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LEGISLATIVE RAIDS ON PROPERTY RIGHTS.

We are glad to see that the Senate very properly refused to introduce a clause in the Railway Act which would have had the effect of giving undue and confiscatory rights to municipalities as against certain public utility companies. It is as much the duty of legislators to conserve vested interests as it is to do all that reasonably can or ought to be done for the giving to the public benefits of new discoveries or inventions. A wise discretion must be exercised; but there should be no tyrannical use of the arbitrary powers which a legislature possesses. A country prospers in proportion to the enterprise and intelligence of its citizens, and new, untried and large undertakings which they may seek to develop require large capital and involve risk of loss, and therefore proper protection is a necessity. It is most important that those who are prepared to invest their money in such ventures should not be at the mercy of the majority in a Legislature which is too much controlled by a popular vote, swayed by self-seeking demagogues or sinister political influence. Some years ago the Whitney Government in Ontario under pressure of this kind lent itself to legislation which was most discreditable and unstatesmanlike, and which was not only a breach of faith on the part of the Government with certain *bonâ fide* investors, but was a serious menace to private enterprise and a bid for political advancement at the expense of sound legislative policy.

The action of the Senate was of an entirely opposite character. The demagogic and sinister influence was a continuation of that above referred to. Without going into details it is sufficient to say that the Senate, in refusing to be swayed, as was the Whitney Government, expressed the opinion that the rights granted by the Parliament of Canada to a certain company ought not to be interfered with to the destruction of millions of money which had been invested

in a company of the character above referred to by capitalists in Great Britain, the United States and Canada. This very proper action caused the usual outcry on the part of those whose iconoclastic efforts were baulked, and the Senate has been abused in the same way as the Judicial Committee of the Privy Council were abused when they took similar ground. We sometimes pay dearly for democracy.

The leader of the Senate, a just man and a statesman, when speaking to the motion, stated that the matter was one which required the closest attention of the highest Courts in Canada, and which had already been dealt with by the Judicial Committee of the Privy Council. Senator Lougheed in outlining his reasons for opposing the suggested clause doubtless expressed the view of the Government as a whole. He said:—

> We are taking the judgment of the Privy Council upon this subject, and we are setting it up, not so far as the rights of the companies are involved in the question, and without any evidence before us of those agreements, or of the situation except the bald statements which are made by delegations and others who feel a degree of animosity to the company. We are asked to interfere with the vested rights which Parliament gave to this company and which have been confirmed by the Privy Council, and on the strength of which financial obligations representing fifteen or sixteen millions of dollars have been entered into by the companies, and with one wave of the hand we are asked to wipe out these very important rights.
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> I am not saying anything in vindication of the company. All I am stating is what I regard to be the principle that we have always consistently observed, namely, that we should not interfere with the vested rights of corporations which have been granted by this Parliament, even notwithstanding what public opinion may be on the subject. As I have already stated, if the Senate of Canada stands for anything, it must stand as a bulwark against the clamour and the agitation and the caprice of the public upon all such situations as this.
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> If the second chamber, which is not answerable to the elector, cannot take that position and cannot stem the pressure of agitation which is brought to bear upon the House of Commons, the popular chamber, in passing legislation of this kind, there is no place in Canada for a second chamber.

It seems to me that this is an occasion when this chamber should assert the principles which they have asserted ever since Confederation and which so far as I know have never been violated in such a way as is sought to do under section 374.

I need not point out too the serious effects the passing of this legislation would have upon financial interests of Canada.

If the persons who have been exploiting the schemes of the Hydro-Electric System, and its attendant municipalities, and now endeavouring to secure this pernicious legislation, were to ask the right to buy out at a fair price any company which stands in the way of their schemes there would be some semblance of fair dealing, and this might sometimes be desirable or even necessary. This, however, is not their policy. They prefer a destructive German method, namely: to obtain legislation which reduces the value of their quarry's property to a "scrap" basis and then take it at their own price, or else wait until a lingering death puts an end to its existence.

MARRIAGE OF CANADIANS WITH ALIENS.

The last census of the Dominion of Canada reveals the fact that in the year 1911 more than one-tenth of our population was of alien origin (1). In the City of Montreal the foreign-born numbered 43,138, in Toronto 33,131, Winnipeg 32,950, and Vancouver 27,713—twenty-seven per cent. of its total inhabitants (2). From the time of this enumeration until the outbreak of the war immigration steadily increased, and by a special census of the Prairie Provinces, taken in June, 1916, it was ascertained that of the 273,998 persons between the ages of twenty and thirty-four living in Manitoba, Saskatchewan and Alberta, 111,304, or more than two-fifths, were of alien origin (3). A large proportion of these foreigners remained unnaturalized, and in Toronto, in 1911, only twenty-seven per cent. had become citizens (4). As

(1) Special report on the foreign-born population, issued by the Canadian Department of Trade and Commerce, 1915, p. 7.
(2) *Ibid*, p. 34.
(3) Bulletin issued by the Department of Trade and Commerce, p. 1.
(4) Special report on the foreign-born population, p. 36.

the male sex greatly predominates among immigrants(5), the natural result has been intermarriage with Canadian women, and these unions of foreign and native born have given rise to a question of serious social and legal importance, viz:—the matrimonial status of a Canadian who becomes the wife of an alien.

There is no doubt that throughout the United States, the chief source of our alien population, all marriages contracted by its citizens in Canada if in conformity with the law of the place of celebration would be held binding (6), and Switzerland(7), Argentina and Brazil (8), would also give full effect to like marriages of any of their subjects, but should the husband owe allegiance to any other foreign country would the Canadian marriage, in all cases, be recognized as valid by his national Courts? Should he die in Canada, leaving property abroad, would his failure to observe any of the essential provisions of his national marriage law compel its tribunals to declare that his Canadian wife and children had no claim to his foreign succession?

The old juristic view upheld the doctrine that the *lex loci contractus* or *celebrationis* should be everywhere applied. "A marriage good by the laws of one country is held good in all others where the question of its validity may arise," said Lord Brougham in *Warrender* v. *Warrender*(9), and in *Scrimshire* v. *Scrimshire*(10), the Court declared: "From the infinite mischief and confusion that must necessarily arise to the subjects of all nations with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad, it has become *jus gentium*, that is, all nations have consented, or must be presumed to consent for the common benefit and advan-

(5) *Ibid*, p. 6. "In every 1,000 persons of foreign birth resident in Canada, June, 1911, 626 were males and 374 females. A further significant fact of alien immigration is that the proportion of males to females has steadily increased in each successive year and quinquennium since 1890."

(6) Bishop: Marriage and Divorce, 1, s. 843.

(7) Unless the parties have celebrated the marriage abroad with the manifest intention of avoiding the causes of nullity provided by Swiss law, Swiss Federal Code, art. 61.

(8) Weiss: Traite de Droit Int. Prive, vol. 3, pp. 404-406.

(9) (1835) 2 Cl. & F. at p. 530.

(10) (1752) 2 Hagg. Cons. Rep. 395, 417, 418.

tage, that such marriages shall be good or not, according to the laws of the country where they are made. It is of equal consequence to all that one rule in these cases should be observed by all countries, that is, the law where the contract is made. By observing this law no inconvenience can arise, but infinite mischief would ensue if it is not . . . The children would be bastards in one country and legitimate in the other."

This old construction of the *jus gentium* has yielded in most countries to the modern view that prohibitions imposed by the national law of a State are incapacities which follow its citizens in whatever country they may marry, and that foreign Courts are entitled to apply the *impedimenta dirimentia* of their own law to the question whether a valid marriage has been contracted abroad(11). Art. 1 of the Hague Convention of 1902(12), expressly provides that all conflicts arising out of marriage are determinable by the national law of each of the spouses, unless that law refers to another law, and this principle has been incorporated in the systems of most nations, including France, Germany, Hungary, the Netherlands, Italy, Portugal, Spain, Roumania, Denmark, Sweden, Norway and Russia(13). All marriages, therefore, contracted abroad by citizens of these countries into which they would be incapable of entering at home, will be treated as null whenever they come under the jurisdiction of their national Courts, notwithstanding their validity in the country in which they were celebrated.

Even in the matter of the form of the marriage, as distinguished from capacity to enter into it, although the *lex celebrationis* is almost universally accepted, the Hague Convention makes a special reservation of the right of each State to which the parties belong, if its law requires a religious ceremony, to refuse to rec-

(11) Burge's Colonial and Foreign Law, vol. 3. pp. 246, *et seq.*

(12) Hague Convention on Marriage Law, 1902 (ratified June 13th, 1902), English translation in appendix to Meili & Kuhn's "International Civil and Commercial Law," 1905.

(13) France (Code Civil, arts. 3 & 170); Germany (Introd. Law, art. 13); Hungary (Law of 1894, art. 108); Netherlands (Civil Code, art. 138); Italy (Code Civil, arts. 100, 102); Portugal (Code Civil, art. 152); Spain (Law of June 18th, 1870, art. 141); Denmark, Sweden and Norway (see 1901, Journal du droit Int. Prive, p. 197, 1077); all cited by Burge at p. 247 (*n*). For Russia, see Special U.S. Report on Marriage and Divorce, 1909, p. 383.

ognize the validity of a marriage contracted by its subjects abroad without regard to this condition(14). Russia, which sends us so many immigrants, considers marriage a sacrament and insists upon a religious celebration for all its nationals of the Christian faith, wherever wed, except in the case of Nonconformists. It further requires that members of the Greek Orthodox Church be married by a priest of that order(15), failing which, the marriage is considered null without judicial action. Greece, which adds to our population ten men to one woman(16), has a like requirement, and in response to a recent enquiry as to the formalities which must be complied with in order to secure the recognition in Greece of a marriage contracted here by one of its citizens, the Minister of its Legation at Washington writes as follows: "I beg to inform you that the Greek law ignores the civil marriage. Our civil Law is the old Roman Byzantine Law, Basilica and Armenoponlos compilations; in other words a legislation that considers marriage as being amenable to the religious province. Consequently a Greek citizen can only marry legally with the intervention of a minister of the Greek Orthodox Church, should the married couple belong to the Greek Church. If, on the contrary, they belong to another creed, the intervention of their minister is required. Marriage, consequently, according to the Greek laws, without the intervention of the Church is inexistent, and consequently the children of parents married purely under the civil law are considered as bastards. There is absolutely no exception to this rule"(17). Bulgaria accepts the formal validity of the marriage

(14) Art. 5.
(15) U.S. Report on Marriage and Divorce, 1909, p. 382.
(16) Special Rep. on the foreign-born population, Can. 1915, p. 50.
(17) "The Greek Law of the 10th August, 1861, had permitted marriages between Christians of the Eastern Orthodox Church and Christians of another religious denomination, under the condition that the marriage ceremony should be performed by a priest of the Eastern Orthodox Church, and that an act should be signed before the 'Juge de Paix' to the effect that the children will be brought up in the dogmas of the Eastern Orthodox Church. As soon as this law was published the French Government addressed strong representations to the Greek Government, contending that it was prejudicial to the interests of its Roman Catholic subjects, and that it was not in consonance with modern principles of religious toleration. Owing to these representations the law above mentioned was abolished two months after by the law of the 15th October, 1861, which simply enacted that marriage is permitted between Orthodox Greek Christians and persons of other religious denominations, if the rules of the Eastern Orthodox Church ke kept." British Report on Foreign Marriages, 1894, p. 80.

of one of its citizens abroad if celebrated according to the laws of the country in which the marriage is performed, with the limitation that an adherent of the Orthodox Greek Church must always be married by a priest of that Church(18), and a similar ceremony is also insisted upon by Servia in like cases(19).

