr. Doherty's legal training and his successful career as an advocate, the fact that he was for fifteen years a judge of the Superior Court of Quebec will be of the greatest value in the position he now occupies, for in its many-sided character the office of Minister of Justice assumes often a judicial aspect.

Mr. Doherty's appointment will personally be acceptable to the public, as he has always been public spirited and interested in other matters besides law. At one time he held a commission as captain in the 65th Regiment and served with that corps during the Northwest Rebellion of 1885. He has a fine presence, is possessed of a well cultured mind and pleasing and attractive manners. His selection by Mr. Borden as Minister of Justice will, we think, be generally considered an excellent one.

THE GRAND JURY.

The grand jury is a very ancient institution, and, when it rightly discharges its duties, plays a very important part in the administration of justice. It is selected from the men of substance of the county, and presumably from the most intelligent class of the community. Among its most important duties is the preliminary investigation of criminal cases for the purpose of seeing whether or not a fair primâ facie case exists for putting an accused person upon his or her trial.

A certain amount of odium necessarily attaches to any one from the bare fact that he has to stand a trial for an alleged criminal offence, even though it should result in his acquittal, and though the Court should declare that he leaves the dock "without a stain upon his character." For on the man himself who has passed through such an ordeal, if he is of a sensitive nature, an indelible injury has been inflicted. This just and merciful barrier which the law so rightly interposes against hasty and unwarranted accusations, it is needless to say, may be used for the purpose of shielding the guilty. It is, therefore, necessary that those who are called to the responsible position of grand jurors, should have a high sense of their duty, not only to the individual, but also to the public, and realize that while it is a solemn duty to shield the individual from the odium of an unjust prosecution, it is equally their duty to the public to be careful that no one against whom a primâ facie case of guilt is made out, escapes trial by his peers.

In order that justice may be duly administered it is desirable that grand jurors should appreciate their limitations, and should be ready to avail themselves of all the help which is necessary for the proper discharge of their duties. It cannot be expected that men even of the calibre of the average grand juror, can be skilful lawyers any more than it is to be expected that the average lawyer will be a skilful merchant or farmer, or mechanician; and for grand jurors deliberately and ostentatiously to disregard the directions of the judge holding the court to which they are

summoned, and dispense with the assistance of the Crown counsel in the investigation of cases submitted for their consideration, while it savours of conceit and self-sufficiency on the part of the jurors, at the same time also indicates the want of what is called "horse sense."

Fortunately for the administration of justice in Ontario grand juries are rarely to be met with who are wanting either in due respect for the Bench, or of that ordinary common sense which is necessary for the proper discharge of their functions.

There are, however, exceptions to every rule, and at a recent assize a grand jury signalized itself by dispensing with the services of Crown counsel in the investigation of a case in which, above all others, such assistance was imperatively necessary in order to enable them to reach a right conclusion; and when the Bench ventured to remonstrate it was met with what might be aptly termed the respectful insolence of the foreman. In such circumstances it is hardly to be wondered at that the finding of the jury resulted in what the court seemed to have regarded as a miscarriage of justice, and having thus, so far as we can gather from what has appeared in the public press, demonstra ir unfitness for the proper discharge of their important duti the court promptly dismissed them.

There may have been reasons for the action of the grand jury which do not appear, and they may have imagined some desire to encroach upon their undoubted rights; but the unseemly incident would have been avoided if the foreman had adopted the usual course of requesting the Crown Counsel to wait upon them for his advice upon any matter of a legal character, with which he would necessarily be more familiar than they could be. Instead of this they took the matter into their own hands and, according to the views of the judge, made a mess of it. Upon the whole, we do not see that the judge could have acted otherwise than he did.

THE DIVORCE HARVEST.

We regret to see that the annual crop of divorces granted in Canada continues to increase. During the last session of the Dominion Parliament twenty-two divorces were granted, fifteen at the instances of wives, and seven at the instance of husbands. In every case but one the cause alleged is adultery; and the remaining case was for an unnameable offence. The applicants for relief are empowered to marry again, but no such permission is granted to the "guilty party."

Of the total number of twenty-two applications, twelve came from Ontario, four from Quebec, three from Manitoba, and two from Alberta. Ontario, as usual, having the unenviable position of heading the list.

It is sometimes assumed by "the guilty party" that, though not expressly authorized to marry again, he or she may nevertheless do so, and in some cases such a view has been carried into practical effect, but it yet remains to be determined whether a parliamentary divorce quoad the "guilty party" has any greater legal effect than the old divorce a mensa et thoro, which was merely a separation from bed and board and did not carry with it the right of remarriage. Those who contract such unions therefore seem to run the risk of the marriage being accounted illegal, and their offspring, if any, illegitimate.

It would seem proper that those responsible for the maintenance of public mortality should consider whether a test case should not be brought to determine the question whether or not such second marriages are lawful, in order that innocent persons may not be led into the false position of thinking themselves lawfully married if they are really not.

There can be little doubt that the primitive Christian Church regarded marriage lawfully contracted, as indissoluable for any cause whatever during the lifetime of the parties. This seems to be established by two recent English publications, one by the Rev. Dr. Wilkin, and the other by Bishop Gore, and according to these writers the better opinion of Biblical critics seems to be that the variation between St. Matthew's gospel and those of St.

Mark and St. Luke, which is supposed by some to introduce an exception to the indissoluble character of marriage in the event of the commission of adultery by the wife, is really an interpolation, in St. Matthew's gospel, made with the possible intention of making its meaning clearer, but which really had the effect of introducing an exception for which there was no authority in any primitive document, and which creates a variance between it and the other two gospels.

In this country, although, in the main, Christian principles are the foundation of social order, it is necessary for Parliament to take into account the fact that all citizens are not Christians, and many who call themselves Christians are not willing to submit themselves in all respects to what may in fact be the Church's law; and again, many Christians are not agreed as to what the Church's law or the Divine law really is regarding questions relating to marriage and divorce, and therefore Parliament, though desirous of supporting by temporal law in the main the principles of the Christian religion where Christians are in general accord, may, and does, in some cases find itself unable in the circumstances to give its coercive support to all prohibitions of the Christian Church, whether viewed as an aggregate of many differing sects, or as being more or less authoritatively represented by one or more of such sects. Thus, with regard to the question of marriage and divorce, the law of the State in many cases fails to impose any penalty either civil or criminal for breach of what is probably the Church's law, or even, to put it higher, the law of God, leaving the observance or non-observance of that law to the conscience of each individual, rather than compel its observance by the compulsion of temporal law. To take a familiar instance, the marriage with a deceased wife's sister was formerly forbidden both by the law of the Church and by the law of the State, but Parliament has now withdrawn its interdict, but that does not impose on any person any duty or obligation to violate the Church's law, it merely exonerates him from any temporal penalty if he does so. So in the case of divorces granted by Parliament with power to

remarry. This in no wise compels any one to remarry during the lifetime of the divorced spouse, but it frees him or her from any temporal penalty or inconvenience or disability for so doing. Those who can only be restrained by temporal law, may avail themselves of the license to violate the Church's law, and the Church can only visit such offenders with spiritual censures and penalties. It, of course, has no power to annul marriages which the State has determined may be contracted without violation of temporal law; but from the ecclesiastical standpoint, so far as such offenders submit themselves to ecclesiastical jurisdiction, they may be refused the privilege accorded to members in good standing. And in aid of the due observance of the Church's law, for which a temporal sanction is lacking, there may at all events be a social sanction, which may prove more or less effective.

If it makes no difference to a person's social standing whether he or she is living in violation of the Church's law, such offences will multiply, but if it is made manifest to all that such offences constitute a recognized social blot, no matter how much the State may tolerate them, there is less likelihood that people who have any regard for their reputation will perpetrate them. In short, one of the best safeguards for the due observance of the Church's law is the existence of a sound and healthy public opinion which will not tolerate its violation. For it is to be remembered, that although all its precepts are not enforceable by temporal law, yet Christianity is part of the law of England, as Blackstone long ago laid down, and it is also part of the law of Ontario, as Harrison, C.J., affirmed in *Pringle* v. *Napanee*, 43 U.C.Q.B. 285; and the like may be said as regards all the other Provinces of the Dominion.

