Canada Law Journal.

VOL. LIV. TORONTO, JULY, 1918. No. 7

*LAW LYRICS.**

Remote in its origin, the popular notion that the lawyer who indulges now and then in "literary lapses" is a poor stick at his profession and had better drop out of it, is still going strong.

That it is not founded in fact is known to everyone reasonably familiar with the personal history of the Bar. Blackstone might have been better employed when he lent professional countenance to this delusion in his *Farewell to the Muses*. So far as he was concerned literary talent did more for him in the way of preferment and reputation than any skill in advocacy or judicial endowment he possessed. In the current number of the *Juridical Review*, Mr. Francis Watt has an interesting paper on Samuel Warren, another lawyer whom the muses favoured. In a letter to John Murray in 1835, accompanying the manuscript of his *Introduction to Law Studies*, Warren dolorously complained that his *Diary of a Late Physician* had impaired his chances of success at the Bar. This venture in fiction had, as he puts it, "set afloat the notion that I am not a practical lawyer." Commenting on this, Mr. Watt says: "A remark in this letter voices a tolerably general opinion—if you succeed in letters you must fail in law—in which there is a grain of truth and a whole bushel of chaff. Warren was mistaken as to his own case. Had he never written a single line of fiction I do not think he would have had any the better practice; nay, it is recorded that one solicitor was so much struck with *Ten Thousand a Year*, presumably from the legal knowledge displayed therein, that he incontinently briefed the learned author. The result fell lamentably short of his expectations." We cannot dwell at length upon this popular fallacy here; suffice it to say that the literary divagations of such mighty men of law as Lord Eldon, Baron Alderson, Sir Thomas Talfourd, Lord Denman and Lord Bowen,

*LAW LYRICS. By E. Douglas Armour, K.C., Toronto. Canada Law Book Company, Limited, 1918.

did no harm to their professional prestige. Baron Cleasby welcomed a spare rainy day, because it swelled the fountains of Helicon for him. Lord Justice Knight Bruce—busiest of lawyers and judges—wrote one of the cleverest epigrams in verse that we have in the language.

We have been impelled to write this exordium to our notice of *Law Lyrics*, because Mr. Armour's personal history very strongly supports our view that there is not only no essential antagonism between the practice of belles-lettres and the practice of the law, but that, to a certain extent, the two may be correlated with the happiest results. Mr. Armour has for many years held a distinguished place at the Bar of Ontario, having attained early prominence as counsel in real property cases. He was for a long period one of the lecturers to the Law Society of Upper Canada; and has contributed three standard works to the library of the profession in Canada. All this means that he has not been slothful in business; yet that he did not the while neglect to "till the fields the muses love" is quite evident from the volume of verse that lies before us.

It is wholly the jocund note of the Comic Muse to which Mr. Armour bids us listen in *Law Lyrics*; but his technical mastery of several difficult metres used is so notable that it provokes in one a desire to hear songs "of a higher strain" from him.

The *Dedication* is quite Gilbertian in quality. It is so short that our space limit permits its quotation in full:

"It's a curious observation
To make, that dedication
Is common both to highways and to books;
But I am satisfied that you
Must acknowledge that it's true,
No matter how ridiculous it looks.

"But a highway's always free,
While a book can never be,
(The publishers, of course, would not advise it),
And so I beg to state
That I gladly dedicate
This little book to anyone who buys it."

The astute reader will learn from this that he is not getting any *vers libre* in these pages!

The poet's skill in character drawing is displayed in the copy of verses entitled *Mr. Justice Shallow* (p. 9). The third stanza is a high-explosive of sarcasm:

> "He made his reputation at the Bar by charging fees
> Which embarrassed all his clients, and by splitting
> hairs with ease;
> Then he was made a Justice by a parsimonious nation
> At a salary which very nearly kept him from
> starvation."

If the word "parsimonious" in the third line were changed to one purely ironic in its meaning or connotation, the whole would strike us as being quite in the vein of Terence.

The Registrar's Dream (p. 18), is good, but is too intimate—nay, too dreadful—a matter to be discussed by this reviewer.

Our readers will find Mr. Armour's treatment of the "Squib Case" and the "Six Carpenters' Case" both vigorous and interesting—indeed, quite up to the standard of legal verse set by such masters as Sir Frederick Pollock and Irving Browne. Lastly we commend both to the histicated and the unwary—the lawyer and the layman—*The Family Solicitor* (p. 25). It is not long, but it contains a whole philosophy.

We congratulate Mr. Armour on his adventure into the lightsome poetic domain in this time of storm and stress. We need to laugh as well as to pray in elemental times—and poetry is the true hand-maid of the spirit then. Can we forget Sir Ernest Shackleton reading Browning to his men in the white desolation of the Antarctic?

CHARLES MORSE.

DIVORCE JURISDICTION IN MANITOBA.

The Manitoba Court of Appeal (Howell, C.J., and Perdue, and Campbell, JJ.A.) has recently held unanimously that the Court of King's Bench of that Province has jurisdiction in divorce: *Walker* v. *Walker*, 39 D.L.R. 731. The Court has arrived at that conclusion

on the following grounds, viz., (1) that by 51 Vict. c. 33, s. 1 (D), it was enacted that "the laws of England *relating to matters within the jurisdiction of the Parliament of Canada*, as the same existed on the 15th July, 1870, were from the said day and are in force in the Province of Manitoba in so far as the same are applicable to the said Province and insofar as the same have not been, or are not hereafter repealed, altered, varied, or modified, or affected, by any Act of the Parliament of the United Kingdom applicable to the said Province or of the Parliament of Canada." (2) That marriage and divorce being matters within the jurisdiction of the Parliament of Canada, it follows that the English law of marriage and divorce as it existed on 15th July, 1870, because by the said Act the law of Manitoba. (3) That the Court of King's Bench of Manitoba is by the 38 Vict. c. 12, s. 2 (M), as subsequently revised in Con. St. of Man. 1880, invested not only with the like powers and authorities as the superior Courts of law at Westminister and the English Court of Chancery and Court of Probate, but also with those of "any Court in England having cognizance of property and civil rights and of crimes and offences." (4) That the English Court of Divorce and Matrimonial Causes" was a Court having cognizance of marriage and divorce. (5) That divorce is a matter of civil right and therefore that the Manitoba Court of King's Bench has jurisdiction to administer the English law of Divorce as it existed on 15 July, 1870. This method of legislation by reference is very apt to involve results which were not contemplated or intended by the legislators; and there can be little doubt that the Parliament of Canada did not realize that by the 51 Vict. c. 33 (D) it was doing what the Manitoba Court of Appeal has now decided it actually did. Had the Parliament of Canada really intended to introduce English divorce law into Manitoba, it would hardly have proceeded thereafter, as it has in fact done in many cases, to give parliamentary relief in matters of divorce to residents of that Province; but would naturally have said to all such applicants: "We have given you a divorce law and you have a Court to administer it; such is the relief you desire in the ordinary course of law and do not come here for special legislation where none is really needed."

