fendant's part in order to found a cause of action for the plaintiff. See Anglin, J., *Brenner* v. *Toronto R. Co.*, 13 O.L.R., 424, 6 Can. Ry. Cas. 262. If so this would involve merely a consideration of the various negligences in chronological order. The formula would be as follows:—

First:—Defendant was negligent, later plaintiff was negligent, but later still defendant was again negligent and so defendant's was the proximate cause and he is liable. This is what no doubt led Anglin, J., to invent the term "Ultimate" negligence and though it is pretty hard to apply even this formula, which sounds quite simple, to actual facts, the courts have not stopped at this but have made the defendant liable even though his carelessness was not the last or "Ultimate" negligence speaking chronologically. In the very case in which the learned judge coined this attractive but dangerous term he held the defendants liable for negligence which was antecedent to the plaintiff's negligence and he decided that this "anterior negligence" amounted to "ultimate" negligence; see p. 437, which shews the danger of attractive terms when applied to the hard facts of actual cases.

In that case the plaintiff was negligent in crossing a street car track at a street crossing. The defendant's motorman was required to shut off power at this crossing by the company's rules, but did not do so. Thus both were negligent but Anglin, J., separated their negligence and held (speaking for a Divisional Court) that though the motorman's negligence was antecedent to that of the plaintiff yet as it continued down to the collision it was the proximate cause of the accident and judgment was given in Divisional Court for the plaintiff. In the Court of Appeal for Ontario, 15 O.L.R. 195, 8 Can. Ry. Cas. 100, this judgment was reversed, not for any misstatement of the law in the Divisional Court but because the Court of Appeal thought there had been no misdirection at the trial and in the Supreme Court (40 Can. S.C.R. 540, 8 Can. Ry. Cas. 108), the judgment of the Court of Appeal was upheld and while there is but little discussion of the law Duff, J., says, at p. 556: "The principle is too firmly settled to admit in this court any controversy upon it; that in an action of negligence a plaintiff whose want of care was a direct and effective contributory cause of the injury complained of cannot recover, however clearly it may be established that, but for the defendant's earlier or concurrent negligence, the mishap in which the injury was received would not have occurred." This for a time rendered the possibility of a plaintiff recovering for "antecedent" "ultimate" negligence of a defendant extremely remote.

The matter has again arisen in the British Columbia cases above referred to and the Privy Council without making itself responsible for the term "Ultimate" negligence has adopted Mr. Justice Anglin's reasoning and decided that though the plaintiff may have been negligent later than the defendant yet if the defendant's earlier negligence put it out of his power to avoid danger when he saw it then the plaintiff may recover. This, therefore, is the law but it is submitted that it is not "Ultimate" negligence and one wonders whether that term were not better dead. It is bound to create confusion and if one may suggest a different formula the following is offered:

1. The joint negligence of plaintiff and defendant when not severable prevents the plaintiff from recovering.

2. The court will analyze the conduct of the parties to find out (*a*)