move the great Tribune, who in truth and deed at this time bestrode the Liberal Party like a Colossus.

The second incident has to do with Mr. Blake on what proved to be his death-bed. Sir Louis visited him. They recalled their years together in the House and the long estrangement between him and the Liberal Party which his absence from his native land entailed during the many years he was a member of the English House of Commons.

At the close of the talk, Mr. Blake made the pathetic remark, so indicative of the conclusion he had come to, as he reviewed his political life: "Davies, there is but one word I desire carved upon my tomb, it is '*Misunderstood.*'"

Let me say by way of apology for the above sketchy, and quite inadequate memoir, that it has been hastily prepared in the midst of great pressure of work at the earnest request of the Editor of the CANADIAN BAR REVIEW.

E. R. CAMERON.

Ottawa.

THE RULES OF THE ROAD IN THE OPERATION OF MOTOR VEHICLES.

PART I.

On the 31st day of December, 1923, there came into force in Ontario, The Highway Traffic Act. This Act consolidates, and groups under appropriate headings, the provisions of three previous Acts—The Motor Vehicles Act, The Highways Travel Act and the Load of Vehicle Act.

In a general sense the whole code of laws which regulates the operation of motor vehicles on the highway, will be found in one sentence of the Highway Traffic Act.

By Section 25 it is enacted that, any person "who drives a motor vehicle on the highway . . . . . at a speed or in a manner dangerous to the public, having regard to all the circumstances, shall incur a penalty."

One principle underlies this whole subject. The law imposes upon everyone who uses the highway, the duty of exercising at all times, that degree of care for the safety and convenience of others which a reasonable person would exercise under the circumstances. The rules of law which serve as a guide to conduct under all circumstances of travel, are known as the rules of the road.

To ascertain exactly what these duties may be under any given circumstances, we must refer to three sources of the law;

1. To those sections of the Highway Traffic Act which specifically set forth certain things to be done or avoided.

2. To municipal by-laws in so far as they may regulate traffic pursuant to the Municipal Act, and

3. To judicial decisions extending over a wide range of varying facts and circumstances.

Part II.

A. There is a duty imposed by law upon every person using the highway to observe the rules of the road. The failure to observe any such duty is termed in law "negligence." Where we have a specific duty, the breach of that duty and damage, we have actionable negligence with which this article is chiefly concerned.

It is not within the scope of this paper to enter upon a discussion of the general principles of the law of negligence. There are, however, two well recognized rules that underlie the whole subject of Negligence. I will state what these rules are and will illustrate by reference to some decided cases how these rules are applied in the operation of motor cars. These rules are:

(a) That the law recognizes a standard of care according to which a person's conduct is measured. No person is expected to exceed that standard and he is not civilly or criminally liable unless his conduct falls below the standard. The standard is that degree of care which a reasonable man would be expected to exercise under given circumstances.

(b) That even where a person fails to observe some duty which the law enforces on him, he is not liable unless his failure was the real or proximate cause of the damage complained of.

To apply the first of these rules to motor cases, reference may be made to the following:

Slattery v. *Haley.*[1] The defendant driving his automobile along a city street was taken suddenly ill and without any preliminary symptoms or warning, became unconscious and fell back in his car. No one else was in the car and thus without guidance it ran up on the sidewalk, and coming into contact with a boy, so injured him that he died. *Held,* that the defendant was not liable. The use of the highway was lawful and the only ground of liability was negligence, failure to discharge the duty of taking care. Sudden

[1] 52 O. L. R. 95.

illness which overtook the defendant excused his failure to discharge that duty. To create liability for an act which is not wilful and intentional, but merely negligent, it must be shown to have been the conscious act of the defendant's volition.

Scott v. *Philp.*[2] The defendant left his motor car standing on a city street. He turned the wheel of it towards the curb, but did not put on the emergency brake. In his absence a boy of 9 years got on the car, with the result that by his action it was put in motion, went rapidly down an incline and against the verandah of the plaintiff's house. *Held,* there was no evidence to warrant the conclusion that the defendant, as a reasonable man, ought to have anticipated such an act as the boy did and therefore negligence on the part of the defendant was not established.