It is claimed that by somewhat similar legislation the English divorce law has been introduced into Saskatchewan and Alberta; but there are circumstances existing in regard to those Provinces which make it doubtful whether either the English divorce law really was introduced and, even if it were, whether any jurisdiction has been conferred on the Courts of those Provinces to administer it. But be that as it may, it seems an extremely undesirable method of legislating upon such an important subject as divorce and marriage, where it is seen by the result that the subject is not dealt with deliberately and intentionally, but Parliament, by a sort of fluke, enacts something it apparently had no intention of enacting.

How far the Manitoba Court of King's Bench is competent to exercise matrimonial jurisdiction may perhaps be open to question—as far as the English divorce court's jurisdiction to grant divorces was concerned, it must be conceded as to that to have had cognizance of a civil right; because the right to divorce is purely statutory; and therefore a purely civil right; but as regards its other matrimonial jurisdiction can it be said to have had cognizance of civil rights? For instance, was the right to claim nullity of marriage a civil or ecclesiastical right? In granting it, were the former spiritual Courts enforcing a civil right or a religious or ecclesiastical right? or are these rights to be deemed synonymous? If the former spiritual Courts' jurisdiction was in respect of religious or ecclesiastical rights, can the transference of their jurisdiction to another Court alter the nature of the rights to be enforced? These are questions which seem to call for consideration in determining the extent of the matrimonial jurisdiction of the Manitoba Court of King's Bench because it is only to the extent that the English Divorce Court had cognizance of "civil rights" that the King's Bench has jurisdiction.

It must be remembered that the English Divorce Court, in 1870, was in all suits and proceedings "other than proceedings to dissolve any marriage" required to proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical Courts have heretofore acted and given

relief, but subject to the provisions in the Act contained and rules and orders made thereunder. The law of the Court, therefore, except as to divorce, is to be the ecclesiastical law or canon law of the Church of England. Can the rights of a subject under that law be said to be "civil rights?"

In law the word civil is used to distinguish secular and temporal rights from religious rights or ecclesiastical rights; thus we talk of civil and religious rights and liberties, not as meaning the same class, but different and distinct classes of rights and liberties. The word "civil" is also used to distinguish ordinary classes of men and things, from criminal, ecclesiastical, military, or political classes of men and things. The matrimonial rights may in one aspect be civil but in another aspect religious or ecclesiastical, *e.g.*, those rights which may be enforced in the temporal Courts may be regarded as civil rights; but those rights which could only be enforced in a Court of ecclesiastical jurisdiction would not appear to be civil but religious or ecclesiastical rights.

CONTEMPT OF COURT.

At a recent somewhat sensational trial for libel, in England, before Darling, J., it was generally reported in the newspapers that one of the witnesses called the learned Judge "a liar" and "a damned liar" in open Court, but it did not appear that any notice was taken of the insult thus offered to the Judge. Recent cases have shewn that the jurisdiction of the Court to commit for contempt ought not to be resorted to merely for the personal vindication of a Judge, but simply and solely to insure and protect the due administration of justice; and yet so gross an insult committed by a witness is, in a very true sense, an interference with the due administration of justice; for, if a Judge may with impunity be thus publicly reviled, that respect for the Bench which is so important an element in securing respect for the law is likely to be very seriously undermined. The great objection to the Judge who is thus publicly insulted imposing any punishment on the offender is the fact that

he is to some extent, in so doing, acting the part of a Judge in his own cause; he is in one sense the party aggrieved and he is also himself the Judge essaying to punish the culprit: and this no doubt is an objectionable feature. Recently in Manitoba a learned Judge, who was similarly insulted, however, did not scruple to impose a severe fine on the offender—but although it is necessary for the due administration of justice that Judges should be armed with considerable powers for protecting the order and discipline to be observed in Courts of justice, it is at the same time to be desired that where the Judge himself is the object of attack or insult, he should not be the Judge by whom the penalty is imposed; at the same time, such offences ought not to go unpunished, but on the contrary should in all cases be rightly and judicially dealt with. How this should be done may perhaps be open to question. One way which suggests itself to us is that the Judge to whom the insult is offered should certify the matter to the Attorney-General, who should thereupon lay an information against the culprit, who should then be dealt with by some other Judge or Judges, like any other offender and punished by fine or imprisonment, or both, as the circumstances of the case might require.

The freedom with which the defendant was permitted to introduce scandalous and irrelevant matter at the trial in question, is happily not very usual in British Courts of Justice. It has however made plain the wisdom of our rules of evidence, which, if enforced, would have prevented what appears to have been a very grievious injustice to persons who were not before the Court, and in no way concerned with the question really at issue.

JUDICIAL CHANGES IN ENGLAND.

Lord Cozens-Hardy has now definitely retired from the Bench. He withdrew last year from work in the Court of Appeal and he now leaves with the good wishes and regrets of the Bar. He was appointed to a judgeship in the Chancery Division in 1899, and in 1907 succeeded Sir Richard Henn Collins as Master of the Rolls. He is succeeded by Lord Justice Charles Swinfen Eady. The vacancy in the Court of Appeal has been filled by the appointment

of Mr. H. E. Duke, K.C., M.P. Mr. Duke tried his hand for a short time in managing Irish affairs, succeeding Mr. Birrell, who certainly mismanaged them. However, Mr. Duke seems now to have found his proper place on the Bench. It is said that his appointment, being a common law man, upsets the balance of the Court as it gives four common law lawyers to two equity lawyers. It is strange how long it takes our conservative brethren in the Old Land to realize the fusion between common law and equity in the administration of justice.

ORDERS IN COUNCIL UNDER THE MILITARY SERVICE ACT AND THE WAR MEASURES ACT.

We publish in full the judgment of the Supreme Court as delivered by Mr. Justice Anglin in the *Gray Case* which, so far as the Dominion is concerned, upholds the validity of the Order-in-Council under which the prisoner was called to military service. The Supreme Court of Alberta (Harvey, C.J., dissenting), as we all know, held otherwise in the *Lewis Case.*

The majority judgment of the Supreme Court of Canada is a masterly and convincing pronouncement. The dissenting judges were Mr. Justice Brodeur and Mr. Justice Idington, the latter read his dissenting opinion to which, however, it is not now necessary to refer.