HUMANITY AND THE LAW.

The subject of negligence is so prominent in these days of rapid transit and reckless disregard of life, that any intelligent discussion of the subject is always welcome.

Our esteemed contemporary, the *Central Law Journal*, publishes an excellent article under the above title, which will be read with much interest. It is written by Mr. Bruce, of Grand Forks, N.D., who has just been appointed a justice of the Supreme Court of that State. He writes as follows:—

Is human kindliness a duty in the eyes of the law? Are we our brothers' keepers? Are the ethics of Christianity a part of the law of the land? Does social progress require the legal sanction and protection of the altruistic and of the humane? To what extent should the public policy of the courts (for it is a judicial conception of a public policy which is behind almost all tort liability), recognize and keep abreast of our higher impulses and conceptions and express in the mandates of the law the concepts of a Christian civilization?

These questions have recently been presented in the three cases of *Union Pacific Railway Co.* v. *Cappier,* 66 Kan. 649, 69 L.R.A. 513; *Depue* v. *Flateau, et al.,* 111 N.W. 1, (Minn.); and *Cincinnati and N.O. and T.P. R. Co.* v. *Marr's Administratrix,* 70 L.R.A. 291 (Ky.); and should be squarely met and settled. The first of the cases arose in the State of Kansas. A trespasser on a railway right of way was struck by a moving car, without fault on the part of the railroad company, and was left by the side of the track in a mutiliated and bleeding condition, without any attempt being made to bind up his wounds or to check the flow of blood. Death ensued as the joint result of the injury and of the exposure. In reversing a judgment for the mother of the deceased, the court, among other things, said:

"These facts bring us to a consideration of the legal duty of these employees toward the injured man after his condition became known. Counsel for the defendant quote the language found in Beach on Contributory Negligence, as follows: 'Under

certain circumstances, the railroad may owe a duty to a trespasser after the injury. When a trespasser has been run down, it is the plain duty of the railway company to render whatever service is possible to mitigate the severity of the injury. The train that has occasioned the harm must be stopped, and the injured person looked after, and, when it seems necessary, removed to a place of safety, and carefully nursed, until other relief can be brought to the disabled person.' The principal authority cited in support of this doctrine is *Northern C. R. Co.* v. *State*. . . . The case does not support what is so broadly stated in Beach on Contributory Negligence. It is cited by Judge Cooley, in his work on Torts, in a note to a chapter devoted to the Negligence of Bailees, indicating that the learned author understood the reasoning of the decision to apply where the duty began after the railway employees had taken charge of the injured person. After the trespasser on the track of a railway company has been injured in collision with a train, and the servants of the company have assumed to take charge of him, the duty arises to exercise such care in his treatment as the circumstances will allow. We are unable, however, to approve the doctrine that when the acts of a trespasser himself result in his injury, where his own negligent conduct is alone the cause, those in charge of the instrument which inflicted the hurt, being innocent of wrongdoing, are nevertheless blamable in law, if they neglect to administer to the sufferings of him whose wounds we might say were self-imposed. With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance. For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men, but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure. In the law of contracts it is now well understood that a promise founded

on a moral obligation will not be enforced by the courts. Bishop states that some of the older authorities recognize moral obligation as valid, and says: 'Such a doctrine carried to its legitimate results would release the tribunals from the duty to administer the law of the land, and put in the place of law the varying ideas of morals which the changing incumbents of the Bench might from time to time entertain.' . . . The moral law would obligate an attempt to rescue a person in a perilous position, as a drowning child—but the law of the land does not require it, no matter how little personal risk it might involve, provided that the person who declines to act is not responsible for the peril."

The second case, that of *Depue* v. *Flateau et al.*, was tried in Minnesota. The plaintiff was a cattle buyer. He called at the farm of the defendants at about five o'clock in the evening of a very cold January day to inspect some cattle he understood they had for sale. It was dark when he arrived and he was unable to inspect the animals and he therefore requested permission to remain overnight. This request was refused, but the defendant Flateau, Sr., invited him to remain for supper. Soon thereafter he was taken violently ill and fell to the floor. From this point his memory was not clear as to what occurred, but he recalled that he again requested permission to remain at the defendants' home over night and that his request was refused. Defendants then assisted him from the house and into his cutter and started him on his journey home, seven miles away. He was found next morning, about three-quarters of a mile from defendants' house nearly frozen to death, having been again attacked by his ailment and having fallen from his cutter. He subsequently brought an action against defendants for damages, claiming that, "in view of his physical condition, which was known to defendants, they were guilty of negligence in sending him out unattended on a cold night to make his way to his home as best he could." This theory the court sustained. It held that "since the plaintiff was not a trespasser upon the premises of defendants, but was there by express invitation, the defendants

owed him the duty, upon discovering his physical condition, to exercise reasonable care in their own conduct not to expose him to danger by sending him out from their home, and that, if defendants knew and appreciated his physical condition, their conduct amounted to negligence, and the question of their liability should have been submitted to the jury."

In the case of *Cincinnati, N. O. and T. P. R. Co. v. Marr's Administratrix*, to which the Minnesota court referred, William H. Marrs, while in an intoxicated condition, wandered into the private switching yards of the Cincinnati, New Orleans and Texas Pacific Railway Company at Lexington, Ky., and at 11 o'clock in the evening, was found by the yardmaster asleep in the labyrinth of tracks. A switching crew coming along with an engine at the time, he was aroused by the crew and the yardmaster and told to move along. This he did, cursing his disturbers as he walked into the darkness. The crew then went to their supper (a midnight lunch), and, returning in an hour, started with their engine along one of the tracks for the purpose of getting a car of stock. While proceeding at the rate of six or seven miles an hour, the engine ran over Marrs, who had again fallen asleep (this time on the track), and inflicted injuries from which he died. To recover damages, for the death thus occasioned, an action was successfully prosecuted by the administratrix of the estate of the deceased man, and the judgment which was recovered was affirmed by the Supreme Court of the State of Kentucky, to which an appeal was taken. "We fully concede," the court said, "that Marrs' being drunk did not make him any the less a trespasser when he first went into the yard of the corporation, and his intoxication added no new duty from it to him then. But when its servants actually discovered him, trespasser though he was, they owed him the duty to refrain from injuring him, and this duty was as comprehensive as the helplessness of his condition demanded to insure his safety from injury by them. The servants of the corporation, after finding him in the yard, could not shut their eyes and

close their faculties to what must have been apparent to the most casual observer, and say that, under the circumstances surrounding Marrs, they owed him no duty, and could after that treat him as a trespasser. They knew he was intoxicated and in the yard, and, having seen him twice before within an hour in a drunken stupor, they had no right to assume that when left to himself he would not again sink into a torpor, as he had done twice before. . . . This being true they owed him one of two alternative duties—either to see him safely out of the yard, which common humanity required, or, failing in this, watch out for him as the engine moved about in the corporation's business."

In this last case there was no invitation and the injured man was a trespasser. It is to be noticed, however, that the employees of the railway company awakened and perhaps to that extent took him under their care. It is also to be noticed that the decision turns rather upon the alleged subsequent negligence of operating the engine in the yard when the switching crew knew or should have known that Marrs was wandering around therein, than on the failure to see him safely out of his dangerous position when he was first discovered and awakened. The analogy, therefore, which the court in the Flateau case, to which we have just referred, saw between this case and the one under its immediate consideration, is not perhaps as clear to others as it was to the Minnesota tribunal. In the Marrs case, there was a sin of commission as well as one of omission. In the Flateau case there was a sin of omission alone. In the Marrs case the employees of the railroad company, so the court held, negligently ran over the man rather than negligently failed to see him in safety from the yards. In the Flateau case the defendant did no affirmative physical act of which complaint could be made or on which an action of tort could be based. He merely denied the permission to stay with him overnight. There was no force and no violence. There was a verbal refusal of a verbal request and that was all. The Flateau case, indeed, is perhaps the first case to be found in the books in which the law of human-

ity and not of strict legal personal and property right prevails, and where a liability in damages is imposed for what was primarily a sin of omission rather than a sin of commission. The defendant, indeed, was held liable not because he did those things which he "ought not to have done," but because he "left undone those things which he ought to have done."