Foster v. *Zavitz.*[3] MASTEN, J. said: "The law does not require a supernatural poise or self control on the part of the driver of a motor vehicle. If some unforeseen emergency occurs which would naturally overpower the judgment of an ordinarily careful driver so that he failed to adopt the best course possible, he may not be negligent."

On the other hand, the Courts have declined to accept as an excuse the fact that the driver failed to see the object injured, because he was blinded by the sun or fog or the glare lights of an approaching car. *Crow* v. *Brennan*[4]; *Anderson* v. *County of Bruce.*[5]

In such circumstances, the Court says there was a positive duty on the part of the owner to stop.

As illustrating the second rule above stated that liability depends not upon the breach of the law, but a breach of the law which was the proximate cause of the damage:—

Honor v. *Bangel.*[6] A car carrying a large quantity of liquor came into contact with a motor truck driven by an unlicensed driver. Middleton, J. said: "The illegality of conduct of either party was not the cause of the accident, but the accident was caused by the negligent driving of both and neither could recover."

To the same effect is *Luck* v. *Toronto Railway,*[7] where the Court (Meredith, C.J.O.) held that assuming, however, that the driver was not entitled to traverse the intersection at a greater speed than 10 miles an hour, it did not follow that the finding as to contributory negligence should have been against the respondent. Contributory

[2] 52 O. L. R. 513.
[3] 24 O. W. N. 127.
[4] 24 O. W. N. 400.
[5] 22 O. W. N. 534.
[6] 19 O. W. N. 380.
[7] 19 O. W. N. page 330.

negligence not only involves a finding of negligence, but of such negligence that but for it, the accident would not have happened. He may have disobeyed the law and yet not have been guilty of contributory negligence.

B. The general law of negligence is qualified in motor cases by some important statutory exceptions.

Note section 43 of the Highway Traffic Act placing the onus of proof that he was not guilty of negligence upon the owner or driver of the car, and note that by the wording of that section the onus is imposed whenever "damage is sustained by any person by reason of a motor vehicle on the highway."

In *Maitland* v. *Mckenzie,*[8] it was held a jury might properly find a verdict for the plaintiff, a pedestrian, although the motor vehicle never came into actual contact with him.

Note also section 42 of the Act which makes the owner and also the driver, responsible for any violation of the Act; that is, for any non-observance of the rules of the road. This is an exception to the general rule upon which the liability of a principal for the act of an agent is determined, and renders unnecessary any enquiry as to whether the driver's act was within the scope of his employment or not.

In *Mattei* v. *Gillies,*[9] the late Chancellor Boyd said, the driver must be regarded as identical with the owner.

There is, under the statute, one exception to the liability of the owner, namely: when the car is in the possession of some person other than the owner or the chauffeur, without the owner's consent. There is an important change in the Highway Traffic Act from the provisions of the former Act. Under the former Act the owner was liable if the car was being driven without the owner's consent, so long as it was in the possession of any person in the employ of the owner. Under the new Act, the owner's liability for employees is restricted and the owner is liable for the negligence of his chauffeur only. If the car is in the possession of any other person, whether employee or not, without the owner's consent, the owner is not liable.

In *Walker* v. *Martin,*[10] Mr. Justice Masten held the owner not liable to a plaintiff who was injured by the negligent driving of the owner's car by the owner's daughter. The daughter was not, in the words of the former Act, "a person in the employ of the owner."

Even before the amendments to the Act as it now stands, it

[8] 28 O. L. R. 506.
[9] 16 O. L. R. 558.
[10] 45 O. L. R. 504.

was held that the owner was not liable for the negligent driving of his car while it was in the possession of a thief. *Gillis* v. *Oakley.*[11]