In addition to reserving the right of States to exact a religious ceremony, the Hague Convention further provides that if the national law of the parties requires publications of their intended marriage, and these are not made, this default may render the contract null in the State to which the parties belong, while not invalidating it in any other State(20). Most modern Codes require publications giving full particulars of the intended consorts, their domicile, and those of their parents, and these must be made in the place of such domicile even in cases where the marriage is to take place abroad. In some early cases the French Courts interpreted art. 170 of their Code as obliging them to declare invalid all marriages where there was lack of publication(21), but these decisions have not been followed in recent years, and the jurisprudence is now definitely settled in that country, and in Belgium and Germany, that where there is good faith, omission to publish will not have the effect of making the marriage void(22). It is also settled law that in cases where the consent of parents must be asked by *une acte respectueux et formel* (as in France and Belgium), or where there is a direction that a person who marries in a foreign country shall register the fact on his return to his native land (as in France, Holland and Italy), failure in either respect will not of itself form a sufficient ground for the annulment of the marriage(23), but the omission may be evidence of fraud, and thus may be a ground of nullity.

The prohibitions as regards capacity, however, are of a more serious nature, and the tribunals of most nations would consider as void the union of one of their citizens abroad who under the

(18)U.S. Report of 1909, p. 348.
(19) Burge, vol. 3, p. 266.
(20) Art. 5.
(21) Burge, vol. 3, p. 161, and cases there cited.
(22) *Ibid*, p. 267.
(23) *Ibid*, p. 268: In France an order of the Court may be obtained *ex parte* at any later date ordering the inscription of the marriage at the Marie of the residence; Vincent et Penaud, Dict. de droit Int. Prive. 519.

impedimenta dirimentia of his own law was forbidden to contract marriage, although he may have satisfied all the conditions of the law of the country in which the union was celebrated. Thus under Austrian law, which accepts the Catholic theory of the indissolubility of marriage except by death so far as members of that confession are concerned, the union of one of its Catholic citizens residing in a foreign country with a person who has been divorced would be considered invalid if performed during the lifetime of the divorced party's former spouse, and could be annulled if the Courts of Austria acquired jurisdiction(24). Similar action would doubtless be taken in like cases by Spain and Portugal, neither of which recognize divorce. Difference of religious faith is also considered a bar by Austria(25), and Greece(26), and marriage between Christians and non-Christians is prohibited. Russia enforces a like restriction, but makes exception in the case of marriages between Lutherans, adherents of the Reformed Church, and other Protestants on the one hand, and Jews and Mahommedans on the other(27). The marriage, therefore, of an Austrian Catholic or an Orthodox Russian or Greek with a Canadian woman of the Jewish faith would have no validity in these foreign countries. Another absolute impediment would be presented if the alien who marries here had not yet attained the age regarded as essential by his national law, and unions with youthful foreigners involve danger of annulment by their domes. Courts owing to the fact that European and Latin American countries have usually a higher limit than our own. No male citizen of France, Belgium, Italy, Holland, Hungary, Roumania or Russia, can contract marriage before he attains his eighteenth year; if from Denmark, Norway or Bulgaria he must be twenty years of age, while natives of Germany, Sweden and Finland only become capable at twenty-one(28). The age of twenty-one is accepted by most nations as the period at which the consent of parents or guardians ceases to be obligatory, but Spain requires such consent until the

(24) U.S. Report on Marriage, 1909, p. 335.
(25) *Ibid*, p. 334.
(26) British Report on Foreign Marriages, 1894, p. 80.
(27) U.S. Report, 1909, p. 382.
(28) These ages, as well as those which follow relating to consent, are compiled from the British and U.S. Reports on Foreign Marriages, previously referred to.

age of twenty-three in case of males, Austria and Hungary until twenty-four, and Italy and Denmark until the attainment of the twenty-fifth year. Russians, without regard to age, always require consent if their parents are living. Marriage without it is not considered invalid, but renders the guilty person liable to imprisonment and entails the loss of all right of inheritance to the property of the parents.

The fact, however, that a marriage contracted in Canada might be declared null by the Courts of the country to which the husband owes allegiance does not preclude its recognition under some foreign systems up to the time when sentence of avoidance is pronounced. France(29), Italy(30), and Spain(31), like the Canadian Province of Quebec(32), all grant civil effect to putative marriages(33). If both parties to the contract acted in good faith the children of such an alliance are considered legitimate, and their legal rights as well as the proprietary relations of the spouses themselves, are settled by the Court in accordance with the principles laid down in the respective Codes. If the wife alone has acted in good faith, such effect is produced only as regards herself and her children, of which she becomes the custodian; ceasing to bear the name of her husband.

Marriages of Canadians with Orientals are fortunately of rare occurrence, though not unknown. In the case of Hindus should any question of capacity to marry arise out of difference of religion, the Courts of India would not apply Hindu law and usage, but would render a decision in accordance with justice, equity and good conscience(34). In *Chetty* v. *Chetty*(35), a Hindu, who was by caste a Vysia or Komati, went to England to study for the civil service, and while there married an Englishwoman (the petitioner in the case) under the Civil Marriage Act, in force in England. He afterwards deserted his wife and child; returned to India, and regarded the marriage as of no effect, his contention being that a

(29) C.C. arts. 201, 202, 1,109, 1,110.
(30) C.C. art. 116.
(31) C.C. arts. 70-73.
(32) C.C. arts. 163, 164.
(33) A marriage contracted in good faith, and in ignorance of those facts which constitute a legal impediment.
(34) Iyer: Hindu Law, Book 1, p. 408.
(35) (1909) P. 67, pp. 80, 81.

Hindu and a Komati could not contract a valid union with anyone not of the same race and caste. The Court held the marriage valid in England on the broad ground that it had been celebrated in a country where there was no prohibition, and further stated that no sufficient reason had been given or principle stated from which it would follow that the Courts of India would apply Hindu law or usage under similar circumstances. To the Hindu of Brahmanic faith marriage is the performance of a necessary religious duty, and is usually entered into at an early age, as future salvation is believed to depend upon the continuation of the family. Bearing this fact in mind a Canadian woman may take it for granted that few, if any, Hindu immigrants, students, or visitors, of mature age, are unmarried, and even if they have contracted no prior matrimonial tie, yet upon their return to India their law allows them to enter into other marriages at will(36). The Chinese also contract early marriages. To die without leaving a son to perform the burial rites and offer up the fixed periodical sacrifices at the ancestral tomb, is one of the most direful fates that can befall a Celestial, and few men pass the age of twenty without taking a wife(37). There is in all cases the same presumption as to prior marriage that has been referred to in the case of the Hindu, with the distinction that the national law of China allows but one wife. Concubinage is permitted, however, and these "secondary wives" as they are sometimes termed, enjoy a legal status(38).

It is impossible within the limits of a magazine article to cover all the *Impedimenta dirimentia* of foreign states(39), but the most notable causes of nullity have been indicated, and it is hoped the necessity demonstrated for a full enquiry as to the requirements of the national law of any alien with whom a Canadian woman may be about to contract marriage.

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(36) "A Hindu may marry as many wives as he chooses": Iyer, p. 413.
(37) Douglas: China, p. 115.
(38) Alabaster: Notes and Commentaries on Chinese Criminal Law, p. 171.
(39) See articles by the writer in Harvard Law Review, vol. XXX, No. 2, on Age and Consent, and American Law Review, vol. LI., No. 3, as to other impediments.

NOTES FROM THE ENGLISH INNS OF COURT.

The Master of the Rolls.

At the request of the Prime Minister, The Rt. Hon. Sir George Cave, Home Secretary, has refused the high office of Master of the Rolls. While the profession, having regard to his great legal attainments, may deplore this decision, there can be no doubt that it will be hailed with satisfaction by the general public. Few statesmen have served their country better since the war began. His are attainments peculiarly fitted for the discharge of the duties of Home Secretary, and it is a remarkable fact that at a time when the employment of lawyers in the high offices of state forms the subject of so much animadversion, no voice has ever been raised against Sir George Cave. He is not the first man to decline this particular office. Many years ago Sir Edward Clarke, K.C., when member for Plymouth, took the same course. Rumour was busy for a time appointing a successor to Sir Herbert Hardy Cozens-Hardy. It was suggested that one of the four ex-Chancellors who are now drawing a handsome pension from the state might well be called upon to fill the post. They are Lord Halsbury, Lord Loreburn, Lord Haldane and Lord Buckmaster. But now Lord Justice Swinfen Eady has been appointed. No better selection could have been made.

The Admission of Women to the Bar.

Several years before the war a lady applied for admission as a student at one of the Inns of Court. Her petition was dismissed by the Benchers, and on appeal to the Lord Chancellor this final "Court of Appeal" upheld the Benchers on the short and simple ground that there was no precedent for the application. Encouraged by the change in public opinion regarding woman's work which has come about during the war, a lady recently sought to be enrolled as a student. The Benchers unanimously decided against her. She subsequently told a press representative that: "I regard this as merely the first stage of a contest which will not be a long one, in view of the fact that I have behind me six

million enfranchised women, who will not tolerate for long this absurdity of the Benchers." Assuming that it is considered desirable to admit women to practise at the bar, it is by no means easy to see how the change can be brought about except with the consent of the Benchers of the four Inns of Court. At any rate it is plain that the Legislature—even when reinforced by those who have obtained the suffrages of the fair "six million" above referred to—cannot intervene without upsetting the whole machinery by which the barrister-at-law is now brought into existence.

An Extraordinary System.

For when you come to look into it, the position of a man at the English Bar is in the last degree extraordinary. He is called to the bar by the governors of a voluntary unincorporated society—namely, the Benchers of an Inn of Court. This society is independent of the state, and although subject to the visitatorial jurisdiction of the judges, is outside the jurisdiction of the High Court or any court. The Benchers decide all questions as to the fitness of students to be called to the Bar, save that their decisions have, since 1837, been subject to an appeal to the Lord Chancellor and the Judges of the High Court sitting as a domestic tribunal. The courts have refused a *mandamus* to the Benchers to admit a person as a student, or to call a student to the Bar (*Booreman's Case* (1642), March, 177). It thus appears that your barrister-at-law is in no sense the creature of any Act of Parliament. He is an anomaly; but that his existence is recognised by the Legislature is plain from the statute book. On the one hand, a stamp duty of £50 is exacted from him by the revenue when he is called; on the other hand, a large number of valuable offices and appointments are declared by the Legislature to be open only to members of the Bar. An all-wise Government has pronounced that only barristers of not less than ten years' standing can fill the office of (*inter alia*) Judge of the High Court; yet it has made no provision for, but has merely left to the chance exertions of private persons, the supply of barristers qualified to fill this high office. It is said, of course, that an Act of Parliament can do anything; but unless the whole

system of calling to the Bar is profoundly altered it is difficult to see how the Benchers of the Four Inns of Court can be ordered to admit women to the ranks of this branch of the legal profession. The problem in the case of solicitors is very different, because a solicitor *is* the creature of statute, and no person is entitled to be admitted and enrolled as a solicitor unless he is a British subject of the male sex. (*Bett* v. *Law Society* (1913), W.N. 355.) It thus appears that the ladies who aspire to become advocates in England will have to do much else besides study the law. They will have to secure the passing of an Act which will sweep away all the cobwebs which in the course of centuries have accumulated round the very foundations of the Inns of Court themselves.

A Tenant's Liability to Repair at Common Law.