Canadians, with a few unimportant exceptions, will be glad that the Supreme Court has found the law to be as set forth by Mr. Justice Anglin. We copy his words as printed in the daily press:—

The applicant moved before me in Chambers for a writ of *habeas corpus ad subjiciendum* under s. 62 of the Supreme Court Act. He is in military custody awaiting sentence of a court-martial for disobedience as a soldier to lawful orders of a superior officer. Such disobedience is declared to be an offence punishable by imprisonment for any term up to life by the Army Act (44 and 45 Vict., Imp., c. 58, s. 9; Manual of Military Law, 1914, pp. 370, 387), made part of the law of Canada by the Militia Act, R.S.C., c. 41, ss. 62 and 74, and the Military Service Act, 1917, c. 19, s. 13. The commitment of the applicant is therefore in a criminal case "under an Act of the Parliament of Canada" within s. 62 of the Supreme Court Act.

Before me in Chambers, and on the argument of yesterday before a full court, counsel for the applicant based their client's claim for discharge from military custody solely on the ground that he had been granted exemption under the Military Service Act, 1917, and that two orders in Council of the 20th April, 1918 (numbers 919 and 962), purporting to cancel or set aside exemptions so granted to men of Class A between the ages of 20 and 23 (which apply to him) are invalid. Counsel representing the Attorney-General frankly conceded that if these impugned orders in Council cannot be upheld the applicant is entitled to his discharge.

The issue is therefore clean-cut, and, while the circumstances of the two cases differ somewhat in points not material, is precisely that recently passed upon by the Supreme Court of Alberta in the case of Norman Earl Lewis. That Court (Chief Justice Harvey dissenting) held the two orders in Council to be *ultra vires*.

As many thousands of young men throughout Canada, most of them already drafted, and a considerable number of them already overseas or en route to Europe, are affected, the importance of the matter involved is obvious. It has occasioned much public excitement and unrest, and numerous applications for writs of *habeas corpus* are already pending in the provincial courts. Under these circumstances it was obviously of great moment in the public interest that the question of the validity of these orders in Council should be authoritatively determined by this court. I therefore readily acceded to the suggestion of Mr. Newcombe, in which Mr. Chrysler concurred, that I should follow the course taken by Mr. Justice Duff, and approved of by the majority of this court in *Re Richard*, 38 S.C.R. 394, and subsequently sanctioned by rule 72 of our rules of court, and, instead of myself dealing with the motion, should refer it to the court.

The doubt which exists as to the appealability of the order for discharge made by the Alberta Court, in the *Lewis case*, the unavoidable delay that the taking of such an appeal (which solicitors for the respondent could scarcely be expected to expedite) might involve, the probability that if I should make a like order in the present case it would not be subject to appeal (sub-section 2 of section 62 gives a right of appeal to the court "if the judge refuses the writ or remands the prisoner") and the fact that it could not be expected that a decision of a single judge of this court would be accepted as binding in the provincial courts, seemed to me most cogent reasons for taking the course suggested, in view of Mr. Newcombe's assurance that it had been already arranged with the Chief Justice and the Acting Registrar that, should the reference be directed, a special session of the court to hear the motion would be called for an early date, so that the applicant would not suffer the prejudice of any undue delay.

Although some questions as to the case being within the s. 62 of the Supreme Court Act, and as to the right of the full court

to deal with it, were raised by two of my learned brothers during the course of the argument, for the reasons already stated I entertain no doubt upon either point.

Against the validity of the order in Council it is urged (a) that Parliament cannot delegate its major legislative functions to any other body; (b) that it has not delegated to the Governor-in-Council, the right to legislate at all so as to repeal, alter or derogate from any statutory provision enacted by it; (c) that if such power has been conferred it can validly be exercised only when Parliament is not in session. The decision of the Judicial Committee in *Powell* v. *Apollo Candle Company*, 10 A.C., 282, cited by Harvey, C.J., in the *Lewis Case*, puts beyond doubt the sovereign character of colonial Legislatures within the ambit of the legislative jurisdiction committed to them, and the constitutionality of limited delegations of their legislative powers. Such delegations have been so frequent that it is almost a matter of surprise that their legality should now be considered open to question. A very common instance is the provision that a statute shall come into effect in whole or in part on a day or days to be named by proclamation to be issued pursuant to an order in Council. Here the limitation upon the extent of the powers delegated is found in the words of s. 6 of the War Measures Act of 1914, "as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable." Their duration is expressly limited by s. 5. A further limitation as to sanctions is imposed by s. 11. As was said in the *Apollo case* at p. 291, "the Legislature has not parted with its perfect control over the Governor; and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him." In *Bank of Toronto* v. *Lambe*, 12 A.C. 575, at p. 588, their Lordships of the Judicial Committee said "the Federal Act exhausts the whole range of legislative power."

A complete abdication by Parliament of its legislative functions is something so inconceivable that the constitutionality of an attempt to do anything of the kind need not be considered. Short of such an abdication any limited delegation would deem to be within the ambit of a legislative jurisdiction certainly as wide as that of which it has been said by incontrovertible authority that it is "as plenary and as ample . . . as the Imperial Parliament in the plenitude of its powers possessed and could bestow." *Hodge* v. *The Queen*, 9 A.C. 117, 133.

I am of the opinion that it was within the legislative authority of the Parliament of Canada to delegate to the Governor-in-Council the power to enact the impugned orders in Council. To hold otherwise would be very materially to restrict the legislative powers of Parliament.

I am quite unable to appreciate the force of the argument based on the *ejusdem generis* rule. In opening, Mr. Chrysler

rather disavowed invoking it. Mr. Geoffrion, however, appealed to it, and in his brief reply Mr. Chrysler appeared to insist upon its application. If this rule of construction would otherwise have governed, its application to section 6 of the War Measures Act of 1914 is clearly excluded by the words which precede the enumeration of the specified subjects, namely, "for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared, etc." That same language is found in section 91 of the B. N. A. Act, and I have never heard it suggested that the residuary powers of Parliament under the general terms of that section" to make laws for the peace, order and good government of Canada" are restricted to matters and things *ejusdem generis* with the subjects enumerated in its succeeding clauses, or, as Mr. Chrysler put his argument on this branch in opening, that the specified subjects should be regarded as illustrative of the classes of matters to which the application of the preceding general terms should be confined. Rather, I think, as put by Mr. Newcombe and Mr. Tilley, the specification should be deemed to be of cases in which there might be such doubt as to whether they fell within the ambit of the general terms—wide as they are—that *ex abundante cautela* it was safer to mention them specifically.