Whether the car is in the possession of some person other than the owner "without the owner's consent" may give rise to questions of some difficulty. On the one hand we have *Hirschman* v. *Beal,*[12] and on the other hand *LeBar* v. *Barber.*[13] Both are decisions of our appellate division and directly opposite results were reached. In the first case, the owner's car was taken to a garage for some minor adjustment and while there, it was taken from the garage by the foreman of a garage and driven down town on a mission of his own. While in his possession, the plaintiff was injured. The Court held under the circumstances, that there was implied permission for the foreman to take the car out to test it after the work was done and while there was no evidence that the car was taken for this purpose, the Court held the owner liable on the ground that the car was in the possession of the foreman with the owner's implied consent. In *LeBar* v. *Barber,* the plaintiff was injured under almost the same circumstances and the owner was relieved from liability because in that case the owner, who was leaving the City, had taken his car to the garage for the purpose of putting it in for storage, with instructions to have the battery and the tires removed, but the car was taken out, contrary to his instructions, and without his knowledge. It was held here that the car was not driven with the owner's consent and the owner was relieved of liability.

Part III.

Having pointed out some exceptions to the general law peculiar to motor vehicle cases and illustrated how some general principles are applied to these cases, let us consider the rules of the road in a little more detail with respect to three matters:—

(a) Collisions between vehicles meeting, passing and overtaking others.

(b) Injury to pedestrians.

(c) Injury to passengers in a motor vehicle.

I will first deal with the rights and liabilities of vehicles which meet at a street intersection.

In England, the law of the road is established by custom. In this Province, there are certain statutory enactments which, with perhaps one exception, are declaratory of the common law. That exception is found in section 36, s. s. 1., of The Highway Traffic Act:—

[11] 31 O. L. R. 603.
[12] 38 O. L. R. at p. 40.
[13] 52 O. L. R. 299.

"Where two persons in charge of vehicles or on horseback, approach a cross-road or intersection at the same time, the person on the right hand of the other vehicle or horseman, shall have the right of way."

Note that in the new Act, the right of way is given where vehicles "approach a cross-road." Under the former Act, the expression is "meet at an intersection." The new Act gives better expression than did the old Act, to the rule as interpreted by the Courts.

Prior to 1917, when this provision was added to The Highway Travel Act, traffic at intersections was regulated by by-laws of the various municipalities. This rule was adopted by the legislature with the object of having a uniform rule throughout the Province.

A regulation of this kind is designed to prevent accidents, not to excuse them, and relieves drivers from no duty of care imposed on them before. One approaching a crossing is not relieved of the duty of looking to the left and if a vehicle on the left reaches the corner first, it has the right of way.

This statutory provision is, therefore, subject to this important qualification, that the vehicle on the right must have arrived before, or at the same time, as the one on the left. If the latter, namely the one on the left arrives first by an appreciable interval of time, the statutory rule ceases to prevail. It may therefore be accepted as a general rule that the vehicle reaching the street intersection first has the right of way. Where there is a dispute between the parties as to which reached the corner first, evidence as to which party ran into the other is relevant and important in determining the progress made by each of the cars across the intersection before the moment of impact. In the result, the party who runs into the other at a corner is commonly held liable.

But the right vested either in the party who is on the right, or in the one who arrives first at the intersection, is in no case an absolute one, or exercisable arbitrarily or without regard to the safety or rights of others, it must at all times be exercised with due regard to the character of the traffic and other conditions existing at the moment.

In a sense, the statutory right of way is further qualified by the provisions of section 24, (formerly sec. 11) which enacts that at street intersections where a driver has not a clear view, the speed must be reduced to 10 miles an hour in urban and 12½ miles in rural municipalities. Evidence of speed at a crossing, or of speed in excess of the statutory limit, is always cogent evidence of negligence and as a matter of experience, usually suffices to fix liability.

It is obvious then, that drivers must use a higher degree of care

at street crossings than between crossings and therefore the fundamental rule is, that a car approaching an intersection must be operated at such speed and under such control that if necessary, it can be stopped soon enough to avoid an accident. The driver of a car approaching an intersection is under a fourfold duty:

(a) To give warning where such warning is reasonably necessary.

(b) Always to be on the alert and to look for cross traffic.

(c) To observe the speed limit, and

(d) To have his car under proper control.