The more one listens to cases in court, the more does one become impressed with the fact that it is seldom a really new point of law comes up for decision. Counsel may say, in opening, "This case raises a new point;" but as the facts come out, the point of law recedes into the background, and eventually is found not to arise. In a recent case (*Jones* v. *Joseph*, Nov. 29, 1917), it was stated in the course of counsel's opening that the question whether a tenant who at the expiration of the term left the premises in a verminous condition was liable to his landlord at common law would have to be decided; yet as the case proceeded it appeared that, as the tenant was liable under a special covenant to leave in good and rentable repair, it became unnecessary to settle a very interesting point. It is thus that the common law is robbed of her just due by the vicious habit of putting special covenants in leases. Lessees of all kinds, in addition to their liability for waste, are under an implied contract to use the premises in a tenantlike manner (*Horsefall* v. *Mather* (1815) Holt (N.P.) 7), but this implied covenant is excluded where there is an express covenant to repair (*Standen* v. *Christmas* (1847) 10 Q.B. 135). The question would have been: Is user of a house in such a way as to allow it to become infested with bugs consistent with user in a tenant-like manner? The consequences of deciding this point in favour of the landlord would be very serious, because the

doctrine might be extended so as to hold a tenant responsible for the dry-rot which from time to time makes its appearance in old wood. Nor would it be legitimate to apply the principle laid down in the celebrated case *Smith* v. *Marrable*, 11 M. & W. 5, where it was held that on the letting of a furnished house there is an implied condition that it is in a fit state for habitation at the commencement of the tenancy. It was there held that a tenant who had taken a furnished house was entitled to repudiate the contract because the place was full of vermin. This principle has never been extended to unfurnished premises.

Trial in Camera.

At the Liverpool Assizes, recently, Mr. Justice McCardie made a protest from the Bench against being compelled to try cases of incest *in camera*. For some unaccountable reason the following clause was inserted in the Act which first made incest a crime: "All proceedings under this Act are to be held *in camera*." A trial for incest is the only judicial proceeding, whether civil or criminal, which *must* be held behind closed doors, and, as Sir Herbert Stephen has recently pointed out in the columns of the *Times*, it is much to be deplored that the Legislature, beset by a fit of squeamishness, created this very dangerous precedent.

If the object had merely been to secure the due of administration of justice, the rule was unnecessary, because every judge has inherent jurisdiction to clear his court if justice cannot be done in public. Again, it has long been the practice at criminal assizes for the judge to order women and children out of court when a certain class of offence is being tried. If the object of the Mrs. Grundys who secured the passing of this Act had been to protect the morals of those who, in morbid curiosity attend in the gallery at assize courts, it is sufficient to say that there are many other crimes in the calendar which are more horrible and far more frequent.

Advantages of Trial in Open Court.

Wholly apart from the fact that the adoption of trial *in camera* is a violation of the common law rights of the individual, there are

reasons of a general nature why all cases of a sexual character should be tried in open court. Owing to the fact that when the black list is called the newspaper reporters invariably put down their pens, the public knows very little about these crimes and their commission—or what is more important—their punishment. With regard to incest in particular there is certainly a large section of the community which does not know it is a crime. Finally, if all cases of incest are tried with shut doors no law reporters, or legal practitioners other than those concerned in the case, are allowed to be present. Consequently the principles applied in trying such cases remain unknown and unrecorded.

Law Reform.

In some recent notes allusion was made to a speech delivered by the President of the Incorporated Law Society, in which he advocated certain legal reforms. He alleged, in particular, that the profession of the law was losing the confidence of commercial men, assigning as principal reasons, that the laws delays and the gradually increasing cost of litigation were driving the city man to courts of arbitration. He went on to say that, in order to meet the needs of the public, lawyers must expedite their proceedings and lower their charges. He then pleaded for the establishment of a school of law—as who should say that legal education in England was in need of reform. Finally, he contended that a Ministry of Justice should be established as a means of promoting reforms, the main object being to get rid of the political element in the exercise of patronage. It is to be observed that these suggestions were made by a solicitor to a society which consists of solicitors. No member of the Bar had any right to be heard upon it.

Is Reform Necessary or Urgent?

The views of a President of the Law Society are entitled to the greatest respect; but the "other branch" or, as the solicitors sometimes call it with a tinge of irony, the "higher branch," is entitled to be heard. To the complaint that the legal profession is losing the confidence of commercial men I would reply in the

sense adopted by the Editor of *Punch* when somebody remarked: "*Punch* is not what it used to be." Burnand replied: "It never was." Similarly there never was a time when lawyers did not come in for a large share of abuse and ridicule. But this is inevitable. The lawyer is constrained to do work in public, and he who comes into notoriety invites criticism. It is important to remember that nearly every law suit which comes before the court creates a disappointed litigant who goes about abusing the judges, the lawyers, and the law itself. The successful party, on the other hand, merely thinks he has got his rights "and there's an end of it." To sound the praises of the legal profession is not going to do him any good, so he remains silent.

Arbitration or Litigation?

The President of the Law Society tells us that commercial men go to arbitration instead of law. But was there ever a time they did not do so? There are a thousand disputes suitable to be decided by a lay arbitrator to one which should be determined by a lawyer. True your lay arbitrator may have no judicial sense and his decision may not be worth more than the spin of a coin; but he is cheap and expeditious and his judgment is final. How can the lawyers, unless the whole of their present machinery is crapped, essay to compete with him? At present the lawyers offers to his client the best that money can buy. It is slow (but not so slow as it used to be) and expensive; but it is justice as administered by courts against which the voice of calumny has never been raised in any part of the world. Are English lawyers to debase themselves in order to supply the public with an inferior article? The answer—of one member of the Bar at any rate—is emphatically,—No. In my view there is and always will be ample room for courts of arbitration and courts of justice to sit side by side.

How the Public "Mistrusts" the Lawyers.

The president also made as if to say that the profession has lost the confidence of the public generally. If this be true I can only say that the public have a strange way of shewing it. In private

life the individual solicitor has the confidence of his client. Which of us when there is a death in the family does not at once call in the family solicitor? There is no compulsion about it. We may, if we choose, prove the will ourselves and settle all the questions which arise without the aid of any lawyer. In public affairs, too, statesmen of every creed place unbounded and, as I submit, well deserved confidence in the legal profession. A glance at the statute book and, in particular, at the Acts which have appeared there since the war will bear me out. In a lecture on "The War and the Law," which he recently delivered at the London University, Lord Scrutton said:

"Later statutes have extended the powers of the courts very much, and impose very difficult tasks on their discretion. They may postpone the satisfaction of his liabilities by a soldier, determine a soldier's tenancy of premises, prevent a landlord from raising rent or a mortgagee from enforcing a mortgage, and so on, and the courts have been left by Parliament to answer the many riddles which have resulted. Generally speaking, the judges are empowered to make any alterations they may think right in any legal obligations, to do justice to the peculiar circumstances of the case as caused by the war. They are given a free hand, with no guidance as to the principles they shall apply. It is not for the judges to complain of the confidence which the Legislature and the public appear to repose in them, but it is one of the many inconsistencies of British character which puzzle foreigners that they should find, on the one hand, an all-wise press and an approving public denouncing the predominance of lawyers in the Government of the nation; and on the other hand, a puzzled Parliament heaping on to the unfettered discretion of these very lawyers the task of settling every difficulty caused in every kind of business during the war. At intervals during the war the ill-omened word "prerogative" appears in the arguments of representatives of the Crown, to justify the action of officials and departments. The rights of the Executive in time of war, which may be of great importance to the safety of the nation, are in danger of being stretched to justify official actions not authorised by Parliament, for which there is no immediate war necessity.

The judges of England recognise their duty to maintain the ancient liberties of the subject, except in so far as these have been diminished by legal means." The case for the legal profession cannot be put better than in these words of a Lord Justice of Appeal.

The School of Law.

As to the suggestion that a school of law is required, the short answer is that we already have many law schools. There is hardly a university in England without one; the Law Society and the Inns of Court are each of them legal seminaries, and the suggestion that study of law in a kind of national law school is an indispensable necessity is an implied negation of the doctrine that the real school for the lawyer is the struggle for (a lawyer's) life. You are not taught how to cross-examine in a lecture theatre; the proper way to conduct a complicated negotiation is not to be found in the pages of "*Fearne on Contingent Remainders*" or in "*Smith's Leading Cases.*"

A Ministry of Justice.

The suggestion that there should be a Ministry of Justice has much to commend it. But before accepting the new it is necessary to consider the merits of the old. The avowed object of the President of the Law Society is to place the exercise of judicial patronage in some person other than the Lord Chancellor—who is our present Minister of Justice if any there be. It is complained of him that being a member of the Cabinet whose party is in office he is subservient to the Government and that his appointments are tinged with politics. However that may be, it is difficult to see how a Minister of Justice would be better able to clear his mind of "party" than the occupant of the woolsack—when making a selection for the judicial bench.

W. Valentine Ball.

Temple, March 5, 1918.

SUPPORT OF ILLEGITMATE CHILDREN.

In a case which was recently decided in England of *Marshall* v. *Malcolm*, 117 L.T. 752, it was held that a claim for support of an illegitimate child of a married woman born while her husband was absent in the service of the Royal Navy, could not be maintained, because, although the English Act permits such actions to be maintained where the wife is living separate and apart from her husband: *Reg* v. *Pilkington* 1 Ell. & Bl. 546; *Reg* v. *Collingwood*, 12 Q.B. 681: it could not be said that a wife was living "separate and apart from her husband" merely because he was absent from his home in discharge of his duties as a sailor. It may be open to doubt whether in any case a claim could be made under the Ontario Act (R.S.O. c. 154), for the support of the illegitimate child of a married woman, inasmuch as by its express terms the Act only applies to "a child born out of lawful wedlock," and it may be well argued that no child born to a married woman during the lifetime of her husband can be "born out of lawful wedlock" so long as the marriage tie remains unsevered, although her offspring may in some cases, on proper evidence, be declared to be illegitimate. notwithstanding the strong presumption in favour of legitimacy. The question in short is, does the case of an adulterine come within the Ontario Act? We are inclined to think it does not.

RELIGION OF CHILDREN.

In view of the custom which largely prevails in the case of marriages between persons of different religious belief, of making ante-nuptial agreements as to the religion of the possible offspring of such marriages, it cannot be too widely known that all such agreements, so far as they purport to control the absolute authority of the husband in the matter, are really of no legal effect whatever; and, notwithstanding any such ante-nuptial or post-nuptial agreement to the contrary, the husband has a paramount right to determine the religious upbringing of his children, of which he cannot contractually divest himself. The law on this point is

very concisely summed up in Halsbury's Laws of England, vol. 17, p. 112, par. 261, as follows: "In the absence of good reason to the contrary a father has the right to determine in what religion his infant child shall be brought up, and he cannot effectually deprive himself beforehand of that right by an agreement to the contrary, either before and in consideration of marriage, or otherwise." This right of the father is respected even after his death, and the law will presume in the absence of any conclusive evidence to the contrary that he desires his children to be brought up in the faith he himself professed and will give effect to that presumption. In the recent case of *Re Taggart*, 41 O.L.R. 85, this question was raised, but the Court being equally divided the appeal was dismissed; but it is to be remarked that the dissentient judges do not in any way impugn the general principle above referred to, but treat the case as one merely involving the question of custody, which of course is quite distinct from that of religious education.

Swaying of railroad trains or street cars is of common and frequent occurrence, and results in numerous instances from natural inequalities of surface, and necessary curves, switches and guard rails in the construction of the roadbed, without there being any defect in the train or car, or in the track, or any negligence in the operation of the train or car. In such case, this motion is to be considered as incidental to this mode of travel, and to have been contemplated by the passenger, and any injuries resulting to him therefrom are unavoidable accidents, for which he cannot recover.