But neither the Flateau case nor the Marrs case can be reconciled with the strict rules of the past, which merely imposed a legal obligation for a negligent affirmative injury to personal or property rights. In both cases humanity was the impelling argument. In the Marrs case it is plain that the negligence in operating the train—the sin of omission—was merely an excuse for the judgment. The accident, indeed, happened an hour at least after the man had first been awakened. The engine crew had gone to supper in the interim. They could hardly have been expected to know that he was still in the yards. The judgment was really rendered because of the omission to lead the drunken man, when first awakened, from the labyrinth of tracks and to a place of safety. Nor can we believe that it was based upon the theory that the employees of the company, having once awakened the man, had assumed a responsibility to him and were bound to finish this work which they had begun and to incur a liability which they would not have incurred if they had let him alone. The fact was that, though a trespasser, he was in a position of danger from which, without danger or a serious loss to themselves, they could have extricated him, and the court, precedent or no precedent, was determined to hold them liable. The positive act, we believe, furnished an excuse for rather than the reason and purpose of the decision.

The subtle distinctions which are drawn in all these cases, indeed, must sooner or later be swept aside, and this both because the public as a whole has no respect for or interest in "nice questions," and because there is no merit or reason in them. The attempt which was made in the opinions in the Cappier case to draw a distinction between those cases in which the defendant has entered upon the care of the injured per-

son and negligently performed his work or desisted therefrom, and those in which he has refrained from aiding altogether, and to hold to a rule of liability in the former and not in the latter, is too opposed to a sound policy to merit any approval whatever. The result of the distinction would be to suppress all the instincts of humanity. It would prevent men, no matter how serious the catastrophe or great the necessity for help, from volunteering any assistance at all for fear that having once begun they could not afterwards desist. It renders one liable for negligence committed while acting humanely. It subjects one to no liability whatever if he allows the cowardly and selfish side of his nature to dominate him and refrain from helping altogether. In an age of legal refinement and of a superimposed law, such distinctions may perhaps be made and may live. They are out of place and impossible in an age of democracy in which the judge and the law-maker are every day finding it more and more necessary to keep in touch with, and to respond to, the ethical and social demands of an idealistic, aggressive and thinking constituency. So, too, the same sentiments which in the ages of the past led men to forcibly deal with the heartless recreant and the coward, will never in this day, where force and personal persuasion must give way to the law, allow that law to sanction heartlessness, and to absolve a man from the duty of rendering at least the first aids to those whom he has injured, even though he may not be legally liable for the injury itself.

One thing is certain, and that is, that the law of negligence and of tort liability has been, and always will be, progressive. It has in the past, it is true, been, and perhaps always will be largely judge-made. It has in the past hardly been popular in its origin. It has, however, though king and judge-made, largely reflected the social conscience of the king and of the judge. Though circumscribed by formalism it has had its origin and expansion in a policy of democracy and of humanity. As our democracy and humanity grow, that expansion will continue.

It is interesting, indeed, and profitable, to trace the gradual growth of the law of negligence in this respect and of the public policy which lies beneath it. The English law at first gave no general redress for negligence. That negligence was only actionable which was expressed in a direct and forcible tort and whose results were direct and proximate. There was no redress for the indirect results, even of forcible torts, nor was there any redress for the sins of omission. It was not until the reign of Edward III. that the action of trespass on the case was invented or created and that the law of actionable negligence really began to exist. With the invention of that writ a new right was created, the right to a relief in damages for injuries sustained through the failure of another, on whom the duty of care and protection was imposed, to perform that duty whether the negligence consisted in omission or commission. But there were questions even then to be settled and which are still largely unsolved. These questions are: "On whom is the duty of care and protection imposed," and "What are our real duties?" "Are we to any, and if so, to what extent, our brothers' keepers?" These questions must be fairly and squarely met. Do we, or do we not, owe to our fellowmen the duty of help and of protection in periods of dire distress when that assistance is easily within our power? Is there aught of Christianity in the law of the land?

Closely connected with the cases we have considered are those in which railway companies and manufacturers have been sought to be held liable for the value of the services of surgeons and of others which have been furnished persons whom they have injured, and it should be incumbent on the companies to procure such services. These cases on the whole point strongly to a new gospel of humanity. Their tendency is to make one believe that the law of negligence and the test of tort liability is to-day, as it always has been, progressive and is the expression of a growing judicial conscience, a conscience, it is true, which is limited by considerations of practicality and which is too regardful of precedents, but which is a conscience nevertheless.

"An implied power," says Judge Thompson in his Commen-

taries on the Law of Corporations, "will be ascribed to any corporation employing labour to incur expenses on account of injuries received by its employees in the line of their employment in the absence of any express statutory grant of such power. This implication rests upon the most obvious grounds of justice and humanity." "The principles of justice and the dictates of humanity, in our judgment, as well as the law," says the Texas Court of Appeals, "in a case where contributory, if not proximate and controlling negligence could be attributed to the injured man," "imposed upon the company the duty to furnish the wounded man medical aid; and the foreman acting for it, in the absence of any higher authority, had the implied power to bind the company for the payment of the services of the physicians whom he had employed." Where, indeed, employees are injured the courts seem generally willing to clothe even subordinate officers and agents with the authority to summon and contract for medical aid, where that aid is immediately necessary. The opinions which so far have refused to extend the doctrine of liability and of implied authority from the railroad cases in which, on account of the well-known dangers of the occupation, it was first asserted, to those connected with other industries, and the few railway cases which themselves deny the liability and the power, can generally be distinguished by the fact that in them liability is sought to be imposed for continuous as well as for immediate and temporary treatment. "In the first case," says the Supreme Court of Kentucky, "the services sued for were not confined to the immediate emergency, but lasted during several months. Appellee in the meantime resided in the same city and only a short distance from where appellant lived, and it would have been very easy for him to have inquired as to the alleged authority of their foreman to act for them. . . . In this case no necessity is shewn why appellee should have selected a physician to treat the injured man during his long confinement, as it does not appear that he lacked friends or relatives, who were both able and willing to do so for him."

There is, of course, much reason and justice behind this protest against liability for services rendered during an extended period of time. Except in the case of employees, and on a theory of employers' liability and risk of the business, there can, indeed, be no reason why the railway company or manufacturer or other defendant should, when the accident was not in the first place due to his negligence, pay for any medical or other services at all, except such other services as may be immediately necessary to save life or to prevent immediate suffering. The officer who calls the physician is as much the agent by necessity of the injured and unconscious man as he is of the railroad or other company. "Ordinarily," the courts say, "one running and calling a physician does not make himself liable, because a contrary rule would make a bystander hesitate to perform such an act of humanity." We would even go so far as to say that in such cases the physician should be compelled to at least temporarily minister and to run the risk of his patient's ability to compensate him for his services.

There is, except on the theory of a judge-made employer's liability law, or of an implied risk of the business in the case of those businesses and employments which, like railroading, are both quasi public and intrinsically dangerous, no more reason why the company should pay gratuities than that the physician or surgeon should furnish them. The doctor, like the railroad company, is a licensee. His business is affected with a public interest. The lawyer can, under the pain of disbarment, be compelled to gratuitously defend the pauper criminal. Why, in extreme cases, should not the nearby physician be placed under the same obligations?