The failure of a driver to observe any of these precautions is an act of negligence which may result in liability for any damage that may occur. The non-observance, however, of any or all of these duties, does not necessarily result in liability, because the general principles of the law of negligence apply. Liability follows, not from a negligent act or omission, but from *that* negligent act or omission which caused the damage. Where both parties are guilty of negligence, it is always a question of fact for the jury whether the damage was the result of the negligent act of one only or the result of the joint negligence of both.

In *Toronto Railway Company* v. *Gosnell.*[14]

"The driver of a cart struck by a car in crossing a track is not guilty of contributory negligence because he did not look to see if a car was approaching, if in fact, it was far enough away to enable him to cross if it had been proceeding moderately and prudently. He can be in no worse position than if he had looked and seen that there was time to cross."

The effect and the limits of the statutory provision as to right of way at intersections, are considered in *Heron* v. *Coleman,*[15] where the late Chief Justice Meredith says: "To entitle a driver to the benefit of the right of way, he must be in the right place at the right time, under proper conditions. If he is driving at an excessive rate of speed, and that negligence on his part is the real cause of the accident, a claim for the benefits of the right of way cannot help him. If he failed to give warning of his approach and that neglect was the cause of the accident, any claim to the benefit of the right of way is out of the question."

In *Aikens* v. *City of Kingston,*[16] a plaintiff approaching an intersection being on the right side, had the right of way. It was contended on behalf of the defendant that having seen the defendant's car approaching at a high rate of speed, it was the plaintiff's duty

[14] 24 S. C. R. page 582.
[15] 46 O. L. R. at p. 154.
[16] 23 O. W. N. 159.

to have stopped and let it pass. Mr. Justice Orde says: "If a collision was imminent and possible to avoid, some duty might be cast upon the plaintiff, but having, under the law, the right of way, he was justified in assuming that the defendant's police van would slow down when nearing the crossing, both because the law required it and because it might be necessary to do so to let the plaintiff cross first. In the result, it might have been prudent for the plaintiff to have stopped—had he done so, the accident would not have happened, but to hold it is the duty of one who is within the law to take some steps to avoid, not an impending but merely a possible accident, because another person is approaching the crossing at too rapid a rate, would be to put a premium on reckless driving."

On the other hand in *Bowell* v. *Galloway*,[17] Mr. Justice Latchford found both parties approaching the intersection at fault. He says: "The plaintiff approached and sought to cross the intersection at a speed in excess of any speed which the defendant had any ground for expecting the plaintiff to use. There was also negligence on the part of the defendant in not looking to his right again when he knew the plaintiff was approaching the intersection."

In *Zinkam* v. *Fleming*,[18] Mr. Justice Latchford says: "The fact that Fleming, the defendant, had the right of way, does not help him. As soon as he saw that if both cars held their courses they would come into collision, his duty was to bring his car to a stop or lessening his speed, turn it so far to the left so as to pass in the rear of the other car if it continued the turn it had begun to make." The defendant's car could have been stopped by a proper application of its brakes in time to avoid the collision and the defendant, having failed to exercise this degree of care, was held liable in damages.

In practice, the question has more than once arisen as to the right of an owner to recover damages from the Crown resulting from the negligent operation of motor vehicles carrying mail or engaged upon departmental business for the Government. Apart from the provisions of the Supreme Court Act or the Exchequer Court Act, the Crown is not liable for any act of negligence; and the provisions of these Acts do not, in my opinion, impose liability for the negligent operation of a motor vehicle. Curiously enough, in a couple of cases that have come under my notice, the Crown has maintained liability insurance, although shielding itself behind the principle of law that there is no liability for the negligent operation of its cars. The difficulty in which the unfortunate owner, who had

[17] 22 O. W. N. 56.
[18] 19 O. W. N. 371.

an action against the Crown, found himself was, in a measure, overcome by entering an action against the driver of the car personally. This is done upon a principle of law laid down by our Courts in a case of *Begras* v. *Tasse,*[19] where Mr. Justice Lennox says (p. 427): "I am clearly of opinion that the claim of the defendant (i.e. the Crown's servant) to immunity by reason of being a servant of the Crown, fails. While the Legislature has authorized the execution of work or the doing of an act, it does not thereby exempt those authorized to do so, from the obligation to use reasonable care that in doing so, no unnecessary damage is done."