To furnish ground for an action against a railroad company for injuries to a passenger from the swaying of a car, it must appear that the swaying was more than is ordinarily to be expected, and that it was due to a defect in the car or track, a negligent or dangerous rate of speed, or some other cause for which the company can be held responsible.—*Case and Comment.*

That a carrier is liable to a passenger for mental suffering inflicted by insult of its conductor, although there is no physical injury, is held in the South Carolina case of *Lipman* v. *Atlantic Coast Line R. Co.*, L. R. A. 1918A 596.

Reports and Notes of Cases.

Province of Saskatchewan.

SUPREME COURT.

Haultain, C.J., Lamont, J., Brown, J.] [39 D.L.R. 4.

ETTER *v.* CITY OF SASKATOON.

Automobiles—Defective highway—Primary negligence—Non-compliance with statute—Registration—Number plates.

Operating a motor car in violation of the statutory requirements as to registration and number plates will bar recovery of any damages sustained by reason of defects in the highway; under such circumstances, a municipal corporation owes no duty to the driver or owner of the car except to refrain from wilful or malicious injury.

W. H. McEwen, for plaintiff; *L. M. Robinson*, for defendants.

ANNOTATION IN 39 D.L.R. ON ABOVE CASE.

REVIEW OF CANADIAN AND ENGLISH DECISIONS ON THE LAW OF MOTOR VEHICLES.

Scope of Statutes; Constitutionality.—The word "motor car" includes a "motor bicycle": *Webster* v. *Terry*, [1914] 1 K.B. 51.

A motor car used for household purposes is within the category of "horses, carriages and household effects:" *Re Fortlage*, [1916] W.N. 214.

A motor vehicle is not an outlaw; it has as much right to be upon the highway as a farmer's waggon, when complying with the statutory requirements: *Per Garrow, J.A., in Marshall* v. *Gowans* (1911), 24 O.L.R. 522.

The statutory requirements of the Motor Vehicles Act do not limit or interfere with the common law remedy for negligence, but they give other remedies directed to other ends: *Campbell* v. *Pugsley* (N.B.), 7 D.L.R. 177.

The Act is passed to insure the safety and protection of persons riding or driving upon the highway, and gives a right of action to any such person who is injured by reason of the non-observance of the requirements of the statute: *Stewart* v. *Steele*, 6 D.L.R. 1; 5 S.L.R. 358.

A province has the power, under s. 92 of the British North America Act, to regulate the use of motor vehicles upon the highways of the province and in doing so does not trench upon the criminal law. The highways are "local works and undertakings" within the meaning of s. 92 (10),

assigned exclusively to the provincial legislature, and do not come within any of the classes of subjects enumerated in s. 91 as assigned to the Parliament of Canada: *Re Rogers* (P.E.I.), 7 E.L.R. 212.

A local or municipal regulation making it an offence to use a heavy motor car on a bridge forming part of a highway of any greater weight than specified in the prescribed notice, except with the consent of the person liable to the repair of the bridge, is *intra vires*; and where such a notice has been affixed to a bridge by the person liable for its repair, any one who drives over the bridge a heavy motor car of a weight exceeding that mentioned in the notice is guilty of the offence: *Lloyd* v. *Ross*, [1913] 2 K.B. 332.

License.—One of the purposes of a license to drive a motor car issued under the Motor Car Act is the identification of the person to whom it is issued, and the production thereof, on due command, to a constable, constitutes *primâ facie* evidence that the particulars it contains refer to the person producing it, and that he is the person to whom it was issued. Secondary evidence of such particulars may be given although no notice to produce the license at the hearing has been given: *Martin* v. *White*, 79 L.J.K.B. 553, [1910] 1 K.B. 665.

The power of municipal corporations as to the granting or refusing motor vehicle licenses may be made exercisable discriminatorily; their acts cannot therefore be controlled by mandamus, particularly where another remedy is provided by statute: *Re McKay* (B.C.), [1917] 3 W.W.R. 447.

A by-law placing further restriction on the operation of automobiles for hire within the city will not be effective to control an unqualified license already held by the accused which remained unrevoked: *Rex* v. *Aitcheson*, 25 Can. Cr. Cas. 36, 9 O.W.N. 65.

Under the Quebec statute (R.S.Q. 1909, arts. 1402-5, as amended by 4 Geo. V. c. 12, s. 3), the chauffeur or operator of an automobile is required, under penalty, to be able to produce his license or certificate of registration, whenever required to do so by the proper authorities; the fact that he does not have it upon his person is no defence: *Lebel* v. *Blier*, 51 Que. S.C. 246.

Registration; Identification Mark.—Under the English Motor Car Act, 1903, a right to use a general identification mark is assigned for one year, on the registration of the car; and it is no defence to a charge of using a car on a public highway without being registered that no notice was given to the accused of the expiration of the right: *Caldwell* v. *Hague*, 84 L.J.K.B. 543; 24 Cox C.C. 595.

The appellants, motor-cycle manufacturers, had had a general identification mark assigned to them, which was affixed to one of their motor-cycles. One of their employees, without their authority, took the motor-cycle to his home, and left it there for some days, while he was away on a holiday. In his absence, his brother, without the knowledge of the appellants, took out the cycle, and used it with the mark upon it:—*Held*, that as the motor-cycle was used without the knowledge or authority of the appellants, they had not violated the regulation requiring manufacturers or dealers to keep a record of the distinguishing number, placed on or annexed to the identification of plates, and of the name and address of the person driving the motor car: *Phelan & Moore* v. *Keel*, 83 L.J.K.B. 1516, [1914] 3 K.B. 165.

Lights.—The driver of a motor-cycle on a public highway, charged with failing to keep a lamp burning thereon illuminating every letter or number on the motor-cycle, is entitled to avail himself of the defence that he had taken all steps reasonably practicable to prevent the mark being obscured, or rendered not easily distinguishable: *Prints* v. *Sewell*, [1912] 2 K.B. 511.

Speed.—Where regulations provide that if a heavy motor car has all its wheels fitted with pneumatic tires, the speed at which it may be driven on the highway shall not exceed 12 miles an hour, where the registered weight of any axle does not exceed 6 tons, and 8 miles an hour, where the registered weight of any axle exceeds 6 tons, the speed limit for a car of such class, of which the registered weight of the front axle is 2 tons 2 cwts. and that of the back axle over 6 tons, is 8 and not 12 miles an hour: *Auld* v. *Pearson* (1914), S.C. (J.) 4.

Horse Power.—A statute making the license duty payable in respect of motor cars, depending upon the "horse power" of their engines, to be calculated in accordance with regulations made by the Treasury for the purpose, does not refer to true horse power as the basis of the scale of duties, but to a horse power calculated according to the Treasury regulations: *London County Council* v. *Turner*, 105 L.T. 380, 22 Cox C.C. 593.

Weight.—A regulation limiting the weight of a registered heavy motor car has reference only to the weight of the motor vehicle, and has no application to the weight of the trailer attached to it: *Pilgrim* v. *Simmonds*, 105 L.T. 241, 22 Cox C.C. 579.

A steam road roller is a locomotive for the purpose of having its weight conspicuously and legibly affixed thereon: *Waters* v. *Eddison Rolling Car Co.*, [1914] 3 K.B. 818.

Brakes.—Where it is shewn that the only means by which the wheels on the back axle could be prevented from revolving were either by reversing the engine or by applying a fly-wheel brake, if the engine were out of the gear the fly-wheel brake could not act nor could the engine be reversed so as to operate as a brake, it will sustain a conviction for operating a motor car without having a brake, independent of the engine: *Cannon* v. *Jefford*, [1915] 3 K.B. 477.

Condition of Highway.—Both drivers of automobiles and drivers of horses have a perfect right to use the highway, but the right of each is subject to the qualification that he must use it in conformity with any statutory requirements, and not so as to make its use dangerous to others: *Stewart* v. *Steele*, 6 D.L.R. 1, 5 S.L.R. 358.

A highway must be in a state of repair as to be reasonably safe and fit for the requirements of the locality, as to be free from jolts and jars interfering with the physical control of cars lawfully operated thereon: *O'Connor* v. *Township of Brant*, 5 O.W.N. 438.

A municipal corporation is not obliged to take extraordinary precautions as to the safety of its highways for automobile traffic; it is sufficient if the streets are maintained with reasonable care for ordinary traffic: *Farad* v. *Quebec*, 35 D.L.R. 661, 26 Que. K.B. 139.

A municipal corporation operating a street railway is liable for a collision

of a street car with an automobile which had become stalled owing to rails protruding at a highway crossing: *Kuusisto* v. *Port Arthur*, 31 D.L.R. 670, 37 O.L.R. 146.

In an action against a municipality for injuries sustained by the driver of a car as the result of a defective culvert across the highway, the defence failed to establish the plaintiff's non-compliance with the provisions of the Motor Vehicles Act, either as to the rate of speed or as to the duty when approaching a culvert a person operating a motor vehicle shall have it under control, and operate at a speed not exceeding 12 miles an hour, particularly where he did know the culvert was there, and could not see it: *Smiley* v. *Oakland* (Man.), 31 D.L.R. 566.

Motor omnibuses constitute "extraordinary traffic" on the highways: *Abingdon* v. *Oxford El. Tram.*, 33 T.L.R. 69.

Liability of Owner when Car Driven by Another.—At common law the owner of a motor vehicle is not answerable for the negligence of the driver thereof, except where the relation of master and servant exists, and where, at the time of the negligent act, the latter was acting within the scope of his employment; and such liability can be changed by statute only by the use of distinct and unequivocal words: *B. & R. Co.* v. *Hugh S. McLeod*, 7 D.L.R. 579, 18 D.L.R. 245; 5 A.L.R. 176, 7 A.L.R. 349.

Under the Manitoba statutes (5 Geo. V. c. 41, s. 63a) the owner of a motor car is not liable for an injury while the car is being driven by another, unless the injury was caused by the negligent or wilful act of the driver: *McIlroy* v. *Kobold* (Man.), 35 D.L.R. 587.

The provisions of the Ontario Motor Vehicles Act (6 Edw. VII. c. 46) 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 vehicle when, outside the duties of his employment, he is out at large on an errand or frolic of his own. Though the owner may not be responsible in a penal aspect for violation of the Act, unless he is personally present, he becomes personally responsible in damages where there has been a violation of the Act by his vehicle: *Verral* v. *Dominion Automobile Co.*, 24 O.L.R. 551 (distinguished in *B. & R. Co.* v. *McLeod*, 7 D.L.R. 579; 5 A.L.R. 176; 18 D.L.R. 245; 7 A.L.R. 349).

Under s. 35 of the Motor Vehicles Act (c. 6, Alta. statutes 1911-12), the owner of an automobile is liable in damages as well as the driver who is using the car with the owner's sanction or permission for injuries sustained by a third party in consequence of the driver's negligence: *B. & R. Co.* v. *McLeod*. 18 D.L.R. 245, 7 A.L.R. 349, reversing 7 D.L.R. 579, 5 A.L.R. 176; *Witsoe* v. *Arnold and Anderson*, (Alta.), 15 D.L.R. 915.

S. 19 of the Motor Vehicles Act, 1912, c. 48, R.S.O. 1914, c. 207, which provides that the owner of a motor vehicle shall be responsible for "any violation of the Act," does not relieve the plaintiff in a negligence action for personal injury against such owner from the obligation of obtaining a finding that the accident was caused by a violation of the Act for which the defendant was responsible. (Per Riddell and Leitch, JJ.) *Lowry* v. *Thompson*, 15 D.L.R. 463, 29 O.L.R. 478.