Mr. Justice Beck appears to have appreciated that this was the purpose of the words "for greater certainty," etc.; yet, by some mental process that I am unable to follow, after saying "the enumeration of the particular subjects of jurisdiction is obviously made in order to remove doubts which might possibly arise as to whether or not the particularized subjects would fall within the general statement of the subjects of jurisdiction," he proceeds to add that "such an enumeration of particular subjects must necessarily be taken as interpretative and illustrative of the general words, which must consequently be interpreted as intended to comprise only such subjects, in addition to those particularly specified, as fall within a generic class of which the specified instances are illustrative and definite of the general characteristics of the class," and he makes a strict application of the *ejusdem generis* rule, thereby excluding the making of orders for the enlistment of certain men exempt under the Military Service Act, 1917, as to which, whatever else may be said of them, there cannot be a shadow of doubt that they were made "by reason of the existence of real war" and because "deemed necessary or advisable for the security, defence and welfare of Canada."

The very purpose of inserting the words "for greater certainty, but not so as to restrict the generality of the foregoing terms," would appear to have been to insure the exclusion of the rule of construction under consideration. "The terms" of s. 6, the generality of which is not restricted, are "to do and authorize such acts and things and to make from time to time such orders and regulations as he may by reason of the existence of real or apprehended

war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada." More comprehensive language it would be difficult to find. The corresponding terms of the B. N. A. Act, s. 91, are "to make laws for the peace, order and good government of Canada in relation," etc. "Welfare" is substituted for "good government" and "security" and "defence" are added in s. 6 of the War Measures Act. In some constitutional acts, for instance, the N. S. W. Constitution Act, we find the word "welfare" used, with "good government" as a substitute for the word "order."

To introduce such a limitation as that suggested by Mr. Justice Beck and approved of by some of his colleagues would therefore appear to me to be to fly in the teeth of the very words of the Act of Parliament itself. Parliament, by express recital in the Military Service Act, 1917, declares that the Canadian Expeditionary Force is engaged in active service "for the defence and security of Canada," and that it is necessary to provide reinforcements to maintain and support it. The position taken by counsel for the Attorney-General, that the orders in Council fall within the very terms of section 6 of the War Measures Act, as orders made for the security and defence of Canada, therefore has statutory sanction.

Nor does the use of the term "orders and regulations" present any serious difficulty. No doubt "regulations" is a term usually employed to describe provisions of an ancillary or subordinate nature, which the Executive, or a Minister, or some subordinate body, is empowered to make to facilitate the carrying out of a statute. But, coupled with the word "orders" (which, as used here, seems to me clearly to mean orders in Council), and employed to connote provisions to be made "for the security, defence, peace, order and welfare of Canada," it has necessarily and obviously a more comprehensive signification. It was used, no doubt, because the Governor-in-Council usually acts by making orders or regulations. "Ordinances" might have been a more apt expression, but the context leaves no room for doubt that it was intended to confer the power to pass legislative enactments such a should be deemed necessary or advisable by reason of "real or apprehended war, invasion or insurrection," which is declared by a definitive clause of the Military Act to establish an emergency.

No doubt the amendment of a statute or the taking away of privileges enjoyed or acquired under the authority of a statute by order in Council is an extreme exercise of the power of the Governor-in-Council to make orders and regulations of a legislative character, but the very statute, the operation of which is affected by the order now in question, contains a provision, not found, we are told, in the original draft, and apparently inserted for the purpose of expressing the acquiescence of Parliament in such a use being made of the powers which it had conferred on the Governor-

in-Council by the War Measures Act. By s.s. 5 of s. 13 of the Military Service Act it is provided that nothing in this Act contained "shall be held to limit or affect the powers of the Governor-in-Council under the War Measures Act of 1914."

The very presence of this sub-section in the Military Service Act, 1917, imported that under the power conferred on the Governor-in-Council by the War Measures Act, orders and regulation might be made, with the validity of which, but for it, some provisions of the Military Service Act might be deemed to interfere. It carries confirmation of the view that the scope of the powers conferred by the War Measures Act was wide enough to embrace matters dealt with by the Military Service Act, and it puts beyond question, in my opinion, the purpose of Parliament to enable the Governor-in-Council, in cases of emergency, as defined, to exercise the powers granted by s. 6 of the War Measures Act, even to the extent of modifying or repealing, at least in part, the Military Service Act itself. The immediate juxtaposition of sub-section 4 to sub-section 5 of section 13, as was pointed out by Mr. Newcombe, served to emphasize the significance of the latter, and make it certain that its purview and operation did not escape the notice of Parliament.

The provision of sub-section 2 of section 6 of the War Measures Act was also relied upon as affording an indication that Parliament did not mean to confer upon the Governor-in-Council power to repeal statutes in whole or in part. Sub-section 2 is probably only declaratory of what would have been the law applicable had it not been so expressed. Parliament, however, thought it necessary to express such powers in regard to its control over its own statute. (Secs. 18 and 19 of the Interpretation Act, R.S.C., c. 1.) I fail to find in the presence of this clause anything warranting a court in cutting down such clear and unambiguous language as is found in the first paragraph of s. 6 of the War Measures Act.

Again it is contended that should s. 6 of the War Measures Act be construed as urged by counsel for the Crown, the powers conferred by it are so wide that they involve serious danger to our parliamentary institutions. With such a matter of policy we are not concerned. The exercise of legislative functions such as those here in question by the Governor-in-Council rather than by Parliament is no doubt something to be avoided as far as possible. But we are living in war times, which necessitate the taking of extraordinary measures. At all events, all we, as a court of justice, are concerned with is to satisfy ourselves what powers Parliament intended to confer, and that it possessed the legislative jurisdiction requisite to confer them. Upon both these points, after giving to them such consideration as has been possible, I entertain no doubt, and, but for the respect which is due to the contrary opinion held by the majority of the learned judges of the Supreme Court of Alberta, I should add that there is, in my opinion, no room for doubt.

It has also been urged that such wide powers are open to abuse. This argument has often been presented, and as often rejected by the courts as affording no sufficient reason for holding that powers, however wide, if conferred in language admitting of no doubt as to the purpose and intent of the Legislature, should be restricted. In this connection reference may be made with advantage to the observations of their Lordships in delivering the judgment of the House of Lords in the *King* v. *Halliday*, 1917, A.C. 260. As Lord Dunedin there said: "The danger of abuse is theoretically present; practically, as things exist, it is, in my opinion, absent."