We next deal with the duty of vehicles meeting others. By sub-sec. 2 of sec. 36 "a person in charge of a vehicle which meets another vehicle, shall turn to the right from the centre of the road, allowing the vehicle so met, one-half of the road free.

There has been discussion in reported American cases and in at least one Canadian case, *Rex* v. *Hurt,*[20] as to the meaning of "centre of the road." In the Canadian case referred to, the expression was held by the Alberta Court to mean the centre of the road allowance, and not necessarily to mean the centre of the commonly travelled track. This would not seem to be a proper construction and the weight of opinion is the other way.

When vehicles going in opposite directions meet to pass, when arises the duty of turning to the right from the centre? The acts of Saskatchewan and Quebec use the expression shall "seasonably turn to the right." This expresses the idea of a duty to turn in a fit or due time. What is a fit or due time is always a question of fact. It may be assumed however, that the driver will be required to turn to his right in time to afford a clear passage on *his* left of the centre line for the approaching vehicle and it will always be evidence of negligence when one person travelling in a direction opposite to that of another runs into the latter, the latter being on his own side of the road at the time.

There is no rule of law requiring the driver of any vehicle to keep to the right side of the road when not meeting other vehicles. A driver may occupy any portion of the highway, so long as that particular portion is not being used or sought to be used by another person. See *Thomas* v. *Ward,*[21] and *Pluckwell* v. *Wilson,*[22] where Mr. Justice Alderson says: "No person is bound to keep on the ordinary side of the road but if he did not do so, he is bound to exercise a higher degree of care and diligence."

[19] 40 O. L. R. 415.
[20] 32 C. C. C. 21.
[21] 11 D. L. R. 231.
[22] 5 Car. & P. at p. 375.

In *Wallace* v. *Bergins*,[23] "In the absence of other traffic, the driver of a vehicle is entitled to go on any part of the road that he wishes to."

The fact that when the occasion to turn to the right arises and the driver of the vehicle who is proceeding on the wrong side of the road is unable to do so on account of the size or character of his vehicle, or the state of the road, will not necessarily excuse him. Such person must comply with s.s. 8 of sec. 38 and immediately stop and, if necessary, assist the person meeting him to pass without damage.

On the other hand, the law will not excuse a person who is on his own side of the road for running carelessly or recklessly into one who is on the wrong side. This is in accordance with the rule laid down in the recent Privy Council case of *Loach* v. *British Columbia Electric*[24] and in such early cases as *Davies* v. *Mann*,[25] the "Donkey case," and in *Clay* v. *Wood*,[26] where Lord Ellenborough said: "Though a person might be on his wrong side, if the road was of sufficient breadth so that there was ample room for the other party to pass, the latter is bound to take that course that will carry him clear of the person on the wrong side."

Here, I want to make reference to actions against municipalities for damages to vehicles arising from non-repair of the highway. This is done to illustrate an important rule in the law of negligence. We will see that the Court may regard a breach of a statutory duty on the part of an owner claiming against a municipality, as fatal to that claim, when a breach of the same duty in actions between common users of the highway may be perfectly harmless.

In *Sercombe* v. *Township of Vaughan*,[27] the plaintiff's truck broke through a defective bridge of the defendant municipality. This truck was subject to the provisions of the Load of Vehicles Act which provides: "No vehicle shall have a greater width than 90 inches." The truck was in fact, 96 inches in width. It was not shown that the breach of the statute was in any way responsible for the result, but the Court dismissed the plaintiff's action and awarded the municipality judgment on its counter-claim for a sum necessary to replace the bridge. Riddell, J., in delivering judgment to the Court said: "The plaintiff had no right to have such a vehicle on the highway and in respect of the highway he was a mere trespasser. That the

[23] (1915) S. C. (Eng.) 205.
[24] 1 A. C. 719.
[25] 10 M. & W. 546.
[26] 5 Esp. 44.
[27] 15 O. W. N. 410.

extra width had nothing to do with causing the accident, had no significance, the truck should not have been there at all."