Under s. 19 of the Motor Vehicles Act, 2 Geo. V. (Ont.) c. 48, R.S.O.

1914, c. 207, the owner of an automobile is liable for any violation of the provisions of the Act by his chauffeur while using the car for purposes of his own without the knowledge or consent of his employer: *Bernstein* v. *Lynch*, 13 D.L.R. 134, 28 O.L.R. 435.

The liability of the owner of an automobile, in virtue of art. 1406, R.S.Q. 1909, as amended by 3 Geo. V. (1913), c. 19, merely creates a presumption of fault on the part of the owner or the driver of the vehicle. The owner is not responsible in damages for injuries occasioned in an accident by his automobile, where the driver thereof is not his servant or agent, *e.g.*, where his nephew, a competent chauffeur, has borrowed or has taken the vehicle without his knowledge and was in charge of it at the time of the accident: *Robillard* v. *Bélanger*, 50 Que. S.C. 260.

A chauffeur who takes his master's automobile out of a garage, in contravention of his master's orders, and proceeds with it to make a call of his own before the time appointed for taking the car out for his master's use, is not to be considered as acting within the course of his employment so as to make the master liable at common law for injuries resulting to another whom he negligently runs down: *Halparin* v. *Bulling*, 20 D.L.R. 598, 50 Can. S.C.R. 471, affirming 17 D.L.R. 150, 24 Man. L.R. 235, reversing 13 D.L.R. 742.

The owner of an automobile is not liable for the negligence of his brother to whom the car was loaned for the latter's own purposes, although at the time of the accident in question the brother was engaged in driving home the owner's wife at the request of the owner's daughter, it not appearing that the owner was aware that the car was being used for that purpose, nor that the daughter had any authority from the owner to request or direct his brother to use the car for the purpose for which it was actually used: *Lane* v. *Crandell*, 10 D.L.R. 763, 5 A.L.R. 42, affirming 5 D.L.R. 580.

The father of the driver, being owner of the car and having authorized the use of it, was heldliable with the son for damages, both under the statute and at common law, for the negligence of the driver: *Boyd* v. *Houston* (B.C.), 10 W.W.R. 518..

The owner of an automobile is answerable at common law for its negligent operation by his chauffeur, where, instead of returning the car to the garage where it was kept, as it was his duty to do after having used the vehicle in the business of his employer, the chauffeur while using the car for purposes of his own and driving it in a reckless manner caused the plaintiff to be knocked off a bicycle and injured as a result of the chauffeur's negligent conduct: *Bernstein* v. *Lynch*, 13 D.L.R. 134, 28 O.L.R. 435.

A chauffeur, having received permission to have his master's motor for a few minutes in order to take something to the house of a fellow servant, at the request of the daughters of the latter, took them for a ride and, on returning with them to their father's house, injured the plaintiff. The jury held that the defendant had not proved that the accident did not arise through the chauffeur's negligence, and, also, that the latter was acting within the general scope of his employment at the time of the accident. *Held*, that having regard to the terms of the statute (6 Edw. VII. (Ont.) c. 46), which cast the onus on the defendant when his motor had occasioned an accident, and make him responsible for any violation of the Act, there was enough

evidence to support the findings; that under the Act the chauffeur is to be regarded as the *alter ego* of the proprietor, as the latter is liable for his negligence in all cases when the use of the vehicle is with permission, though he may be out on an errand of his own: *Mattei* v. *Gillies*, 16 O.L.R. 558.

E. and J. were joint owners of an automobile licensed as a jitney and, at the time of the accident, operated by E. as a "jitney." J. had a chauffeur's license, but there was no evidence of agency or partnership. *Held*, that the facts fell far short of establishing that J. had "entrusted" E. with the automobile within the meaning of the Motor Vehicles Act (B.C.), and that the onus was on the plaintiff in an action for damages sustained while riding in the automobile to shew that J. came within the provisions of sec. 33 of the Act: *Moore* v. *B.C. Electric R. Co.*, 22 B.C.R. 504, affirmed in 35 D.L.R. 771.

The Motor Vehicles Act, 2 Geo. V. c. 48, did not make the owner of a stolen automobile responsible for damages sustained when it collided with another vehicle through the negligence and furious driving of the person who had stolen it a short time previously, if the owner was himself guilty of no negligence in the manner in which he left the automobile and had taken away the spark-plug so that the thief could not have operated the car without supplying a similar spark-plug: *Cillis* v. *Oakley*, 20 D.L.R. 550, 31 O.L.R. 603.

The taking by a servant of a garage keeper, without the owner's consent, of a car stored in the garage for repairs, the servant mistaking it for a demonstration car, raises no such *animus furandi* as to render such taking an act of larceny which will relieve the owner from the liability imposed by sec. 19 of the Motor Vehicles Act, R.S.O. 1914, c. 207: *Downs* v. *Fisher*, 23 D.L.R. 726, 23 O.L.R. 504.

An employee of a repair shop, who takes out a motor vehicle left there for repairs, to test it by driving it upon a highway, and after so testing it continues to drive it for his own pleasure, has not "stolen" it from the owner within the meaning of the Ontario Motor Vehicles Act (R.S.O. 1914, c. 207, s. 19, as amended by 4 Geo. V. c. 36, s. 3); nor does it constitute a "theft" by virtue of sec. 285B of the Criminal Code, as enacted by 9 & 10 Edw. VII. c. 11, which makes it an offence to take a motor vehicle for use without the consent of the owner; also that the person so driving may be regarded as in the "employ" of the owner, who is responsible for his acts: *Hirshman* v. *Beal*, 32 D.L.R. 680, 38 O.L.R. 40, reversing 37 O.L.R. 529.

In the Quebec case of *McCabe* v. *Allan*, 39 Que. S.C. 29, it was held that where the owner of an automobile sends it for repairs to a company, and the latter after doing the work sends out the machine, in the care of one of its own chauffeurs, to test it, and an accident occurs through the fault of the chauffeur, the owner is not liable for the consequences. The fact that his own chauffeur was in the automobile at the time is immaterial.

A conditional vendor, reserving title to the car until fully paid for, may be regarded as the "owner" of the car and subject to the statutory penalties. But he cannot be held for an accident at a time when the car was neither in his control nor in that of his agent: *Cote* v. *Pennock*, 51 Que. S.C. 537. In Ontario it was held that a conditional vendor is not the "owner" of the automobile within the meaning of s. 19 of the Motor Vehicles Act, 2 Geo. V.

c. 48, R.S.O. 1914, c. 207, so as to incur a statutory liability for personal injuries sustained by the mismanagement of the car while under the control of the conditional vendee or of his servant, by the infringement of motor car regulations, passed under statutory authority: *Wynne* v. *Dalby*, 16 D.L.R. 710, 30 O.L.R. 67; affiirming 13 D.L.R. 569, 29 O.L.R. 62.

Statutory Onus.—By statute (see R.S.O. 1914, c. 207, s. 23) the burden of proof is shifted upon the owner or driver of the car, that the loss or damage did not arise through their negligence or improper conduct. And where there is evidence of excessive speed and want of that degree of care, which, if exercised, the accident could have been avoided, that burden is not discharged even if there had been contributory negligence: *Hall* v. *McDonald*, 12 O.W.N. 407.

But this simply shifts the onus. In the absence of such provision, when a plaintiff came into court alleging damage sustained by reason of a motor vehicle on a highway, he must prove negligence or improper conduct on the part of the owner or driver; the provision removes the necessity, and makes it sufficient for the plaintiff to prove damage sustained by reason of a motor vehicle on the highway: *Bradshaw* v. *Conlin*, 40 O.L.R. 494, 39 D.L.R. 86.

Although by the Motor Vehicles Act (Ont. 6 Edw. VII. c. 46, s. 18), when any loss or damage is sustained by any person by reason of a motor vehicle on the highway, the onus of proof that the loss or damage did not arise through the negligence of the owner or driver of the motor vehicle is on the owner or the driver, yet the person injured or his representative must establish that the damage was sustained by reason of the motor vehicle: *Marshall* v. *Gowans* (1911), 24 O.L.R. 522.

S. 33 of the Motor Vehicles Act (Alta. Stats. 1911-12, c. 6) throws upon the driver of the vehicle, in all cases of accident, the burden of proof that the injury did not arise through his negligence. Even where the plaintiff admits his own negligence in crossing a highway without looking, the driver of the vehicle must prove that he could not by the use of ordinary and reasable care have avoided the accident which resulted: *White* v. *Hegler*, 29 D.L.R. 480, 10 A.L.R. 57.

Under the Quebec law (R.S.Q. 1909, art. 1406), a person injured as the result of the operation of an automobile establishes fault on the part of any one in charge thereof, for which the owner is responsible. The statute 3 Geo. V. c. 19, s. 3, in effect relieves the plaintiff from proving negligence: *Woo Chong Kee* v. *Fortier*, 20 D.L.R. 985, 45 Que. S.C. 365.

The onus of the defendant to disprove his negligence has been held not discharged in the case of a boy struck by an automobile when sitting in a toy-waggon at the side of the part of the street devoted to vehicles: *Hook* v. *Wylie*, 10 O.W.N. 15, 237 (C.A.).

Negligence—What is.—Though a motor is not an outlaw, it must also be borne in mind that the driver is not the lord of the highway, but a man in charge of a dangerous thing, and so called upon to exercise the greatest care in its operation. He is required to signal before passing, and he should watch to see that his signal has been heard, and that way is being made for him to pass. An accident having occurred "by reason of a motor vehicle upon a highway," the statutory onus is upon the defendant to shew that the

accident did not happen by his negligence or improper conduct: *Fisher* v. *Murphy*, 3 O.W.N. 150, 20 O.W.R. 201.

While the automobile is not dangerous *per se*, its freedom of motion, speed, control, power and capacity for moving without noise, give it a unique status and impose upon the motorist the strict duty to use care commensurate with its qualities, and the conditions of its use, especially since the dangers incident to the use of the motor vehicle are commonly the result of the negligent or reckless conduct of those in charge, and do not inhere in the construction and use of the vehicle so as to prevent its use on the streets and highways: *Campbell* v. *Pugsley* (N.B.), 7 D.L.R. 177.

Except but for wanton and lawful injury, the driver of an unlicensed or unregistered car is not entitled to recover for injuries sustained in a collision with another vehicle negligently driven: *Contant* v. *Pigott* (Man.), 15 D.L.R. 358.

The non-observance by the driver of an automobile of a duty imposed upon him by statute is in itself evidence of negligence: *Stewart* v. *Steele*, 6 D.L.R. 1, 5 S.L.R. 358; *Campbell* v. *Pugsley* (N.B.), 7 D.L.R. 177.

Under certain circumstances the chauffeur is required to exercise a more than ordinary degree of care for the safety of pedestrians, and to anticipate the possibility of being confronted at any time in such a situation by pedestrians who for the moment lose control of their mental faculties, and are overcome by a sudden panic, although at other times of healthy and rational intellect: *Rose* v. *Clark*, 21 Man. L.R. 635.

It is the special duty of a person driving a motor vehicle to keep a good lookout while approaching a tramway crossing, and it is the duty of such person coming out from a cross-road into a main artery of traffic to wait and give way to that traffic, and not to throw himself headlong into the advancing traffic along the main travelled road. (*Per* Irving, J.A.): *Monrufet* v. *B.C. Electric R. Co.*, 9 D.L.R. 569, 18 B.C.R. 91.