As Lord Atkinson observed: "However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment—namely, national success in the war, or escape from national plunder or enslavement. It is not contended in this case that the personal liberty of the subject can be invaded arbitrarily at the mere whim of the executive. What is contended is that the executive has been empowered during the war, for paramount objects of State, to invade, by legislative enactment, that liberty in certain states of fact."

(6) It may be open to doubt whether Parliament had in mind, when enacting the War Measures Act, that legislative enactments such as those now under consideration should be passed by the Governor-in-Council acting under it, while Parliament itself should be actually in session. We can only determine the intention of Parliament, however, by the language in which it has been expressed. The terms of s. 6 of the War Measures Act are certainly wide enough to cover orders in Council made while Parliament is in session, as well as when it stands prorogued. The fact that in the present instance a resolution was adopted by both Houses of Parliament approving of the orders in Council, while it does not add anything to their legal force as enactments, makes it abundantly clear that no attempt was made in this instance to take advantage of the powers conferred by s. 6 of the War Measures Act topass legislation without the concurrence and approval of Parliament.

For the foregoing reasons I am of the opinion that the motion for *habeas corpus* must be refused. But having regard to the fact that this has been made a test case, and to its criminal character, there should, in my opinion, be no order as to costs.

*LIABILITY OF DRUGGIST FOR NEGLIGENCE IN SALE OR COMPOUNDING OF DRUGS.**

Generally, as to Duty and Liability.—The duty owed by druggists to their patrons is to exercise ordinary care. This, however, is ordinary care with reference to the particular business in question, and is fixed in view of the probable results of negligence. The care required of every person is always commensurate with the dangers involved. It is necessary, in order to establish the required degree of prudence, vigilance, and thoughtfulness to consider the poisonous character of so many of the drugs with which the apothecary deals, and the grave and fatal consequences which may follow the want of due care. The general customer ordinarily has no definite knowledge concerning the numerous medicines, but must rely implicitly upon the druggist, who holds himself out as having the peculiar learning and skill necessary to a safe and proper discharge of the duty legally required of him.

Ordinary care with reference to the business of a druggist must therefore be held to signify the highest practicable degree of prudence, thoughtfulness, and vigilance, and the most exact and reliable safeguards, consistent with the reasonable conduct of the business, in order that human life may not constantly be exposed to the danger flowing from the substitution of deadly poisons for harmless medicine.

All the authorities agree, and the very necessities of the case require, that the highest degree of care known to practical men must be used to prevent injuries from the use of drugs and poisons. It is for these reasons that a druggist is held to a special degree of responsibility. The care must be commensurate with the danger involved. The skill employed must correspond with that superior knowledge of the business which the law requires. The same rule that applies to the common carrier of passengers, and for the same reason—that is, that the life and safety from bodily harm of a passenger is at hazard, and his security due to the care and

* This article is taken from the *Central Law Journal* of April 26th. The authorities for the various propositions will be found in that issue.

skill of the carrier alone, and under circumstances where the passenger is powerless to protect himself—applies to the druggist. So, too, the life and health of a customer at the druggist's counter is at hazard, and he is equally dependent for security upon the care and skill of the druggist, and is equally powerless to protect himself.

In applying his knowledge and exercising care and diligence the druggist is bound to give his patrons the benefit of his best judgment; for even in pharmacy there is a class of cases in which judgment and discretion must or may be exercised The druggist is not necessarily responsible for the results of an error of judgment which is reconcilable and consistent with the exercise of ordinary skill and care. He does not absolutely guarantee that no error shall ever be committed in the discharge of his duties. It is conceivable that there might be an error or mistake on the part of a qualified druggist which would not be held actionable negligence.

He is required to possess a reasonable degree of knowledge and skill with respect to the pharmaceutical duties which he professes to be competent to perform. He is not required to possess the highest degree of knowledge and skill to which the art and science may have attained, nor to have the skill and experience equal to the most eminent in his profession. That reasonable degree of learning and skill which is ordinarily possessed by other druggists in good standing is the standard of his qualifications.

It has been declared to be the duty of druggists to know the properties of the medicines they sell, and to employ such persons as are capable of discriminating when dealing out medicines to customers.

If the druggist was negligenct he is liable, whether or not he was registered.

It has been held that the negligent sale of poison is an indictable offence at common law as well as under statute.

In a case where the druggist gave a customer acetanilid when he called for phosphate of soda, and the customer was injured thereby, it was held that negligence would be presumed; the rule *res ipsa loquitur* applying.

Liability for Negligence of Clerk.—It is elementary that the master who undertakes to perform a service is liable for the negligence of his servant who, when in the scope of his employment, is performing the services undertaken. This is true as well when the servant is a man of great skill and ability and is performing an act which requires peculiar technical knowledge, as when the servant is a man of no special skill and is doing work of the most ordinary kind. The rule is applicable to a druggist and his clerk.

In a case in which the defendant sought to escape liability on the ground that his clerk was a duly licensed pharmacist, the Court said: "The fact that Cutner, the defendant's clerk who compounded the prescription in question, 'was a competent druggist of experience,' does not relieve the defendant from a claim for damages for injuries sustained on account of negligence of his clerk. 'The most skilful and competent may be, and human experience teaches us will be, sometimes negligent. Hence the fact that one is skilful and competent may prove that he will generally be more careful than the unskilful and incompetent; but it has no tendency to prove due care on a particular occasion.' "

The fact that a druggist, in compliance with a statute, employs a competent and registered pharmacist, does not relieve him from liability for such employe's negligence.

Where a clerk supplied an undiluted form of trikresol, when a one per cent. solution was prescribed, and the action was founded on these facts, it was immaterial that the clerk went further and applied the same to plaintiff's arm, or whether in so doing he was acting in the scope of his employment in so applying it.

Drug for Particular Purpose.—The purchase of a drug for a particular purpose is not the equivalent of purchasing a particular drug. In the former instance the druggist impliedly represents that the drug is suitable for that purpose. So where plaintiff stated to defendant's drug clerk that he wanted to purchase "ten cents worth of corrosive sublimate to apply to the body to kill lice," and the clerk prepared it for that purpose, and the solution proved to be so strong that it caused severe injury, the defendant was held liable therefor. Such case was held analogous to those where a harmful drug is sold for a harmless one.