In *Roe* v. *Township of Wellesley*,[28] the motor car was driven by the plaintiff's son, a boy under 16 years of age, and the car and occupants were injured by a defective road. Latchford, J., held, that as the plaintiff's son was prohibited by statute from driving, the use of the highway which he was making was unlawful and even if the highway was out of repair, there would be no cause of action.

To the same effect is *Anderson* v. *County of Bruce*.[29] In a later case, it was sought to apply the principle of the Sercombe decision to a claim by the occupants of one car arising out of a collision with another car negligently driven on the highway. It was held, that the principle was not applicable as between common users of the highway. This was the case of *Godfrey* v. *Cooper*.[30] The plaintiffs here were passengers in a jitney driven by F. and were injured in a collision with the defendant's motor vehicle which was negligently driven on the highway. F. had no license to drive the car, although he came within the section of the Act which required him to have one. The defendant sought to apply the principle of the Sercombe case and contended that as F. was illegally on the highway, the plaintiffs had no cause of action. The Court repudiated this doctrine and pointed out that while a municipality owed no duty to one illegally using its highway, that as between individuals who were using the highway, the defendant could not rely upon a breach of the statute, unless he could show that such breach was the proximate cause of the accident. F.'s failure to procure the necessary license was not shown to have caused the accident, and the plaintiffs were entitled to succeed. The result would of course, have been entirely different if the injury to the passengers in F.'s car had been caused by the defective condition of the highway.

Section 38, s.s. 4, 5 and 9, fix the duties of drivers travelling in the same direction.

The driver of the rear vehicle must, by section 39, when overtaking a horse-drawn one, "signal his desire to pass." In other cases where he attempts to pass without warning, it would be a question of fact for the jury, whether he failed in his duty to exercise reasonable care.

Assuming that the driver of the vehicle overtaken refuses to allow the rear vehicle to pass, this will not justify the latter in making the attempt, if such attempt is attended by danger.

[28] 43 O. L. R. 216.
[29] 22 O. W. N. 534. Affirmed 23 O. W. N. 634.
[30] 46 O. L. R. 565.

When a driver overtakes another vehicle and passes on the left of the centre line, he is perhaps violating the provisions of sub-sec. 2 of sec. 36 with respect to vehicles approaching from the opposite direction. Quite apart from statute, his inability to leave that part of the highway reserved for others and voluntarily occupied by him, would not relieve him from liability for injuries sustained by a traveller going in an opposite direction.

The Legislature has seen fit to emphasize this common law rule by giving it recognition in the new Act, hence we find sub-sec. 9 of sec. 36.

(9) No person in charge of a vehicle shall pass, or attempt to pass, another vehicle going in the same direction on a highway, unless and until the travelled portion of the highway in front of, and to the left of the vehicle to be passed is safely free from approaching traffic.

Only brief notice may be given to that part of the subject which deals with injuries to pedestrians; the facts and circumstances out of which liability arises are too varied to permit of discussion at this time. Until quite recently, this subject might be said to fall quite outside the law of negligence. The motorist was always held liable and was, in effect, an insurer of the safety of every pedestrian on the highway. This was due largely to a general antipathy to motors and the difficulty of discharging the onus of proof imposed by the Act upon the owner. With the increase in the numbers of motors in use, there is a noticeable change in the attitude of juries toward these cases.

It may be, actions of this kind are necessary consequences of rapid transit and modern conditions. Up to the present time legislative effort has been directed or misdirected to regulate only one section of the traffic which uses the highway, namely, the vehicular. The pedestrian roams about at his sweet will. Is not the logical solution the regulation of all traffic? Why not concede to the pedestrian prior rights at crossings and to wheeled traffic prior rights between crossings, and when an accident happens, hold liable the one who invades the prior right of the other, unless he clearly establishes his innocence?

Theoretically at least, the pedestrian is under the law at present subject to the same duty to exercise reasonable care as is the motor driver.

Baron Pollock in *Williams* v. *Richards*,[31] says: "It is the duty of every foot passenger to use due care and caution crossing a street

[31] 3 Carr. p. 81.

and if his negligence contributes in any way to the injury he suffers, he cannot recover."