All other services, however, which are immediately necessary, the injuring party should furnish, no matter how free from blame he may be, and especially should this be the case with employers and quasi public corporations, and theoretically at least, with all corporations. There can, indeed, be but little question that the duty to furnish employees with reasonably safe appliances and tools and premises on which and with which to work, and to

give warning of hidden and unexpected dangers, which was itself judge-made, will sooner or later be extended to that of furnishing the immediate relief which the emergency requires. It is, in short, a species of employers' liability insurance which the morals of the age will not suffer to be withheld. The public will, of course, pay the bill in the increased price of the articles they buy and of transportation, but they will no less insist upon the rule. It is not strictly logical, to be sure, nor it is consistent with the theory of a complete contractual equality between employer and employee to which the American courts have for so long adhered, and in which as a people we like to believe, but it is humane, and the courts are coming more and more to believe that in the matter of personal employment a contractual equality does not in truth exist.

Nor should the rule be necessarily applied to railway companies alone. It should equally be applied to all corporations which use appliances, vehicles, or machinery which are dangerous to human life, and especially to those which for purposes of gain, invite the public upon their premises. It should be applied to private persons who do likewise. The infliction of injury upon another, should bring with it the duty of at least temporary care, whether the entity who inflicts that injury be corporate or personal. If corporate, there is, of course, an added argument for the rule in authority, if not in logic, and the cases are now quite numerous which, irrespective of charter restrictions or authority, justify a greater police control of corporations than of natural persons. The theory, indeed, which underlies these cases, and which is that without the action of the state the corporation could not have been, or have had any rights at all, and that service to society is an implied condition of every charter, is one which the voting public will readily sanction, and it is the steadily voting public who ultimately control our public and social policies.

The expansion of the law in this respect would be no greater than the expansion of our statute law which has compelled railway companies to fence and to elevate their tracks, or which has

compelled them to use spark consumers, and has made the mere spreading of the fire from a railway track primâ facie evidence of negligence. These are all as it were, risks attendant to the license and the liability is based on the theory that not merely should a public utility serve the public, but that losses naturally resulting from the use of a privilege should be borne by the licensee. The railroad company is compelled to fence and guard its turntables against child trespassers, because, on account of the inquisitiveness of childhood, there is no other way to avoid the loss of life. Similarly, no matter how much we may preach and how much we may warn, accidents will happen, and the most careful at times will be careless. Crossing accidents will occur. Does not a due regard for human life demand that the bleeding or wounded man be temporarily ministered to by the agency which clearly occasions the loss? The law for the protection of human life and of the careless as well as of the careful, can demand the elevation of railroad tracks and the incidental expenditure of millions of dollars, and this simply because the railroad is inherently dangerous, and otherwise accidents must occur? Can not the law say that the railroad company, where the track is not elevated, shall at least temporarily care for those that are injured? Can not the law say that in cases of accident, such as a sudden sickness upon the highway, or upon a railway train, the nearby physician shall minister even though he may not be absolutely sure of his reward?

Nor should trespassers even be denied some measure of aid and of protection, although it is true that so far the courts have shewn but little sympathy towards such persons and have been slow to conceive of any duty of medical help. Except in the cases of young children, where the trespass is through ignorance and a natural curiosity rather than wantonness, and is often the result of a temptation too great to be borne, there can, indeed, be no reason why the railway company or the manufacturer or the business man should be compelled to bear the loss, any more than the physician himself, or why the former should be compelled to pay, any more than the latter to serve. There is much reason

indeed, for holding that the medical profession is a business which is as much affected with a public interest as is that of the carrier himself. We are also aware that in the case of *Wills* v. *I. & G. N. R.R. Co.*, 41 Tex. Civ. App. 58, 92 S.W. 273, the court, in denying the implied authority of the conductor to employ surgical help, said: "We do not undertake to say what would be the power and duty of a conductor of a railway company where a passenger or employee was injured. Here the party injured was a trespasser. and a similar distinction is to be found in a long line of cases." But the distinction and the rule should never, and we believe will never, be allowed to permit of absolute brutality, and the leaving of an injured man to bleed or to freeze to death by the roadside or by the railway track. The first aids to the injured must at least be administered, the person, if possible, must be carried to a place of safety and medical help must be summoned and the public authorities notified. There are points, indeed, beyond which sympathy and humanity submerge all rules of technical rights or technical logic.

It is interesting to note to what an extent the calls of a higher duty and humanity were recognized in the mandates of the Hebrew law and how far behind the ancient Hebrew we moderns often are. It is interesting and suggestive, however, to note that no penalty for, or right of civil action based upon the neglect of these mandates seems to have been provided. Perhaps it would be more in accordance with the fact, to say that these mandates, though contained in the so-called Laws of Moses, were not strictly laws at all, but were mere teachings (torah) or moral precepts. The Hebrew codes seem to have been in this respect loftier in their concept than that of Hammurabi or the laws of the Assyrians, Babylonians or Egyptians from which so much of them was derived, but to have recognized the same difficulty when an attempt was suggested of enforcing the mandates of humanity by the imposition of pains and of penalties. But perhaps no penalties were necessary in a small community and among a small people, such as the Israelites always were, where church and state were so closely co-ordinated and where the dis-

approval of the priestly class was so dreaded and was fraught with so serious a social consequence. Perhaps even to-day the disapprobation of our friends and of our neighbours may be made more potent for punishment than any pain or penalty or suit for damage that the law may sanction. Even now it is often the disgrace which comes from a conviction in the courts of law which men dread rather than the fine or imprisonment or monetary loss which results therefrom. The cases, indeed, are not uncommon where the men have been compelled to leave the communities in which they have lived, because at times of accident by drowning or fire they have hesitated in risking their own lives in order to save those of others. The brand of cowardice is even to-day of far-reaching injury to its wearer. The doctrine, indeed, that "one's first duty is to himself and to his family" and that "self-preservation is the first law," has never met with an unqualified support among a people such as ours whose very civilization is grounded on heroic self-sacrifice.

These Hebrew codes, it is true, say but little about the first aid to the injured as we now use the term. They say much, however, about the duty to the suffering and to the stranger within the gates. The duty of personal aid in the hour of distress, the manly and hospitable nomad and frontiersman takes for granted, and it is only the class selfishness of a crowded civilization which causes it to be forgotten. The care, indeed, which the Hebrew law enjoined concerning the property of the helpless, must have premised a regard for his life also. "If thou meet thine enemy's ox or ass going astray, thou shalt surely bring it back to him again," the code of torah says. "If thou see the ass of him who hateth thee lying prostrate under its burden, thou shalt in no case leave it in its plight; rather thou shalt, together with him, help it up." "Thou shalt not see thy fellow Israelite's ox or his sheep going astray and withhold thy help from them; thou shalt surely bring them again to thy brother. And if thy fellow Israelite do not live near thee, or if thou do not know him, then thou shalt bring it home to thine house, and it shall be with thee until thy fellow Israelite seek after it; then thou shalt restore it to him again.

Thus shalt thou do with his ass, and with his garment, and with every lost thing which belongeth to thy fellow Israelite, which he hath lost and thou hast found; thou mayst not withhold thy help."

Yet the ancient Hebrews were a primitive and a semi-barbarous people. Can the possessors of the newer dispensation afford to quibble and to debate?

APPLICATION OF THE COVENANT TO REPAIR TO DECAYED AND DEFECTIVE STRUCTURES.

Among the questions on which a legal practitioner has to advise almost daily is that of the scope of the obligation to repair, as expressed in the ordinary covenants to that effect contained in a lease or agreement; and, as the judgments of the Court of Appeal in the recent case of *Lurcott* v. *Wakeley* (104 L.T. Rep. 290; (1911), 1 K.B. 905), appear to mark something like a new departure in the law applicable to the subject, a few observations suggested by those judgments are here offered in view of the general importance of the matter.

That the amount and quality of repairs necessary to satisfy the covenant are dependent upon the age, class, and condition of the premises demised has been established by a long series of decisions extending over many years. In the earlier cases, indeed, it appears to have been thought that, as the result of this, no greater obligation was thrown upon the tenant than that of keeping the premises generally in about the same condition of repair as that in which they were when they were demised to him. This, however, was finally decided, in the year 1847, to be an unsound view of the law in the case of *Payne* v. *Haine*, 16 M. & W. 541, where a new trial was ordered on the express ground that the judge had directed the jury to act on that basis; and ever since that decision it has been regarded as settled that under a mere covenant to keep premises in repair the lessee may have to put them, if necessary, into a better con-

dition (and so keep them) than that in which he received them from the landlord.