Though there is no rule of law requiring the driver of an automobile to keep on the right side of the road, nevertheless he is negligent in being on the left side of the road without any excuse therefor, where he knows that he is very likely to collide with other drivers coming from the opposite direction: *Thomas* v. *Ward*, 11 D.L.R. 231, 7 A.L.R. 79.

Under the Motor Vehicles Act (N.B.), 1911, 1 Geo. V. c. 19, s. 4, sub-sec. 1, it is the motorist's duty "reasonably to turn to the left of the centre of the highway so as to pass without interference:" *Campbell* v. *Pugsley* (N.B.), 7 D.L.R. 177.

The statutory rule of the road in Alberta requiring drivers of vehicles when they meet to "turn to the right" does not imply that a driver of an automobile should always by on the right side of the road, but simply requires the driver to turn to the right in a reasonable and seasonable time to avoid collision: *Thomas* v. *Ward*, 11 D.L.R. 231, 7 A.L.R. 79.

In the absence of statutory provision and of proof of any regulation of the Lieutenant-Governor in Council under sub-sec. 3 of s. 20 of the Motor Vehicles Act (Alta.), or of any municipal by-law, the act of a defendant in driving to the left of the centre line of a street is not negligence *per se*, even though the rule of the road in this country is, as the Court is entitled to

recognize without proof, to keep to the right: *Osborne* v. *Landis* (Alta.) 34 W.L.R. 118.

The driver of a motor car who attempts to pass a vehicle ahead does so at his own risk and peril, and is responsible for any collision that may occur: *Menard* v. *Lussier*, 32 D.L.R. 539, 50 Que. S.C. 416.

The driver of an automobile is not guilty of contributory negligence where, on approaching another automobile coming towards him on the wrong side of the road and having reasonable ground to believe that there was not ample room for him to pass the approaching vehicle on his right side of the road, turns to his left, though it turned out to be the wrong course to adopt, because a collision resulted, where it appears that the driver's embarrassment was due solely to the action of the approaching automobile in adhering too long to the wrong side of the road without turning to the right of the road seasonably: *Thomas* v. *Ward*, 11 D.L.R. 231, 7 A.L.R. 79.

A taxicab driver's act in running into an upright post plainly visible, resulting in injury to a passenger, was *prima facie* negligent, where while running at considerable speed he turned quickly to correct a mistake in turning into a wrong street: *Hughes* v. *Exchange Taxicab and Auto Livery* (Man.), 11 D.L.R. 314.

The driver of an automobile is not relieved from liability for running into the plaintiff by reason of the fact that, in order to avoid striking children who suddenly ran into the street, he was compelled to change the course of his automobile, and in doing so struck the plaintiff who was about to board a street car, where the defendant's own negligence had placed him in a situation where the swerving of the automobile became a necessity: *Oakshott* v. *Powell*, 12 D.L.R. 148, 6 A.L.R. 178.

The driver of an automobile who does not remain at rest behind a stationary car, at a distance of not less than 10 feet, as required by a city by-law, and who injures a passenger descending from a car, is liable for the consequences of the accident. On the other hand, a passenger who descends from a car without looking around whether or not the road is clear to cross the street without danger is guilty of a serious fault. In such case the accident is due to common fault: *Evans* v. *Lalonde*, 47 Que. S.C. 374.

A pedestrian crossing a wide street, who stops in the roadway at a safe place beside the street car track for a street car to pass and then walks back in the direction from which he came without looking for approaching vehicles, is himself guilty of negligence, disentitling him to recover where, in retracing his steps, he walked in front of an automobile proceeding at a moderate rate of speed and was knocked down and injured before the motorist could avoid him: *Todesco* v. *Mans*, 23 D.L.R. 417, 8 A.L.R. 187.

Driving an automobile contrary to the rule of the road as required by a municipal traffic by-law, particularly the reckless proceeding out from behind a street car in a diagonal course, thereby hiding from view a street car approaching from an opposite direction, constitutes contributory negligence which will preclude recovery for injuries sustained in consequence of a collision with the street car: *Tait* v. *B.C. Electric Ry.*, 27 D.L.R. 538, 22 B.C.R. 571, from which an appeal was quashed by the Supreme Court of Canada: 32 D.L.R. 378, 54 Can. S.C.R. 70. See also *McGarr* v. *Carreau*, 46 Que. S. C. 448.

Turning a corner in violation of the rule of the road as provided by a local municipal by-law is negligent driving: *Hodgins* v. *Lindsay*, 7 O.W.N. 133; *Kidd* v. *Lea*, 10 O.W.N. 216.

Swinging an automobile ahead of a street car going at high speed, for the purpose of avoiding a hole in the pavement, is negligence which prevents recovery for damage sustained in a collision, notwithstanding the concurrent negligence of running the street car at an excessive rate of speed. The driver could have seen the street car coming towards him had he taken the precaution to look as he should have done: *United Motor Co.* v. *Regina*, 10 S.L.R. 373.

Taking hands off steering wheel while running at high speed is gross negligence: *Borys* v. *Christowsky*, 27 D.L.R. 792, 9 S.L.R. 181.

Looking down at the machine, instead of looking up, thereby swerving to the wrong side of the road, is negligence which will preclude recovery for injuries sustained in a collision in an effort to escape from the dangerous position: *Coffey* v. *Dies*, 10 O.W.N. 255 (C.A.).

McPhillips, J.A., dissenting, in the case of *Kinnee* v. *B.C. Electric Ry.*, [1917] 1 W.W.R. 1190, held that it is active negligence to drive a motor car with a closed hood up, and only being able to look out through the isinglass.

Attempting to cross a street when in full view of an approaching street car is negligence of the driver of the automobile, regardless whether the street car was going at high speed or not: *Ontario Hughes-Owens* v. *Ottawa Electric Ry.*, 13 O.W.N. 156; *Seguin* v. *Sandwich Windsor and Amherstburg R. Co.*, 9 O.W.N. 108.

Running a street car at a high rate of speed at a place where people were leaving a theatre, thereby colliding with an automobile proceeding out from thereabouts, is negligence for which the railway company is responsible; where both are at fault the company may be condemned to pay half of the damages claimed: *Fairbanks* v. *Montreal St. Ry.* (Que.), 31 D.L.R. 728.

Placing a car in the hands of an inexperienced and unlicensed driver will render both the owner and the driver jointly and severally liable for any accident: *Lebeau* v. *Colas*, 51 Que. S.C. 335.

Permitting a minor to drive a car contrary to the statutory requirement as to the age of the driver is *ipso facto* negligence: *Discepolo* v. *City of Fort William*, 11 O.W.N. 73.

Operating without license in contravention of statute constitutes an unlawful user of the highway and precludes recovery for injuries caused by obstruction thereon: *Greig* v. *City of Merritt* (B.C.), 11 D.L.R. 852.

Non-compliance with the statutory provisions as to registration of the car, in not carrying a number plate, operates as an absolute bar to the recovery of damages sustained by it by reason of defects in the highway: *Etter* v. *Saskatoon* (Sask.), [1917] 39 D.L.R. 1.

Failure to look when approaching a street crossing, thereby resulting in a collision, will not preclude recovery if the accident is caused by the ultimate negligence of the defendant, as, for instance, a failure to slow up, or to give the required signals: *Nairn* v. *Sandwich, &c. Ry.*, 11 O.W.N. 91, 394; *Jones* v. *Niagara &c. Ry.*, 10 O.W.N. 460; *Smith* v. *Regina*, 34 D.L.R. 238, 10 S.L.R. 72; *Banbury* v. *Regina* (Sask.), 35 D.L.R. 502. But see *Honess* v. *B.C. Electric Ry.*, 36 D.L.R. 301, 23 B.C.R. 90.

Injury by a motor vehicle to a person lawfully standing on a place properly reserved for the public cannot be defended on the ground of an "emergency" where the driver was negligent, and failed to keep a watchful lookout: *Elliott* v. *Fraba*, 10 O.W.N. 41 (C.A.).

An accident resulting from the disorder of a car in the course of operation, which could have been avoided by the exercise of reasonable care, by examining whether the car was in a fit condition to be safely operated before starting out with it, is properly attributable to the negligence of the driver: *Brooks* v. *Lee*, 7 O.W.N. 219.

Duty When Approaching Horses.—That automobiles are vehicles of great speed and power, whose appearance and puffing noise are frightful to most horses unaccustomed to them, and that from their freedom of motion they are literally much more dangerous than street cars and railroad trains, are elements of danger calling for the utmost care and caution to protect the public in their operation: *Campbell* v. *Pugsley*, (N.B.), 7 D.L.R. 177.

The provisions (R.S.O. 1914, ch. 207, s. 16) as to distance and speed, when approaching horses on a highway, are of a specific and definite prohibition, and do not rest upon the knowledge or reasonable belief of the operator. Where the prohibition is clear, a *mens rea* is not necessary, even in criminal matters: *Bradshaw* v. *Conlin*, 40 O.L.R. 494, 39 D.L.R. 86.

Under the Quebec statute (6 Edw. VII. c. 13, s. 24) it is the duty of the driver of a motor vehicle to stop on signal from a person approaching and driving a carriage, although the horse does not at the time of the signal appear to be frightened: *The King* v. *Hyndman* (Que.), 17 Can. Cr. Cas. 469; *Collector of Revenue* v. *Auger*, 25 Can. Cr. Cas. 412.

The Motor Vehicles Act (N.B.) 1 Geo. V. ch. 19, s. 3, sub-sec. 4, provides that in case a horse appears "badly frightened" in meeting a motor the motorist shall stop the car. It is a question for the jury to determine upon the evidence, in a negligence action against the motorist, just what may be the condition that should be termed "badly frightened." *Campbell* v. *Pugsley* (N.B.), 7 D.L.R. 177.

Where horses, rightfully upon the highway, become frightened and unmanageable owing to the approaching motor vehicle, the onus is upon defendant to disprove his negligence: *Ashick* v. *Hale*, 3 O.W.N. 372, 20 O.W.R. 606.

Where an auto on the highway is liable to meet a horse and buggy, and to frighten the horse because in that locality the auto may still be a strange and startling object to the horse, it is the motorist's duty to know this and increase his care and caution accordingly: *Campbell* v. *Pugsley* (N.B.), 7 D.L.R. 177.

A driver of an automobile who continues to advance towards horses which, by their actions, indicate that they are frightened by his car, is guilty of negligence, and is liable to the owner of the horses for injuries sustained by him while trying to hold them: *Stewart* v. *Steele*, 6 D.L.R. 1, 5 S.L.R. 358.

If seeing that a horse encountered on the highway has become frightened, the driver merely stops the automobile, but does not turn off the motor, the noise of which causes the horse's fright to continue, he is guilty of negligence and liable jointly and severally with the owners of the car for an

accident resulting therefrom. The lack of fencing or other protection along the road is no defence to an action against them: *Lubier* v. *Michaud*, 38 Que. S.C. 190.

Where an automobile on the highway is meeting a horse and buggy, and the car is frightening the horse and the motorist sees or ought to see this, it is the legal duty of the motorist to stop his car and take all other precautions as prudence suggests, and this irrespective of any statute regulating and controlling the use of motor vehicles and whether or not the driver of the horse holds up his hand to indicate the trouble with his horse; and the greater the danger capacity of the car the greater is the degree of care and caution incumbent on the motorist in its use and operation: *Campbell* v. *Pugsley*, (N.B.), 7 D.L.R. 177.