Failure to Label Poison—Contributory Negligence of Patron.—Plaintiff, a farmer, who at times practised veterinary surgery, went to defendant's drug store and purchased a bottle of castor oil and some Rochelle salts, which he himself desired to take, and some sulphate of zinc to make a wash to be applied to a colt's foot. The salts and sulphate of zinc were wrapped in separate packages, and the latter was then attached to a bottle containing the oil by a rubber band. When plaintiff reached home, he placed the bottle and the package of sulphate of zinc, the two being still attached, on a shelf in his room, and the other package, containing the Rochelle salts, he placed on a shelf in a cupboard with medicine used by him in his veterinary work. A few days later, plaintiff desired to take a dose of the salts and his wife undertook to prepare the same for him. She used the sulphate of zinc, which was still attached to the bottle of castor oil, and plaintiff was made ill from taking the same. A statute required the druggist to label poisons, and there was evidence that there was no label on the sulphate of zinc, although there was positive evidence that there was. There was a verdict in favour of the plaintiff, which was upheld on appeal. The court sustained an instruction which told the jury that even if they found that defendant had failed to label the drugs, as required by law, yet that fact would not relieve plaintiff from the exercise of reasonable care and caution in using the same to prevent injury to himself, and if they further believed that plaintiff knew he had purchased sulphate of zinc with the Rochelle salts, and through his own negligence and want of reasonable care and caution, took the sulphate of zinc instead of the salts, and was thereby made sick and injured, he could not recover for such injury. The court also declared that a violation of the statute requiring labels to be placed on drugs sold would constitute negligence *per se*.

Improperly labeling poison.—In the leading case of *Thomas* v. *Winchester* (6 N.Y. 397), the agent of defendant, who manufactured vegetable extracts for medicinal purposes, put up belladonna, a deadly poison, in a jar and labeled it dandelion, and sold it to a druggist in New York, who in turn sold it to another druggist who put it up for the plaintiff in pursuance of a phusician's pre-

scription calling for dandelion. A small portion of the medicine was administered to the plaintiff, and she suffered injury therefrom. It was held that the defendant was responsible for the injury without any privity of contract, because he committed an act of negligence imminently dangerous to the lives of others.

The intestate, who was suffering from diarrhœa, went, at the advice of a friend, to a drug store to procure ten cents worth of "black draught," a comparatively harmless drug, of which he intended to take as a dose, a small glassful. The druggist's clerk testified that he came to the store and asked the proprietor, the defendant, for ten cents worth of "black drops;" that defendant told him that that was a poison, that the dose was 10 to 12 drops, and advised him to take another mixture; that he refused, and the clerk, by the defendant's directions, gave him two drachms of "black drops" in a bottle, with a label having those two words written on it, but nothing to indicate the dose or that it was poison. The intestate took the bottle home, drank almost all its contents, and died from the effects thereof. It was held error to nonsuit the plaintiff, who sought to recover for intestate's death, but that the case should have been submitted to the jury on the question of whether defendant was not guilty of negligence in failing to place on the bottle a label shewing that its contents were poisonous.

Smith v. *Hayes* was a case of a druggist selling belladonna for dandelion, and in which he was held liable to the customer, who was injured as a result.

Failure to Dilute.—It has been held to be an act of negligence for a druggist to give one who asks for something to wash out a wound, a solution of carbolic acid so strong that it burns the flesh and turns it black, and that the person to whom it is given is not guilty of contributory negligence in using it.

The plaintiff ordered of the clerk in charge of defendant's drug department, for immediate use, a dose of aromatic spirits of ammonia. She drank the same "and became immediately poisoned, and her mouth and throat and other internal digestive organs became burned and inflamed," etc. An expert witness called by the plaintiff testified that each particular discomfort which plaintiff testified

followed upon her taking the mixture could be produced by the dose of aromatic spirits of ammonia, if the dose was not sufficiently diluted. Held, that these facts justified the jury in finding that the clerk who prepared and administered the dose was negligent.

Plaintiff sought to recover from defendants for injuries resulting from the application of undiluted trikresol, and there was evidence that plaintiff and his physician were in defendant's store, which was in sole charge of an unregistered drug clerk; that his physician prescribed verbally a one per cent. solution of trikresol, for an infection on his arm; that the clerk supplied and applied to his arm undiluted trikresol, with the result that he was seriously injured. A judgment in plaintiff's favour was affirmed.

Improperly Mixing Ingredients of Powders.—Actions were brought to recover on account of alleged negligence in compounding a physician's prescription, calling for five grains of phenacetin and five grains of sugar of milk, to be put up in the form of five powders, containing one grain each of the phenacetin and sugar of milk. The prescription had been refilled two or three times, and administered to the little girl, 4 years of age, to whom it was given on this occasion with evil consequences. It was not in controversy that the defendant pursued the usual course in filling this kind of a prescription. He weighed out five grains of each of the required ingredients, placed them in a mortar, stirred them with a pestle "from a minute and a half to two minutes," dumped the mixture upon a prepared paper, graded it up as near as possible, divided it into five equal parts, and then placed them in separate papers and folded them for use, properly marking the box in which they were contained. The evidence shewed that this was the appropriate and usual method of filling this kind of a prescription. One of the powders was analyzed, after the child had been given one of them which proved to be an overdose, and it was found to contain, instead of one grain of phenacetin, only six-tenths of a grain; consequently the other four-tenths must have gone into one or more of the other powders.

In upholding verdicts for the plaintiffs, the Court said that, "It was incumbent upon the defendant either to so thoroughly mix the ingredients that each powder would contain substantially

the quantity it was intended to have, or to compound each powder separately by weight, which was practicable to do."

Grinding Herbs in Mill Formerly Used to Grind Poison.—A druggist was held liable in damages for injuries to a customer due to taking a dose of medicine made of snake root and Peruvian bark, and in which was a quantity of poisonous drug which had become mixed with the root and bark when they were ground in a machine which had not been cleaned after grinding some of the poisonous drug. Commenting on the general rule of liability in such a case, the Court in part said: "If a man who sells fruits, wines and provisions, is bound at her peril, that what he sells for the consumption of others shall be good and wholesome, it may be asked, emphatically, is there any sound reason why this conservative principle of law should not apply with equal if not with greater force to vendors of drugs from a drug store, containing, as from usage may be presumed, a great variety of vegetable and mineral substances of poisonous properties, which if taken as medicine will destroy health and life, and the appearance and qualities of which are known to but few, except they be chemists, druggists or physicians?"

Misreading Illegible Prescription.—Action was brought by the plaintiff against the defendant druggist on account of the negligence of a clerk employed by him in filling a prescription, which, there was evidence, caused her great pain and suffering. The prescription as intended by the doctor who wrote it called for powders to be taken three times a day, each one containing five grains of calumba, with other ingredients. The clerk who compounded the prescription substituted calomel for calumba. The trial Court found in favour of plaintiff, and held that the clerk should, by the exercise of due care, have read the prescription as calling for columba, or at least that there was such doubt as to the correct reading as should have led him to inquire of the doctor.