In *Biehn* v. *Hands*,[32] the plaintiff stepped from the curb in front of a moving motor car. Riddell, J., dismissed his action, saying, the real cause was the plaintiff's own negligence.

In *McMinn* v. *Paradine*,[33] the jury found the defendant motorist had not satisfied the onus imposed on him by the Act and also that the plaintiff could have avoided the accident by reasonable care. Smith, J., dismissed the action, holding, that where the negligence is equal or where it is joint, the plaintiff cannot recover.

In *Hadley* v. *Carolis*,[34] the plaintiff was walking along the Toronto-Hamilton Highway on the unpaved portion north of the concrete. Without looking to see what was coming, he stepped on to the concrete and was struck by the defendant's car. The Court of Appeal set aside a verdict in the plaintiff's favour and ordered a new trial, because the Trial Judge had failed to instruct the Jury as to the plaintiff's duty, having regard to the fact that he was leaving a place of safety and going into a place of danger.

Where the person injured is the occupant of a motor car, his right of action may be against the owner or driver of the car occupied or against the owner of some other car or object with which the car occupied has collided.

First, let us examine what action lies against the owner or driver of the car occupied. It was said by Baron Parke, in *Lygo* v. *Newbold*,[35] that "a person who undertakes to provide for the conveyance of another, although he does so gratuitously, is bound to exercise due and reasonable care." This rule was adopted and applied by Middleton, J., in *Parlov* v. *Lozina*.[36]

The practical result of the rule is, that the owner or driver of a motor car owes to the passengers in that car, be they guests or otherwise, exactly the same degree of care that he owes to a pedestrian on the highway and in case of accident, the onus of proof rests upon the motorist to the same extent.

In *Gray* v. *Peterboro*,[37] the owner of a motor car was held liable to the driver's guest for the driver's negligence. Here without the owner's knowledge or consent, his chauffeur had invited a friend to accompany him in the car. By the negligent driving of the chauffeur the guest was injured, sued the owner and recovered dam-

[32] 22 O. W. N. p. 35.
[33] 23 O. W. N. 658.
[34] 22 O. W. N. 72.
[35] 9 Ex. 302 (1854).
[36] 47 O. L. R. 376. Affirmed 19 O. W. N. 571.
[37] 47 O. L. R. 540.

ages. This liability was founded on section 42 of the present Act, which makes the owner as well as the driver liable for any failure to exercise the necessary degree of care.

Where a claim is by a passenger against the owner of another car or object which causes the damage, another difficulty arises. Suppose the damage sustained by a passenger is the result of negligence on the part of both the driver of the car which he occupies and the owner of the other car or object, does the negligence of the passenger's driver bar the passenger's claim?

In *Coop* v. *Robert Simpson Co.*[38] the Court of Appeal held that it did not. The plaintiff's husband, seated in a side-car of a motor cycle driven by L., was killed in a collision between the motor cycle and a motor truck owned by the defendants, The Robert Simpson Co. Mulock, C.J.O., in the Court of Appeal, said: "When the combined negligence of different persons causes injury to an innocent person, there are no degrees of liability; each is liable as a principle to the person so injured and therefore, even if the negligence of the driver of the motor cycle was one of the causes of the accident, if the defendants also contributed to it, they also are answerable to the plaintiff."

There are exceptions to this rule, where the passenger has control over the driving of the vehicle or where he knowingly and voluntarily exposes himself to the risk of its being negligently driven.

Dixon v. *Grand Trunk Railway.*[39] The plaintiff and four others hired a motor car and arranged that one of their number, Scott, should procure the car and drive it; Scott, being the only one of the party who knew how to drive. The motor car collided with a train of the defendants. The defendants and Scott were both found guilty of negligence. Meredith, C.J.O., in delivering the judgment of the Court of Appeal, said: "In my view, all five men had control of the motor car. The negligence of the driver, Scott, was therefore imputed to the injured plaintiff and his action was dismissed.