In an action by the plaintiff for personal injury for negligence against the driver of an automobile on meeting a horse and buggy on the highway, and the consequent frightening the horse, it is not contributory negligence by the plaintiff to whip up his horse and pass the motor car on the embankment side of the road, where the evidence shewed that the plaintiff was accustomed to driving horses and that the means he took, by using the whip, to urge his horse ahead and keep it on the road, were reasonable and proper under the circumstances, and that the law of the road in New Brunswick required the plaintiff to pass on the left-hand side, where the embankment was: *Campbell* v. *Pugsley* (N.B.), 7 D.L.R. 177.

One carefully driving an automobile at slow speed on a highway is not liable, under sec. 29 of the Motor Vehicles Act, B.C. 1911, for injuries sustained by a horse, where it appeared that it became frightened and unmanageable, not at the automobile, but by a steam shovel that was in operation near the road, and ran into the automobile: *Queer* v. *Greig*, 5 D.L.R. 308.

Although the driver of a horse followed by an automobile is required "as soon as he can go to the right in order to leave a free passage on the left," nevertheless, if he does not leave the automobile sufficient space, and the chauffeur attempts to pass the carriage, he does so at his own risk and is liable in case of collision: *Ménard* v. *Lussier*, 50 Que. S.C. 416.

Allowing Vehicle to Remain on Highway.—Allowing a vehicle to remain on a street an unlawful length of time, from the time it becomes unlawful to be on the street ("between dusk and dawn" under the Motor Vehicles Act, 2 Geo. V. (Ont.) c. 48 s. 6), renders the owner liable, at common law, for his illegal act: *Bailey* v. *Findlay*, 7 O.W.N. 24, 159.

The leaving of a wrecked motor car on the side of the road is not necessarily negligence, nor does it amount to an unreasonable user of the highway, entitling the owner of a runaway horse, frightened by the wreck, to damages. Neither is the owner liable by reason that at the time the motor was wrecked it was being driven by an unlicensed driver: *Pederson* v. *Paterson*, (Man.), 31 D.L.R. 368.

The defendant's servants momentarily left stationary but unattended in a highway a steam motor lorry. In order to start the lorry it was necessary to withdraw a hand-pin from the gear lever, and to move that and two other levers. Two soldiers seeing the lorry mounted it. One tried but failed to set it in motion. The other succeeded in starting it backwards, so

so that it ran into plaintiff's shop front and did damage for which the action was brought: *Held*, that there was in the circumstances no evidence of negligence in leaving the lorry unattended; and assuming that there was negligence, that there was no evidence that it caused the damage: *Ruoff* v. *Long*, [1916] 1 K.B. 148.

The owner of an automobile—a bright red one—was driving to a village, intending to stop at an hotel there and have dinner. On arriving at the foot of the hill, the road over which led to the hotel, he found that, owing to the condition of the road, it was impracticable to drive the car up on the hill, so he drew it up at the side of the road about 2 feet from the travelled part, locking it, as required by the Act, and taking the key with him, then went to the hotel and had dinner, remaining there some 3 hours. While the car was in this position, the plaintiff was in the act of driving down the hill, and when he was about 20 rods from the car, his horse caught sight of it, and shewed signs of fright. The plaintiff, notwithstanding, drove him on about a rod, when he again shewed fright, the plaintiff still urged him on, and when within a rod and a half of the car he shewed an inclination to leave the road, and on the plaintiff pulling him back, he wheeled around and upset the carriage, whereby the plaintiff and the horse and carriage were injured. It appeared that the car could have been driven to a yard of another hotel some 600 feet away: *Held*, there was some evidence of negligence to submit to the jury as to there being an unreasonable user of the highway, and an authorized obstruction thereof, and, therefore, a finding in favour of the plaintiff should not be disturbed: *McIntyre* v. *Coote*, 19 O.L.R. 9.

Collisions; Liability.—That loss or damage was incurred or sustained "by reason of" a motor vehicle on a highway may be found where, in order to avoid an automobile, a pedestrian was compelled to step backward and in doing so came into contact with a horse and was injured: *Maitland* v. *Mackenzie*, 13 D.L.R. 129, 28 O.L.R. 506, affirming 6 D.L.R. 366, 23 O.W.R. 80.

A horse and carriage driven on the wrong side of the street, in contravention of a municipal by-law, is negligence which will prevent recovery for damage as a result of being struck by an automobile properly operated: *Girard* v. *Wayagamack*, 51 Que. S.C. 317.

When the primary cause of an automobile collision was the defendant's violation of the rules of the road (Nova Scotia stats. 1914), by running on the wrong side of the road when approaching an intersection, and cutting the corner at that intersection, he cannot evade the consequences of his negligence by setting up that the plaintiff (who was originally on the proper side of the cross street) had swerved, in the emergency, to the wrong side of the cross street in an attempt to avoid the collision: *Bain* v. *Fuller*, 29 D.L.R. 113, 51 N.S.R. 55.

Notwithstanding the negligence of plaintiff in driving an automobile down a hill at an excessive rate of speed, recovery for injuries incurred through a collision with defendant's automobile will not be barred where the real cause of the accident was the negligence of the defendant in being on the wrong side of the road without excuse, and not turning out as soon as he should have done and not allowing the plaintiff ample room to pass him: *Thomas* v. *Ward*, 11 D.L.R. 231, 7 A.L.R. 79.

In a negligence action for damages resulting from the collision of two automobiles where it appears that the defendant was guilty of primary negligence, and by the exercise of reasonable care could in the circumstances eventually have avoided the result of his own primary negligence as well as that of the plaintiff (assuming the plaintiff to have also been guilty of primary negligence), the ultimate responsibility for the collision rests upon the defendant: *B. & R. Co.* v. *McLeod*, 18 D.L.R. 245, 7 A.L.R. 349, reversing 7 D.L.R. 579, 5 A.L.R. 176.

In an action for damages sustained by the plaintiff by a collision between an automobile, driven by the defendant in the streets of a city, and a bicycle ridden by the plaintiff, by reason, as the plaintiff alleged, of the negligence of the defendant: *Held*, that if the defendant could not be said, in the peculiar local condition to have been "turning" or "approaching a corner of intersecting streets," and so did not come under sec. 23 of the Motor Vehicles Act, still besides not conforming with the rules of the road, and he had violated sec. 13, by not sounding his horn when it was reasonably necessary, and sec. 22 in going at a speed that was unreasonable, improper and dangerous to life and limb; and even the speed of 7 or 8 miles an hour, which he admitted was excessive and the defendant had not rebutted the statutory presumption of negligence; but the plaintiff had made out a case which would entitle him to succeed even if the ordinary rule as to onus applied: *Wales* v. *Harper*, (Man.), 17 W.L.R. 623.

It was held (*per* Simmons and McCarthy, JJ.), that where a cyclist after becoming aware of the approach of an automobile in a direction at right angles to his own and the apparent danger of a collision, increases his speed in a rash attempt to pass ahead of the approaching automobile, his contributory negligence in this respect is the proximate cause of the ensuing collision, notwithstanding the negligence of the defendant in approaching an intersection of streets without taking proper care. Scott and Stuart, JJ., held that where a cyclist finds himself confronted with an emergency as above described and, owing to a mere mistake of judgment, swerves to the left to gain space and increases his speed in the hope of getting safely past, the automobilist is the proximate cause of the accident: *Orser* v. *Mireault* (Alta.), 7 W.W.R. 837.

Notwithstanding the grievous injuries inflicted upon the plaintiff, the rider of a motor-cycle, though partly through the negligence of the defendant driving a motor car, and notwithstanding that the defendant escaped from the collision unscathed, the plaintiff's action wholly failed, because, according to the findings of the jury, the plaintiff would not have suffered any injury from the defendant's negligence but for his own negligence: *Adams* v. *Wilson*, 10 O.W.N. 138 (C.A.).

An action for injury to an automobile by a collision with a street car on turning a corner cannot be maintained against the electric railway if there was no evidence to warrant the jury in finding that the motorman, by exercising reasonable care, could have stopped his car and have avoided the collision after he had become aware or ought to have become aware that danger was imminent: *Gooderham* v. *Toronto R. Co.*, 22 D.L.R. 898, 8 O.W.N. 3.

Where, in agony of imminent collision caused by a jitney driver's recklessness, a motorman increased speed, in the hope of avoiding an accident, the railway company is not liable for injuries occasioned thereby to a passenger of the jitney: *Moore* v. *B.C. Electric Ry.*, 35 D.L.R. 771, affirming 22 B.C.R. 504.

In the derailment of a car resulting in a collision with an automobile, there is *prima facie* negligence of the railway company: *Currie* v. *Sandwich, Windsor and Amherstburg R. Co.*, 8 O.W.N. 287; 7 O.W.N. 739, reversing 7 O.W.N. 40, 18 D.L.R. 685, 19 Can. Ry. Cas. 210.

Duty of Invitee.—An invitee, or one riding gratuitously as a guest, has a right of action against the host for an accident occurring through the latter's negligence: *Karavias* v. *Gallinocos* (1917), 144 L.T. 25, and note at p. 72. To the same effect is the recent American case of *Jacobs* v. *Jacobs* (La.), 74 So. 992, L.R.A. 1917 F, 253.

Rights and Liabilities of Seller or Manufacturer.— An automobile manufacturer and his agent are liable for an accident resulting from latent structural defects in a car sold by them, and guaranteed to be in good order when delivered; the liability is not only contractual, but also delictual: *Lajoie* v. *Robert*, 33 D.L.R. 677, 50 Que S.C. 395. See also *Nokes* v. *Kent* (Ont.), 9 D.L.R. 772, and American cases: *Macpherson* v. *Buick Motor Car Co.*, 217 N.Y. 382, L.R.A. 1916 F, 696 (annotated); *Cadillac Motor Car Co.* v. *Johnson*, 221 Fed. 801, L.R.A. 1915 E, 287 (annotated).

The seller of a gasoline engine who negligently installs it, and not the manufacturer thereof, is answerable to the purchaser for any damages resulting from its defective installation. *Tollington* v. *Jones*, 4 D.L.R. 648, 4 A.L.R. 344.

The lien of a conditional vendor covers the chattel in its altered condition, and its equipment, as a touring car when converted into a hearse: *B.C. Independent Undertakers* v. *Marine Motor Car Co.* (B.C.), 35 D.L.R. 551.

Pleading; Damages.—The Quebec statute 6 Edw. VII. c. 13 provides that no municipal by-law to regulate the speed of automobiles shall have any force or effect. An allegation in the declaration, in an action for damages against the owner of such a vehicle, that he was unlawfully driving it at a speed "far in excess of that permitted by the by-laws of the locality," is irrelevant and will be struck out on demurrer: *Peck* v. *Ogilvie*, 31 Que. S.C. 227.

The damage recoverable for injury to an automobile is not limited to repairs that are apparent, but includes also the expense of a thorough examination of the car: *Sears* v. *Gourre*, 52 Que. S.C. 186.

Garages; Liens.—The term "garages" within the meaning of a municipal by-law are "garages to be used for hire and gain," that is, public garages, automobile liveries: *Miller* v. *Tipling*, (1917), 13 O.W.N. 43; *Toronto* v. *Delaplante* (1913), 5 O.W.N. 69, 25 O.W.R. 16.

A "garage" does not include a place where automobiles are kept without extra charge while undergoing repairs. So held in construing the license provisions of the Quebec Motor Vehicles Law (R.S. Que. 1909, art. 1402b, statutes 1916, c. 21): *Collector of Revenue* v. *Verret*, 28 Can. Cr. Cas. 314, 38 D.L.R. 630.