In sustaining judgment for the plaintiff, the Court in part said: "A prescription calling for 120 grains of calomel to be taken in 24 powders, one three times a day, is extraordinary, and, if taken as directed, was liable to be attended by serious results. Cutner (the clerk) was an experienced pharmacist, and, when he delivered

the medicine as he had compounded it, could have anticipated that an injury like that which actually occurred would naturally follow. He could have seen from the nationality and appearance of the plaintiff that she knew nothing of the property and uses of calomel. The prescription itself as he read it in connection with the surrounding circumstances excited his suspicion that calomel was not intended. The record does not disclose that he then made a reasonable effort to ascertain whether he might not be mistaken. The defendant contends that the prescription was written in Latin, illegible, and doubtful as to what drug was really intended. Assuming this to be true, it did not lessen the duty of the clerk to be alert to avoid a mistake. If there was any reasonable doubt as to the identical thing ordered, the defendant's clerk should have taken all reasonable precaution to be certain that he did not sell one thing when another had been called for."

Injurious Hand Lotion.—In an action to recover for personal injuries, the plaintiff testified that she purchased from a clerk in defendant's store a bottle of his "Hand Lotion;" that she took it home and used some of it on her hands that evening; that she was in the habit of keeping some cold cream or something of that nature to put on her hands and lips; that she had used the lotion before and found it a good remedy; that she used it on her hands also the next two nights; that at first her hands did not shew anything out of the way, or that the medicine was injuring them, but in two or three days they commenced to get red and burn; that she used some of the lotion on her lips and they became red and sore, and scaled off; that she went to defendant's store and saw him concerning the lotion she had used on her hands and he remarked to her: "I don't see why the medicine should affect your hands in that way, unless it was not shaken up; it is a medicine that should be shaken well before it is poured out of the bottle." There was further evidence tending to shew that the injuries resulting from the use of the lotion, and were not eczema, as claimed by defendant; and that plaintiff was confined to her bed for some time, and suffered greatly from such injuries. Judgment in favour of plaintiff was affirmed.

Corrosive Sublimate for Chlorodyne Tablets.—The plaintiff recovered judgment for injuries resulting from the wrongful filling of a prescription by the defendant, by substituting corrosive sublimate tablets for chlorodyne tablets, as called for by the prescription. The defendant was a skilful and competent druggist, and when the tablets were returned to him by the physician, after plaintiff had taken one, he admitted that there had been a mistake, but claimed that at the time the store had been moved one of the firm who owned the store (not sued in this case) had, by mistake, put these tablets, which were large and white, into a bottle having on it the manufacturer's label "chlorodyne tablets;" that said member of the firm said to him that he "put those tablets in there," and that when the stock was moved "the tablets got mixed, or that bottle was mixed in with the others." It was contended for defendant that not only were the two bottles alike, that they were labeled "chlorodyne tablets," but that the tablets in the two bottles were alike in color, size and shape. To the contrary, the physician testified that the tablets in the two bottles shewn him by defendant were wholly and strikingly different in both color and size; that in one were large white tablets, marked "poison" in big letters on the tablets, and in the other were the real chlorodyne tablets, small and very dark green in color. Defendant denied that the word "poison" was stamped on the white tablets, but admitted that the genuine chlorodyne tablets with which he filled the prescription after discovery of the mistake were taken from the other one of the two bottles on the shelf labeled "chlorodyne tablets." There was evidence that chlorodyne tablets are of different colors, but no evidence of white ones. In sustaining judgment for plaintiff, the Court in part said: "It is inconceivable that, if he had given thoughtful attention to the matter, he could have failed to note the striking difference in the appearance of the tablets in the two bottles bearing the same label, and the extraordinary, if not unprecedented, fact that in one of them the supposed chlorodyne tablets were white. Yet, so far as appears, no special examination or effort was made to determine the real character of the white tablets, but, apparently without question or hesitation, they were delivered to the plaintiff as harmless medicine."

Antiseptic for Acetanilid Tablets.—The plaintiff was suffering from a severe headache, and sent her 9-year-old son to a neighbouring drug store to purchase some acetanilid tablets. The boy called at the drug store and made known his wants to defendant's clerk, who, in lieu of acetanilid tablets, gave him antikamnia tablets. Upon receipt of the antikamnia tablets, plaintiff returned them by W., a young man about 20 years of age, with instructions to advise the clerk to send her acetanilid tablets, as originally requested. W. went to the drug store and delivered the message to the defendant's clerk, again naming the kind of tablets desired, whereupon the clerk refilled the box, wrote something upon it, and gave it to W., who delivered them to the plaintiff. The latter was in a dark room at the time, and owing to the pain in her head, and because she assumed that the tablets were what she had requested, she swallowed one. The tablets were in fact antiseptic tablets and poisonous, and as a result of taking the tablet, plaintiff was made ill, and suffered greatly. Defendant's clerk testified that W. asked for antiseptic tablets; that he explained to W. that they were poisonous; and that he wrote the word "Poison" on the box containing the tablets. W. denied asking for antiseptic tablets and that the clerk made any statement that the tablets were poisonous. It was undisputed that the last tablets had on them in raised letters the word "Poison." It was also undisputed that they were returned in the original box which contained the antikamnia tablets, and that there was written on the box what some of the witnesses said was "Paid" and what some said was "Pois." The box did not have on it the skull and crossed bones. It was held that a verdict for the plaintiff was warranted by the evidence, and judgment in her favour was affirmed.

REVIEW OF CURRENT ENGLISH CASES

(Registered in accordance with the Copyright Act.)

PRACTICE—EVIDENCE—ACTION TO PERPETUATE TESTIMONY—DEPOSITIONS—PUBLICATION—SUBSEQUENT LEGITIMACY SUIT—INABILITY OF WITNESSES TO ATTEND TRIAL—ADMISSIBILITY OF DEPOSITIONS.

Beresford v. *Attorney-General* (1918) P. 33. This was a petition to establish that the petitioner was the legitimate eldest son of the fifth Marquis of Waterford. Prior to the institution of these proceedings the respondents in view of the petitioners' claim had instituted a suit to perpetuate testimony and the depositions of certain witnesses were taken in that suit. The testimony of these witnesses was required in the present proceedings but the witnesses were too infirm to be able to attend to give evidence. The respondents therefore applied to Horridge, J., in Chambers, for leave to use the depositions of these witnesses, but he refused the motion, but ordered the evidence of these witnesses to be taken on commission. The Court of Appeal (Eady, Warrington and Scrutton, L.JJ.) held that the respondents were, in the circumstances, entitled to use the depositions as claimed and it was not necessary to take their evidence again on commission, or to produce the witnesses in Court.