There are, however, many traces of the doctrine that the covenant did not extend so far as to impose upon the tenant the duty of giving to the landlord the benefit of "new work generally," or that of replacing an old structure by a new one when the former had become worn out by mere process of time, or rendered useless for its purpose, after the lapse of an interval more or less long, owing to its inherent defects of construction. The classic reference on this topic is, of course, to the passage in which Chief Justice Tindal summed up the law to a jury at Nisi Prius in the case of *Gutteridge* v. *Munyard* (1834), 1 Moo. & R. 334; 7 Car. & P. 129,—a passage which, after being cited with approval again and again in the courts, and accepted by text-writers during several generations, has now been authoritatively pronounced to be at least misleading, if not incorrect.

The passage in question is to the effect that, where an old building is demised, it is not meant by a mere covenant to repair that it is "to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement;" and that "what the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss which, so far as it results from time and nature, falls upon the landlord." Singularly enough, two reports of the summing-up have been preserved, and it is only in one of them, 1 Moo. & R. that the passage occurs textually, which has lately provoked so much comment, though no doubt the other is not very materially different; but, as has already been said, the statement of law which it embodies appears, in the long period which has elapsed since it was laid down, not only to have remained unchallenged, but to have been adopted as the basis of numerous judgments of high authority. It may suffice to refer for this purpose to *Lister* v. *Lane*, 69 L. T. Rep. 176; (1893), 2 Q.B. 212, where Lord Esher, M.R., in delivering the leading judgment of the Court of Appeal, transcribes and accepts it without qualification.

Now, however, it is definitely laid down that, if not altogether wrong, it is only in a very restricted sense that the ruling of the Chief Justice can be regarded as accurate. That the words are capable of being read too widely, and that they should receive some limitation, has, perhaps, long been obvious; for to say that a tenant may not be bound by the covenant to restore the premises in an improved condition, or in a way which may improve their value, and that he is not responsible for any effects caused by time or the elements, is to run counter to doctrines already spoken of as well-established. The curious point is that no such limitation seems to have been yet suggested.

But to lay down what the precise limitation should be is the real difficulty. At the root of the whole matter, perhaps, lies the principle that the covenant in question is one only to repair, and not (as it has been put) "to give a different thing" from that which the tenant took when he entered into it: (see *Lister* v. *Lane*, sup., per Lord Esher, M.R.). But it is now established by the latest decision of the Court of Appeal that "a different thing" in this connection means a different principal subject-matter of demise, and that it does not follow that he is called upon to give "a different thing" because he may have to replace or renew a structure only in its subordinate parts. To determine, however, what are its "subordinate parts" within the rule will, it is conceived, often be a matter giving rise to much trouble, and the whole question is, no doubt, to a great extent one of fact and of degree. Suppose, for instance, the demise includes fifty separate houses, would the decay from inherent defects of one of them entail liability for its reconstruction as relating only to a subordinate part of the whole subject-matter of the demise?

Before *Lurcott's* case there were three reported decisions—two of them also decisions of the Court of Appeal—on the subject of the effect of the covenant to repair on structures which have "lived their life," either through mere lapse of time, or from their inherent faultiness of construction, or both;

and all of them are based on the view that on the facts as proved the result was not within the scope of the covenant.

The first, decided in 1893, was *Lister* v. *Lane*, to which reference has already been made. In this case an old house had been built on a timber structure laid upon river mud several feet above a layer of solid gravel, and the only way of effectually dealing with it was by the process known as "underpinning," which consists of digging down to the gravel and then building up from that to the brickwork; and it was held by the Court of Appeal that work of this kind was not within the covenant to repair, because it would be in effect "making an entirely new and different house." Having regard to what has already been said, it seems important to notice that the house in question (which was condemned as a dangerous structure and consequently pulled down) was clearly not the principal, but apparently only a very subordinate, part of the subject-matter of the whole demise which was comprised in the covenant to repair. It would therefore appear that for an erection to be a subordinate part of a demise within the rule in *Lurcott's* case it must be a subordinate part (such as a roof, a floor, or a wall) of some structure, and that separate buildings and areas comprised in a single demise should be looked upon for this purpose as separate and distinct.

The second decision, also one of the Court of Appeal, was that of *Wright* v. *Lawson* (19 Times L. Rep. 203, 510), ten years later. In this case a local authority had served notice to secure the brickwork of a certain bay window of a house, but it was not possible to re-erect the window as it existed before on account of certain defects in its construction, whilst a new bay window could only be built by erecting supports of a substantial character. It was held that the tenant could not under the covenant to repair be rendered liable to replace the old window, and that he had sufficiently discharged his obligation by building a new one set back in the main wall of the house.

The third and last case was that of *Torrens* v. *Walker*, 95 L. T. Rep. 409; (1906), 2 Ch. 166, before Mr. Justice Warrington.

In this case the obligation to repair which came in question was one undertaken by the landlord, who had agreed to keep the outside of the demised premises at all times in good repair; but the learned judge held that the obligation was subject to exactly the same limitations as in the case where it rested on the tenant. Whether this view was correct seems open to question; but with that we are not concerned here. Assuming that it was, there appears every reason for refusing to attach liability to the lessor, in respect of his covenant. Substantially the whole of the structure which was the subject-matter of the covenant to repair had to be pulled down, and it could not have been re-erected in the same manner as before. Applying the test laid down in *Lurcott's* case, no one, if the building had been re-erected, would have called it the same building as it had been. The most important difference between this and the two earlier cases—apart from the question, to which we have just adverted, as to the incidence of liability under the covenant being on the landlord—seems to be that no direct evidence was forthcoming as to any faultiness of construction, and such faultiness was apparently inferred from the circumstance that the building, though it had had a long life (about 200 years), might, like other buildings, have lasted longer still.

In *Lurcott's* case the facts were few and simple. It may be premised that the covenant there was one couched in the most stringent terms, for under it the tenant had undertaken to repair and "keep in thorough repair and good condition" all the premises demised to him; but, though Lord Justice Fletcher Moulton seems inclined to rest his judgment mainly upon this consideration, the other members of the court treat the matter just as if the covenant had been expressed in the ordinary general terms. Shortly before the expiration of the term a dangerous structure notice had been served requiring an external wall to be taken down to the level of the ground floor. The lessee failed to comply with this notice, and the lessor did the work a few weeks after the term had ended, and afterwards, in compliance with a further notice then given under sec. 208 of the

London Building Act, demolished the part of the wall which was below the ground, and rebuilt it with concrete foundations and damp-courses in accordance with the requirements of the Act. It was held that the tenant was liable under his covenant for the whole of the cost of the work which had been executed by the landlord.

The gist of the decision appears to be in the finding of fact that with a new wall the house would still be the same house, and therefore that the repair or restoration found to be necessary was only restoration of a "subordinate" part of the subject-matter of the covenant. It is not, however, easy to see the real distinction in this respect between the case and *Wright* v. *Lawson*. Surely the window in that case was also only a subordinate part of the subject-matter of the covenant. Supposing the new window had been erected with the necessary substantial supports required by the local authority, would anybody have said that the house was a different house to the one which existed before? In the one case the thing replaced was a window, and in the other a wall; the window required new supports, just as the wall required new foundations. It is quite true that the external form and appearance of the new window, if erected, unlike that of the new wall, would have been different. But beyond the fact that the change was more obvious to the eye in the one case than in the other, can any other real difference be suggested? Lord Justice Buckley, who was apparently the only judge who dealt with *Wright* v. *Lawson*, said that the bay window there could not be replaced, but could only be reproduced by that which would be a new structure. But if a window be a "structure" within the rule, why is an external wall not a structure also? If repair (as the learned judge says) is restoration by renewal or replacement of subsidiary parts of a whole, while renewal, as distinguished from it, is reconstruction of substantially the entirety of the subject-matter of the covenant, why, if the wall (as it clearly is) is only a subsidiary part of "the whole," is replacement of the window a reconstruction of the entirety? The entirety of what?