Delaney v. *City of Toronto.*[40] This was an action brought for the death of J. A. Delaney. The deceased was a passenger in an automobile owned and driven by a brother of the deceased. Owing to the defective condition of Dundas Street the car was upset and J. A. Delaney sustained injuries from which he died. The occupants of the car were under the influence of liquor. The Court held, that while the doctrine of volenti non fit is not strictly applicable, there was practically the same voluntary taking of the risks involved.

[38] 42 O. L. R. 488.
[39] 47 O. L. R. 115.
[40] 19 O. W. N. 523. Affirmed 20 O. W. N. 192.

Here again, the negligent driving of the car was imputed to the passengers and the action failed.

In *Gosnell* v. *Township of Southwold*,[41] Masten, J., said: "The fact that the occupant and owner of the motor vehicle are closely related, does not affect the rule that the driver's negligence is not imputable to the occupant, but if the occupant has the right of control over the operation of the vehicle and permits it to be negligently driven, he is chargeable with his negligent failure to require the driver to operate the car properly.

In *Trueman* v. *Hydro Electric Commission*,[42] an electric car of the defendants struck a motor car belonging to and driven by the plaintiff. The plaintiff's wife, who was a passenger in the car, was killed and the motor car was damaged. An action was brought by the plaintiff for damages to the motor car and under Lord Campbell's Act on behalf of himself and the infant children of the parties. The Jury found both the plaintiff and the defendants guilty of negligence. The Court of Appeal held, the plaintiff was entitled to recover the damages assessed to the children in respect to their mother's death, but not the damages assessed to the plaintiff in respect of his wife's death. The Court said: "He could no more recover for her death for which his negligence was the cause, than he could recover for the automobile."

Part IV.

To complete this article, let me make brief mention of the criminal liability arising out of failure to observe the rules of the road. I have reference not to the penalties incurred under the Ontario Statutes for speeding and similar offences, but to indictable offences under the Criminal Code.

Bear in mind, that whatever the character of the negligence may be, there is no criminal offence unless the negligence

(a) Causes bodily harm when the offence is described as a criminal negligence.

(b) Causes the death of some person when the offence is described as manslaughter or murder when wilfully done.

The criminal nature of the offence, therefore, does not depend upon the kind or degree of negligence involved but upon whether bodily injury or death resulted.

It is the generally accepted, but erroneous belief, that criminal negligence must involve some degree of wilful or reckless misconduct.

[41] 16 O. W. N. 266.
[42] 23 O. W. N. 665.

That is, perhaps, the law under the English cases, but under the Code a different rule prevails here; the Supreme Court has so held.

In *Rex* v. *McCarthy*[43] the Supreme Court held that the distinction is not maintainable between that which would render a man liable for civil damages for negligence and that which would render him criminally liable.

The criminal character of an offence has an important relation to civil actions on insurance policies.

In *Yorkshire* v. *O'Hearn*,[44] the Court of Appeal held, that where a person had insured himself against public liability and had by an act which amounted to criminal negligence, caused injury to some person, he has, by that criminal act, lost his right of indemnity against the insurance company. The principle upon which this decision rests, is that it would be contrary to public policy to permit any person to enter into a contract of indemnity against his own criminal act.

In *Sowards* v. *London Guarantee*,[45] Ferguson, J., delivering the judgment of the Court of Appeal, said: "The case of *O'Hearn* v. *Yorkshire* is authority that the plaintiff cannot get indemnity for loss occasioned by his own criminal or illegal act," but here the act was that of the plaintiff's son and the defendant was held liable.

On appeal to the S. C., Canada, this case was reversed on another ground.

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JUDICIAL COMMITTEE DIFFERENCES.

In the *Board of Commerce case*,[1] Lord Haldane said:

"It is one thing to construe the words 'the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters,' as enabling the Dominion Parliament to exercise exclusive legislative power *where the subject matter is one which by its very nature belongs to the domain of criminal jurisdiction.* A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing first to attempt to interfere with a class of subjects committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary

[43] 62 S. C. R. 40.
[44] 20 O. W. N. 275.
[45] 22 O. W. N. 513.
[1] [1922] 1 A. C. 191.