Where petroleum spirit is kept in the tank of a motor car which is placed for the night in a garage, the garage is a "storehouse" and a "building, . . . in which petroleum spirit is kept:" *Appleyard* v. *Vaughan*, 83 L.J.K.B. 193, [1914] 1 K.B. 528.

The right of lien conferred by the Innkeepers Act (1 Geo. V. (Ont.) c. 49, s. 3), upon livery stable keepers, does not apply to keepers of automobile garages. As distinguished from the common law lien of an innkeeper on property of a third party in possession of the debtor, the statutory lien will not be construed as covering the property of a third person: *Automobile & Supply Co.* v. *Hands*, 13 D.L.R. 222, 28 O.L.R. 585.

The fact that an automobile was returned in a damaged condition to the care of the garage-keeper, on the order of the conditional vendee, to be left until repaired but without any change of the terms upon which the garage-keeper had therefore taken care of it, will not change the latter's status to that of a warehouseman so as to entitle him to a lien for the fixed monthly compensation as against the conditional vendor: *Webster* v. *Black*, 17 D.L.R. 15, 24 Man. L.R. 456.

In Quebec there is a lien for automobile repairs enforceable by conservatory attachment, and it is payable as a preferred claim out of the proceeds of the sale of the vehicle: *Morin* v. *Garbi*, 50 Que. S.C. 273.

The owner of a garage is a paid depository, and as such is responsible for damage by fire to an automobile entrusted to his care, unless he can prove that the accident did not result from any fault on his part: *Brunet* v. *Painchaud*, 48 Que. S.C. 59.

Offences and Conviction.—Under the Ontario statute (6 Edw. VII. c. 46, s. 13) the owner of a motor vehicle for whom a permit is issued is responsible not only in regard to fines and penalties imposed by the Act, but also in damages, for any violation of the Act or of any regulation provided by order of the Lieutenant-Governor in Council: *Mattei* v. *Gillies*, 16 O.L.R. 558. This case was distinguished in *B. & R. Co.* v. *McLeod*, 7 D.L.R. 579, 5 A.L.R. 176; 18 D.L.R. 245, 7 A.L.R. 349.

Under the provisions of the Motor Vehicles Act (N.B.), 1911, 1 Geo. V. c. 19, s. 4, sub-sec. 4, the motorist violating its provisions incurs a fixed penalty by way of fine for the violation. This penalty is additional to, not in lieu of, civil damages to the person injured by the motorist's negligence: *Campbell* v. *Pugsley* (N.B.), 7 D.L.R. 177.

Under the Quebec Motor Vehicles Act (R.S.Q. 1909, art. 1416, as amended in 1914, c. 12, s. 4), a person driving an automobile must stop when signalled or called upon to do so under penalty of fine although the officer making the signal is not in official uniform or exhibiting his badge of office: *Collector of Revenue* v. *Auger* (Que.), 25 Can. Cr. Cas. 412; *The King* v. *Hyndman*, 17 Can. Cr. Cas. 469.

Driving a motor car without a light is "an offence in connection with the driving of a motor car." *Ex. p. Symes*, 103 L.T. 428, 22 Cox C.C. 346, 27 T.L.R. 21.

A violation of the Defence of the Realm Regulations (1914), prohibiting the use of powerful lamps on motor cars is an offence "in connection with the

driving of a motor car": *White* v. *Jackson*, 84 L.J.K.B. 1900, following *Ex. p. Symes*, 103 L.T. 428, and *Brown* v. *Crossley*, [1911] 1 K.B. 603.

Allowing a motor car to stand on a highway so as to cause an unnecessary obstruction thereof does not constitute an offence "in connection with the driving of a motor car": *Rex* v. *Yorkshire, Ex. p. Shackelton*, [1910] 1 K.B. 439.

Failing to have the back plate of a motor car illuminated during the period prescribed by statute is an offence indorsable on the license: *Brown* v. *Crossley*, [1911] 1 K.B. 603.

Driving a motor car in a public park at a speed exceeding the limit fixed by a park regulation is such an offence: *Rex* v. *Plowden, Ex. p. Braithwaite*, [1909] 2 K.B. 269.

Unlawfully using a motor car on a public highway, on which the identification mark was not in conformity with the regulations, the letters and figures of the identification not being of the size prescribed, is an indorsable offence: *Rex* v. *Gill, Ex. p. McKin*, 100 L.T. 858 22 Cox C.C. 118.

Driving recklessly, driving at a speed dangerous to the public, and driving in a manner dangerous to the public, are separate offences: *Rex* v. *Cavan Justices* (1914), 2 Ir. R. 150, following *R.* v. *Wells*, 68 J.P. 392.

The period of suspension of a license for a violation of the Motor Car Act dates from the time of conviction, and the giving of notice of appeal does not have the effect of deferring the operation of the order of suspension: *Kidner* v. *Daniels*, 102 L.T. 132, 22 Cox. C.C. 276.

In a prosecution for a violation of the Act the prosecution must prove that the warning or notice of the intended prosecution required by the statute was given to the accused; a conviction without such proof is bad: *Dickson* v. *Stevenson* (1912), S.C. (J.)1.

Where a defendant, knowing that his identity was to be the subject-matter of an inquiry, intentionally absented himself therefrom, the identity of his name and address and the number and place of issue of his license, and those of a person previously convicted, is evidence upon which the identity of the defendant with such person may be held to be established. The words "proof of the identity" do not mean conclusive proof, but evidence upon which a tribunal may find that the identity has been proved: *Martin* v. *White*, [1910] 1 K.B. 665.

The driver of a motor car was convicted of driving his car over a measured distance at a speed exceeding the speed limit, the only evidence being that of two constables who had been stationed at either end of the measured distance, and who deposed, the one to the time at which the car entered, the other to the time of which it passed out of the measured distance. An objection to the sufficiency of the evidence, on the ground that as each of these times was a fundamental fact in the charge it could not be established by the uncorroborated testimony of a single witness, was repelled and the conviction sustained: *Scott* v. *Jamieson*, [1914] S.C. (J.) 187.

On a charge against the owner of a motor car, it is unnecessary to do more than allege generally than the driver has committed an offence under the statute. The conviction is good although it does not particularize which of the offences enumerated in the statute the driver had committed: *Ex parte Beecham* [1913] 3 K.B. 45.

Where a driver of a motor car is convicted for the offence of driving a motor car on a public highway between one hour after sunset and one hour before sunrise, without having the identification plate on the back of the car illuminated, the company owning such car may be convicted of aiding and abetting the driver of the car in the commission of the offence, inasmuch as the company must act through agents, sending out a car in an improper condition, and it is not necessary to prove a criminal intent on the part of the company: *Provincial Motor Cab Co.* v. *Dunning*, [1909] 2 K.B. 599.

A summary conviction under sec. 18 of the Ontario Motor Vehicles Act, 2 Geo. V., c. 48, providing that if an accident occurs to any vehicle in charge of any person owing to the presence of a motor vehicle on the highway, the person in charge of such motor vehicle shall return to the scene of the accident and give in writing to anyone sustaining loss or injury the name and address of himself and of the owner of the motor vehicle and the number of the permit, will be quashed, though the motor vehicle driven by the convicted person grazed the wheel of a passing buggy with sufficient force to loosen two spokes in its wheel, if it appeared at the trial that the person in charge of the motor vehicle did not know or have reason to know that such an injury had resulted to the buggy: *Robertson* v. *McAllister*, 5 D.L.R. 476, 19 Can. Cr. Cas. 441,

Under the Quebec Motor Vehicle Act, the owner of an automobile may be summarily convicted for an infraction of the speed limit upon a public highway, where a registered automobile is taken out without his consent by a machinist of the garage where it had been left for repairs. The doctrine of *mens rea* or guilty knowledge does not apply to that offence, in view of the clause therein (art. 1406) which provides that the "owner" shall be held responsible for any violation and for accidents or damages caused by his motor vehicle upon a highway. The onus is upon the prosecution to prove the fact of registration of the automobile on a charge against the owner for an offence committed by some else while operating his motor car: *The King* v. *Labbe* (Que.), 17 Can. Cr. Cas. 417.

Bench and Bar

Judicial Appointments.

John Gordon Gauld, of this City of Hamilton, Province of Ontario, K.C., to be Junior Judge of the County Court of the County of Wentworth, vice Judge Monck retired (April 17).

The Judges Act.

As we go to press we notice that a bill has been introduced in the Senate amending the Judges Act. Not having an opportunity of examining the bill we cannot go into any detailed criticism. As to one of its provisions we have always held the opinion that Judges should not, except under very exceptional circumstances, be taken away from their judicial duties and serve on commissions. It is also a provision of the bill that judges, upon retiring, should receive a pension of only two-thirds of their salary instead of the whole amount as under the present Act, and this would seem to apply to judges already appointed. In view of the inadequate salary paid to our Supreme Court Judges this provision would be most unfair, especially if it is intended to apply to those who already hold office. The salaries of the Supreme Court Judges are entirely inadequate and should be increased rather than diminished. You cannot have a first-rate article without paying for it, and it is most important in the interests of the public that the best men at the Bar should have a special financial inducement to give up a lucrative practice and go on the bench. The honour, of course, is great, but the salary should bear some proportion, not only to the honour, but to the financial sacrifice. The present inducements are not sufficient.

A clause which requires a Judge to make a sworn declaration that he has received no remuneration outside his official salary before he can demand his salary is an improper one and should be struck out.

War Notes.

LEGISLATION AS TO FOOD PROFITS.

There have been quite ample disclosures of illicit trading in foodstuffs to the detriment of consumers to satisfy some drastic action by Parliament to put a stop to such victimisation of the public in relation to commodities essential to all. The Bill to come before the Legislature directly the Houses reassemble is one based upon the Defence of the Realm Regulations, and its object is to penalise overcharges for foodstuffs. Persons who sell goods at prices in excess of those permitted by the Food Controller are to forfeit to His Majesty a sum equal to double the amount of the excess charged. In any proceedings taken to

recover such amount the Court is empowered, on being satisfied that there has been a breach of the Food Controller's order, to order an account to be taken in like manner as if the sum recoverable had been money had and received for the account of His Majesty.—*Law Times.*

Administration of Oaths Overseas.

It may be useful to note the following amendment to Sec. 13 of 6 Geo. V. ch. 24. Sec. 68 of the Statute Law Amendment Act, 1917, makes that section to read as follows:—

13. In addition to the classes of persons named in section 38 of the Evidence Act, an oath, affidavit, affirmation or declaration for use in Ontario, may be administered, sworn, affirmed or made out of Ontario by a Colonel or Lieutenant-Colonel or Major of the Canadian Expeditionary Forces on active service, out of Canada, and shall be as valid and effectual and shall be of like force and effect to all intents and purposes as if it had been administered, sworn, affirmed or made in Ontario before a commissioner for taking affidavits therein or other competent authority of the like nature.

Our cotemporary *Law Notes* (American), in commenting on the punishment inflicted on a person guilty of seditious talk by lynching him, very properly deprecates an act of violence of that sort. At the same time the writer insists that the nation should be protected as well from enemies within as from those without, and that "whispering traitors" should be punished as severely as those who speak aloud their traitorous thoughts. Pacifists who use language which tends to give countenance to the enemy are being promptly dealt with in the United States, and should be more severely dealt with here and in England than they are. We notice that Lord Lansdowne has again been using language discouraging to those engaged in the prosecution of the war, and thereby helping on the cause of the enemy. We had hoped that his previous escapade and subsequent apology would have been sufficient to curb his *cacoethes loquendi* in the pacifist direction.