The truth seems to be that in order to reconcile the two decisions a further limitation ought to be introduced into the rule as enunciated in the later case, and the matter would then stand thus: primâ facie the burden of repairing, restoring, and renewing is on the tenant who has entered into a covenant to repair. But he can relieve himself of that burden if he can shew that, owing to circumstances beyond his control, the work necessary would be a work wholly of reconstruction, provided he can establish, either that that work would go to what is substantially the whole subject-matter of the covenant, or (if it involve only a subordinate part of the demise) that that subordinate part would, after its reconstruction, necessarily present a different form to the form it had before. It will be noticed that in *Lurcott's* case the Master of the Rolls says that the question to be asked is whether it can fairly be said that the character of the subject-matter of the demise, or part of the demise, has been changed; and possibly he may have had the above considerations in view, though we are left without much guidance as to the nature of the "part of the demise" to which the rule applies.

It may be further observed that the ground on which the principle rests which absolves the tenant from liability when there has been a radical change of circumstances in the character of the whole subject-matter of the demise is said, in the same judgment, to be that such a change of circumstances could not have been within the contemplation of the parties when they entered into the covenant. It is, however, well settled that if demised premises are destroyed by fire, the tenant, unless specially protected by the terms of his lease, is bound, under his covenant to repair, to rebuild them. Why such an event should be considered more within the contemplation of the parties than the decay of the premises from the lapse of time, or from some structural defect, it is not, perhaps, easy to understand. One would have thought that in the usual course of things it would be, not more, but less within such contemplation.

The foregoing observations appear to suggest that the matter is one replete with difficulties, and that the latest decision reported on the subject is not at all likely to be the last.—*Law Times.*

CONVICTION OF PALMISTS.

Several recent prosecutions of "professional palmists," and in particular, a case heard before the magistrate at the Marylebone Police Court on the 4th inst., illustrates what is the gist of the offence pretending to tell fortunes by palmistry. The defendant was charged with "pretending or professing to tell fortunes by palmistry with intent to deceive." It was urged on his behalf that there was no evidence of intention to deceive, but the learned magistrate held that it was immaterial to prove that intention, as palmistry imported a deception. He was probably following a dictum of Mr. Justice Denman in *Penny* v. *Hanson*, 56 L.T. Rep. 235; 18 Q.B. Div. 478. In that case the defendant was convicted of pretending to tell fortunes with intent to deceive by means of astrology, and there was no evidence to shew whether or not he believed in the truth of his profession. Mr. Justice Denman held that the mere fact of professing to tell fortunes by astrology was evidence of an intention to deceive, in that nowadays no sane man believes in such a power. That case left open the question whether the mere pretending or professing to tell fortunes was an offence, without averring intention to deceive. The Vagrancy Act, 1824, s. 4, which creates the offence, enacts that "Every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects . . . shall be deemed a rogue and vagabond. . . ." In *Reg.* v. *Entwistle* (80 L. T. Rep. 657; (1899) 1 Q.B. 846, the Divisional Court upheld a conviction for "unlawfully pretending to tell fortunes, contrary to the form of the statute." The defendant had professed to tell fortunes by means of palmistry, and, upon conviction, moved the court for a certiorari to quash the same on the ground that the alleged offence was not within the above section of the Vagrancy Act,

as the conviction did not aver an intention to deceive. The court refused to quash the conviction on the ground that, although to prove an offence under the Act it was necessary that the thing should be done in order to deceive, the words "pretending or professing" imported that intention, and that the words "to deceive and impose . . ." in the statute referred only to "using any subtle craft, means, or device, by palmistry or otherwise." Hence it would seem that the offence of telling fortunes by palmistry may be laid and described either as "pretending or professing to tell fortunes by palmistry," or as "using a subtle craft, means, or device by palmistry to deceive and impose, etc." The Divisional Court in the last cited case followed and adopted a dictum of Baron Cleasby in *Monck* v. *Hilton*, 36 L.T. Rep. 66; 2 Ex. Div. 268) to the effect that "The section includes all persons who pretend to tell fortunes (which imports that deception is practised by doing so), or use subtle devices, by palmistry or otherwise, to defraud."—*Law Times.*

The mass of cases reported in the United States is simply appalling in its volume, and in the extent of their increase from year to year. It is said that the volumes of reports extant in 1872 were 1517, and that the number up to a recent date was 5,947; easily 6,000 by this time. By multiplying the number of volumes by the number of cases contained in each, one has some idea of what one would have to wade through to learn all that has been said on the various subjects adjudicated upon.

The fusion of law and equity is still engaging the attention of the Bar in the United States. The Committee of the American Bar Association to prevent delay and unnecessary cost in litigation had an article on the subject prepared by Prof. Pound, which is published in some of our exchanges. It seems strange that that which engaged the attention of the profession in England and her dependencies so many years ago, and which was almost universally adopted by them, is still a moot question with our usually go-ahead neighbours.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Divisional Court, Chy.] [Oct. 6.

YOUNG *v.* TOWNSHIP OF BRUCE.

Highway—Non-repair—Injury to traveller—Notice of accident—Absence of details—Sufficiency, in view of knowledge of Council.

Appeal by the plaintiff from the judgment of the County Court of the county of Bruce, dismissing an action brought to recover damages for personal injuries sustained by the non-repair of a township highway, upon which plaintiff was being carried in a public vehicle on Dec. 8, 1908. The vehicle, with the plaintiff in it, went over an embankment, which should have been guarded by rails, but was not. The action was dismissed on the ground that the notice of the accident given by the plaintiff to the defendants was insufficient.

The defence pleaded that no notice of the accident was given as required by Municipal Act, 1903, s. 606, sub-s. 3. It appeared however, that the following letter was written by the solicitors to the town clerk, which it was claimed was a sufficient notice:—"We have been consulted by the plaintiff regarding the injury received by him on the 8th December, while being driven in the 'bus between Underwood and Port Elgin in consequence of the road being out of repair. No protection was provided, and the 'bus was thrown down some considerable distance. This notice is given pursuant to the Municipal Act." On Jan. 20th, the town clerk replied: "Yours of the 31st re alleged accident to Young received and considered by the council. I have been instructed to notify you that Bruce township council will not pay any damages, as they do not consider they are liable for any such damages."

Held, 1. That although the letter to the town clerk was defective in details it substantially set forth the fact of the accident and the cause of it; and it was sufficient if it gave the information which the law demands should be given.

2. Under the circumstances of the case, the vagueness in the notice in reference to the precise locality on the highway where the accident occurred was not material inasmuch as the Council from its knowledge of the culverts, hollows and places where protection was needed, was given sufficient information to make investigation in view of the threatened action; and the maxim id certum est was applicable to eke out the apparent insufficiency of the notice. *O'Connor* v. *City of Hamilton*, 10 O.L.R. 529, distinguished.

Washington, K.C., for plaintiff. *Kilmer*, K.C., for defendants.

Divisional Court, K.B.D.] WARD v. MCBRIDE. [Oct. 12.

Slander—Words imputing a felony—"Robbery"—Innuendo a legal impossibility—Explanation by other words—Right of defendant to shew facts.

Appeal by defendant from the judgment of MULOCK, C.J. Ex.D., upon the verdict of a jury, in favour of the plaintiff, in an action for slander. The defendant, who was an alderman of the city of Toronto, at a meeting of the City Council referred to an action brought by the city corporation against the present plaintiff, (*City of Toronto* v. *Ward*, 18 O.L.R. 214), and said that the plaintiff had "robbed the city." This was the slander charged. The defendant was at the time urging that as a reason why no consideration should be shewn to the plaintiff in a matter then before the council. He explained that what he meant by robbing the city, etc., was that the plaintiff had withheld money which had been recovered in the action. The plaintiff alleged that this was the charge of a crime.

Held, 1. The Common law does not permit any one to lay hold of a single word in a statement, and assert that as such word, in its strict legal sense, is the name of a crime, therefore a crime is imputed by the speaker using the word. The whole of the circumstances under which the word is used and the whole of the context must be considered. If it appear either from the utterances as set out in the claim or in the innuendo, or in the evidence given, that in truth and in fact there was no charge or imputation of crime, the jury should not find the defendant liable, though he had in words imputed a crime.

2. As the words alleged in the statement of claim were "Mr. Ward has robbed the city of $25 a year," and as it could not

be contended that what was charged was actual theft, the innuendo fails.

3. The occasion was privileged. Alderman are legislators in the same sense as members of Parliament. The defendant had the right as an alderman to say anything which he honestly believed to be true, though false in fact; but, if a crime was in fact imputed by him and he did not actually believe that the plaintiff did commit a crime, the qualified privilege would be nullified

Appeal allowed with costs, and the action dismissed with costs.

R. McKay, K.C., for defendant. *M. K. Cowan*, for plaintiff.

Divisional Court, K.B.D.] [Oct. 16.

VERRALL *v.* DOMINION AUTOMOBILE CO.

Motor vehicles—Excessive speed—Motor taken out by servant for his own purposes without permission—Neglect by owner of precautions to prevent unauthorized use.

Appeal by defendants from the judgment of FALCONBRIDGE, C.J.K.B. in favour of the plaintiff, after trial without a jury, in an action for damages for injury to a taxicab owned by the plaintiff, owing to a collision with a motor-car of the defendants, taken out of the defendants' sale-rooms by a demonstrator employed by them, without their knowledge or permission, and for his own purposes.

Held, 1. The import of 6 Edw. VII. c. 46 and 9 Edw. VII. c. 81, is that though the owner of the motor may not be responsible in a penal aspect for the violation of the Act unless personally present, he is responsible in damages when there has been a violation of the Act by his vehicle. There is a quasi-liability in rem, which attaches to him as the owner of the law-breaking vehicle.

2. The defendants' motor being held for sale only, and not for hire or private use, there was an obligation on the owner to take care that it was not taken out by any servant for unauthorized purposes and there was negligence in not effectively providing against such unauthorized use.

BOYD, C. (in part): "The provisions of the special legislation indicate pretty plainly that the mind of the Legislature was to abrogate to some extent the common law rule that the master of a

vehicle is exempt from responsibility if his servant does an injury with the master's vehicle, when, outside of the duties of his master's employment, he is out at large on an errand or a frolic of his own. The Legislature has intended that this dangerous use of these licensed vehicles, when the statute has been violated, should be compensated for to those who suffer by the proprietor of the vehicle. As between him and the public who use the highways, he is the responsible party, and it behooves him to use all necessary safeguards to prevent this abuse. It is one of the requirements of the statute (s. 14) that every motor shall be provided with a lock, key, or other device to prevent it being set in motion; and, though that is primarily intended to secure it when left in the street or other public place, it suggests an easy way by which it may be secured at night in the owner's own premises from being mishandled and misused by his own employees."

Thurston, K.C., for plaintiff. *Curry*, K.C., for defendants.

Middleton, J.] [Oct. 17.

RE TOWN OF SARNIA AND SARNIA GAS AND ELECTRIC LIGHT CO.

Arbitration—Municipal Act—Disqualification of arbitrator—Removal of—Member of school board.

There was a summary motion by the company for an order declaring that A.W. was disqualified from acting as arbitrator for the Town of Sarnia upon an arbitration between the town and the company under the Municipal Act, he being one of the school trustees.

Held, 1. Although an award may be set aside for misconduct of the arbitrator and for bias this bias does not furnish ground for removal under the statute.

2. A.W., though a member of the school board, is not a member or officer of the corporation, and so cannot be disqualified under the Municipal Act and no bias could be alleged against him.

Frank McCarthy, for the applicants. *Featherston Aylesworth*, for the town corporation.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] PEASE *v.* RANDOLPH. [Oct. 23.

Bond—Successive actions on same bond—Pleading—Amendment—Presumption in favour of seal having been affixed with authority—Agreement to stifle prosecution—Illegal consideration.

Held, only one action can be brought upon a bond with a penalty; but, if the objection is not pleaded to a second action, it cannot be raised at the trial and an amendment raising it should not necessarily be allowed.

The defendants had signed the bond in question in this action, at the request of one Turner, who was indebted to the plaintiff. They intended the document to be their bond and it purported to be under seal, and it was sealed when handed by Turner to the plaintiff, but they swore that there were no seals upon it when they signed it. They did not, however, say that they did not authorize Turner to complete the document and make it what it was intended to be by affixing seals.

Held, that it should be presumed that the defendants had authorized Turner to affix the seals for them, and that their defence of alteration of the bond failed.

Turner had become indebted to the plaintiff under circumstances exposing him to a criminal prosecution, in respect of the debt, and, at the interview between him and the plaintiff's solicitor respecting a settlement, the latter told him that he was liable to a criminal prosecution; but, outside of this, there was no evidence of a promise or agreement not to prosecute.

To induce the defendants to give the bond in question, Turner told them he was threatened with arrest, but for a totally different offence.

Held, distinguishing *Jones* v. *Merionethshire, etc.*, [1891] 2 Ch. 587, [1892] 1 Ch. 173, that there was not sufficient evidence to warrant a finding that the bond had been given for an illegal consideration, viz., an agreement not to prosecute.

Semble, such a defence, if made out by the evidence, should be given effect to by the Court of Appeal, although not pressed at the trial, or mentioned in the præcipe filed for the appeal.

Scott v. *Brown*, [1892] 2 Q.B. 724, and *Gedge* v. *Royal Exchange*, [1900] 2 Q.B. 220, followed.

Cooper, K.C., and *Meighen*, for plaintiff. *H. A. Burbidge*, for defendants.

Full Court.] [Oct. 23.

RE WOOD AND CITY OF WINNIPEG.

Municipality—By-law—Unreasonableness and discrimination in residential districts—Prohibition—Removal of prohibition in favour of individual owner—Acquiescence.

Appeal from decision of PRENDERGAST, J., noted ante, p. 279, dismissed on the ground that the by-law objected to was within the powers of the city council and was not unreasonable or discrimatory and that the city had obtained a substantial and sufficient consideration from Millman for the removal of the restriction as to his property.

The court declined to express any opinion as to whether or not the applicant was estopped by his acquiescence and delay from making his application.

Phillipps and *Whitla*, for applicant. *T. A. Hunt*, for city of Winnipeg.

Full Court.] LEWIS FURNITURE CO. *v.* CAMPBELL. Oct. 23.

Undue influence—Father and son—Fraudulent misrepresentations.

The defendant was induced to sign the promissory note for $500 sued on as security for his father. He was only 22 years old and his account of what took place when he signed the note was that the plaintiffs' manager represented to him that a third party, who was liable for the debt along with the father, had offered to pay $200 or $250, and that with that and what they had in the warehouse there would not be very much for him to pay. The defendant's father was also present at the interview and importuned the son to come to his relief by signing the note, which he did very reluctantly and after refusing at first. The plaintiff's manager and his solicitor, who was also present, denied these statements at the trial in the court appealed from, but the judge entered a verdict for the defendant, thereby accepting his version of the facts. No evidence was given as to whether or not the third party referred to had actually made

any such offer, nor was anything said as to the amount or value of what was in the warehouse as being applicable in reduction of the debt.

Held, that the defendant was not liable on the note as there was undue influence brought to bear upon him and misrepresentation as to the amount of the liability he was incurring and a want of independent advice to one so young, all of which brought the case within the principles laid down in *Bank of Montreal* v. *Stuart*, [1911] A.C. 120.

Per CAMERON, J.A., dissenting:—The alleged representation as to the offer that had been made by the third party was not proved to have been false and therefore that ground failed. As to the statement that "there was furniture in the warehouse," this was not of itself so material to the transaction that the falsity of it would vitiate the note, and there was not sufficient in the facts relied on to warrant a finding that any "undue influence," within the meaning of that term as used in the decided cases, had been brought to bear upon the defendant as he was able to take care of himself and fully understood the nature of the transaction.

Donovan, for plaintiff. *Towers*, for defendant.

Prendergast, J.] PERKS v. SCOTT. [Oct. 16.

Vendors and purchasers—Cancellation of agreement by vendor for default of purchaser—Different modes of cancellation provided in agreement—Equitable relief against forfeiture.

The agreement of purchase by plaintiff from defendant of the land in question provided in one paragraph that, in case the purchaser should at any time be in default, the vendor should be at liberty at any time after such default, with or without notice to the purchaser, to cancel the contract and declare the same void and forfeit any payments that might have been made on account thereof and retain all improvements, etc., and that the vendor should be entitled, immediately upon any default as aforesaid, without giving any notice or making any demand, to consider and treat the purchaser as his tenant, holding over without permission or any color of right, and might take immediate possession of the premises and remove the purchaser therefrom. Further on in the agreement, and separated from

the above provision by other covenants, there were provisions for two other modes of cancellation in case of default, one by service of a notice personally on the purchaser of intention to exercise the power of cancellation after one month, to be followed at the end of the month by a notice similarly served declaring the cancellation to be complete and effective, and the other by notice, after the default had continued for three months, declaring the contract null and void, addressed to the purchaser deposited in the post office at . . . and directed to the post office at . . .

Held, that, upon plaintiff making default, the defendant had a right to select any one of the three modes of cancellation provided for, and that a notice pursuant to that first above quoted, personally served upon the defendant, was valid and effectual as a cancellation of the agreement, subject to the power of the court to give equitable relief if the circumstances should warrant it. *Canadian Fairbanks* v *Johnston*, 18 M.R. at 601, referred to.

The defendant having, in his statement of defence, submitted to redemption by the plaintiff, upon payment of the arrears and certain expenses, judgment was given accordingly, allowing the plaintiff two months after the Master's report to pay the amount found due by him and costs, and in default that the agreement should be cancelled.

Cooper, K.C., and *Meighen*, for plaintiff. *Fullerton* and *F. G. Taylor*, for defendant.

Robson, J.] [Oct. 19.

DART *v.* ROGERS.

Vendor and purchaser—Specific performance—Misrepresentations by purchaser inducing sale—Materiality of.

Held, 1. A decree for specific performance of an agreement of sale will not be refused because of any misrepresentations by the purchaser, unless they are material, that is, relate to some part of the contract or its subject-matter, and a buyer is not liable to an action of deceit for misrepresenting the seller's chance of sale or the probability of his getting a better price for his property than the buyer offers. *Archer* v. *Stone*, 78 L.T. 34, and *Vernon* v. *Keyes*, 12 East 632, 4 Taunt. 488, followed.

2. Applying this principle, statements made by the plaintiff to the defendants, during negotiations for the purchase of the

property in question, that there was nothing in a rumor (said to be current) of a big concern having bought, or being about to buy a large parcel of land on the opposite side of the street, of part of which the plaintiff was one of the owners, with the intention of erecting extensive improvements thereon, that he, the plaintiff, had never been approached by any one with a view to purchasing his interest in such property and that part of that property could then be bought at a price per foot frontage very much lower than the defendants were asking for the property in question, even if false to the knowledge of the plaintiff, were held not to be material to the contract or such as to entitle the defendants to refuse to carry out their sale.

3. A misrepresentation as to who the real purchaser was, might, under some circumstances, be so material to the contract as to vitiate it, but in this case the defendants, although they had been told by the plaintiff that he was buying for another named person, could only say that, if they had known that the plaintiff was buying for himself, they would have been suspicious that he was concealing facts which would have made the property more valuable and would not have sold to him at the price actually fixed, and they actually made out and signed the contract of sale in the plaintiff's own name. It was therefore held that the alleged misrepresentation as to the identity of the proposed purchaser was not, under the circumstances, material to the contract.

Wilson, K.C., *Andrews*, K.C., and *H. A. Burbidge*, for plaintiff. *Sutton, Fullerton* and *O'Connor*, for respective defendants.

Province of British Columbia.

SUPREME COURT.

Morrison, J.] [Oct. 24.

IN RE MABEL PENERY FRENCH.

Statute—Construction—Legal Professions Act, s. 37, sub-ss. 3 (b), 4(b)—Interpretation Act, R.S.B.C. 1897, c. 1, s. 10, sub-ss. 13 and 14—Right of women to admission to legal profession.

On an application for a writ of mandamus to compel the Benchers of the Law Society to accept the application of Mabel

Penery French for enrolment as an applicant for call and admission,

Held, that the legislature, when framing the Legal Professions Act, had not in mind the probability of women seeking to enter the profession, and therefore any remedy for the omission lies with the legislature and not with the Benchers of the Law Society. Application refused.

See *In re Mabel Penery French*, 37 N.B. 359.

J. A. Russell, for application. *L. G. McPhillips*, K.C., contra.

Book Reviews.

The Law Quarterly Review, October. Edited by the Rt. Hon. Sir Frederick Pollock, Bart., D.C.L. London. Stevens & Sons, Limited, 119 and 120 Chancery Lane. 1911.

This number, which concludes volume 27, is an exceptionally interesting one. In addition to the many notes on current legal literature and recent decisions, it contains the following articles: The reception of Roman law in the 16th Century; Principles of liability for interference in trade, profession or calling, by an Indian writer; The Land Transfer Report; Lessee's covenants to repair; Death duties; Habeas corpus in the Empire, etc., with the usual book reviews.

Bench and Bar.

Judicial Appointments.

Hugh Thomas Kelly, of the City of Toronto, in the Province of Ontario, to be a Judge of the Supreme Court of Judicature for Ontario, a Justice of the High Court of Justice for Ontario, and a member of the Common Pleas Division of the said High Court of Justice, in the room of Hugh McMahon, deceased. (Nov. 13.)

Flotsam and Jetsam.

The (English) Law Society's new President, Mr. William John Humfrys, is a Hereford solicitor, who has been mayor more than once of his city, and is well known as an able and well-read lawyer, who has led a strenuous life at home and yet has found time to travel much abroad. Mr. Humfrys is a veteran, for he was admitted in 1863, sixteen years before his predecessor, and yet he ranks almost as a junior among his learned friends at Hereford, which has long been famous not only for the high professional standing and character of its solicitors, but also for their longevity. Thus, Mr. J. F. Symonds, Mr. Humfrys's father-in-law, died a few months ago at the age of ninety, having been called in 1841; Mr. H. C. Beddoe, the Bishop of Hereford's legal secretary, was admitted in 1847; Mr. John Lambe, the city coroner, a relative of Lord Llandaff, another veteran, who also comes from Hereford, was admitted in 1855; Lord James of Hereford, whose death last month the profession deeply regrets, was well over eighty, while his elder brother, who died a few years ago, Mr. Gwynne James, was called in 1845, and practised his profession down to the last, being held in not less esteem in Hereford than Lord James himself.—*Law Notes.*

We read in the papers recently that the Latin quarter students created a riot at the Sorbonne because the Latin paper in the Bachelorship examination was too difficult. The dissatisfied students, it seems, set up a deafening din in one of the halls of the school, the windows fairly rattling to their cries of "A bas Uri," the examiner who set the papers. The malcontents, after being expelled, formed a procession and paraded through the Latin quarter, shouting in a dismal monotone the passage from Cicero's "De Gloria ac Morte," which brought about their downfall in the examination. Two hundred students returned to the Sorbonne, and after being charged by the police in the courtyard made a bonfire of the examination papers. What a dull lot we are in this old country? Articled clerks here often consider the examination questions too hard, but all they do is to "cus and swear" privately. How much more exciting life would be if they would only copy the example of their French *confrères!* Chancery Lane would be quite lively.—*Law Notes.*