PRIZE COURT—CARGO LADEN ON ENEMY VESSEL—TRANSFER OF CARGO FROM ENEMY VESSEL TO NEUTRAL, IN TRANSITU, AFTER WAR BEGAN—CARGO WAREHOUSED IN BRITISH PORT—SEIZURE AS PRIZE.

The Bawean (1918) P. 58. This was a proceeding in the Prize Court for condemnation of a cargo seized in the following circumstances: Before the outbreak of war some cases of tea were shipped in a Chinese port on a German vessel bound to Hamburg. The tea was consigned to a firm in Bremen. War having broken out after the vessel had sailed, she put into a Dutch port for refuge, and the cargo was transferred to a Dutch vessel, the consignees at Bremen having sold the tea to a Dutch firm who directed it to be conveyed to London, intending there to sell it. On its arrival at London the tea was warehoused in the port of London, where it was subsequently seized as prize. Evans, P.P.D., held that the transfer after the war began was inoperative to protect the cargo from seizure as prize, and it was accordingly condemned.

PRIZE COURT—ENEMY CARGO—DISCHARGE IN PORT OF LONDON—SALE OF CARGO LIABLE TO SEIZURE AS PRIZE—PROCEEDS OF SALE—SEIZURE OF PROCEEDS.

The Glenroy (1918) P. 82. In this case Evans, P.P.D., held that where enemy's goods liable to seizure as prize are brought to the Port of London and sold, the proceeds of such goods are liable to seizure and condemnation as prize.

JURISDICTION — DIVORCE — FOREIGN DOMICILE OF HUSBAND — BRITISH PROTECTED SUBJECT—RESIDENCE IN EGYPT.

Casdagli v. *Casdagli* (1918) P. 89. This was an action for divorce by a wife against her husband in which the latter raised the objection that the English Court had no jurisdiction, because he was domiciled in Egypt. It appeared that the defendant was a British subject, born in England in 1872, and that since 1895 he had resided in Egypt, and was a registered protected British subject, subject to the jurisdiction of the British Consular Courts there. These Courts had no matrimonial jurisdiction in divorce. The Court of Appeal (Eady, Warrington, and Scrutton, L.JJ.) held (Scrutton, L.J., dissenting) that the husband had not acquired a new Egyptian domicile of choice, and that his domicile of origin remained, and therefore that the English Court had jurisdiction.

WILL—CONSTRUCTION—GIFT TO PERSONS ATTAINING AGE OF TWENTY-FIVE—DATE WHEN AGE REACHED.

In re Shurey, Savory v. *Shurey* (1918) 1 Ch. 263. The simple question in this case was at what date a person attains a given age. The question arose on the construction of a will, whereby the testator gave his residuary estate to his three sons and two others named, "as shall attain the age of twenty-five." The eldest son Charles was born on July 22, 1891, and died on July 21, 1916, being the day preceding the twenty-fifth anniversary of his birth. Sargant, J., held that he had attained 25 years, according to law, although according to ordinary parlance a person is not supposed to attain 25 until the twenty-fifth anniversary of the date of his birth.

COMPANY—DIRECTOR—MISFEASANCE—PAYMENT OF DIVIDENDS OUT OF CAPITAL—LOST CAPITAL—SUBSEQUENT APPRECIATION OF CAPITAL ASSETS—LIABILITY TO RECOUP LOST CAPITAL BEFORE PAYMENT OF DIVIDENDS—FIXED CAPITAL—FLOATING CAPITAL.

Ammonia Soda Co. v. *Chamberlain* (1918) 1 Ch. 266. This is an important decision on questions of company law. The action

was brought by a shareholder of a limited company against directors thereof, for alleged misfeasance in paying dividends out of capital. The facts were, that a part of the subscribed capital of the company had been lost, and subsequently the company made profits, and the directors set off the losses against a subsequent appreciation of the company's assets ascertained by valuation made by two of their number who were not expert valuers, and approved by the company in general meeting and paid dividends out of subsequent net profits without any further provision for replacing the losses. Depreciation of buildings and plant had been charged to revenue account to an amount exceeding the losses. Peterson, J., who tried the action, held that for the purpose of determining whether or not the dividends were paid out of capital the sums charged for depreciation could be written back to capital, and that the valuation being bona fide and approved by the general meeting the appreciation in value of the assets could properly be set off against the losses, and that there was no objection in law to such a revaluation or to such treatment of the appreciation in the value ascertained thereby; and he also held that, even if such revaluation were inadmissible the dividends were in the circumstances not paid out of capital but out of current profits, and with this conclusion the Court of Appeal (Eady, Warrington, and Scrutton, L.JJ.) agreed. Eady, L.J., in his judgment, defines what is meant by fixed and floating capital. The former he defines as the assets which the company retains and on which capital has been extended, and which assets either themselves produce increase independent of any further action, or are made use of to produce income. The floating or circulating capital is that portion of the subscribed capital which is intended to be used by being temporarily parted with and circulated in business in the form of using goods or other assets which, or the proceeds of which, are intended to return to the company with an increment and so to be used again and again in like manner, and always return with accretion. Where circulating capital is expended in buying goods to be sold at a profit or in buying raw materials from which goods are manufactured and sold at a profit, the amount of capital so expended must be deducted from the receipts before any profit can be ascertained. It may also be noted that the Court also holds that the Companies Act does not, nor does the general law, prohibit a company from distributing the clear net profits of its trading in any year unless its paid-up capital is intact, or until it has first made good all trading losses incurred in previous years.

WILL—LEGATEE OF STOCK—FAILURE OF LEGACY OWING TO TESTATOR BEING TRUSTEE—OTHER LEGACIES INCREASED BY FAILURE OF GIFT—COMPENSATION BY LEGATEES WHOSE LEGACIES ARE INCREASED.

In re Macartney, Macfarlane v. *McCartney* (1918) 1 Ch. 300. In this case a somewhat peculiar state of facts existed. A testator by his will bequeathed to his daughter Maggie £3,000 in Australian stock, and also to Maggie and six other children, his shares in a company called McCartney, McIlray & Co., which owned 90 per cent. of the assets of the Malta Tramways, of which the £3,000 was the only asset. It turned out that the testator was trustee of this £3,000 stock for the Malta Tramways, consequently the gift thereof to Maggie failed, but the gift to the six other children was thereby increased; and the question was, whether or not the six children were bound to make compensation to Maggie to the extent of the sums by which their legacies were increased by reason of the failure of the gift of the £3,000 to her, and Neville, J., held that they were.

SANITARY AUTHORITY — NUISANCE — EASEMENT — PRESCRIPTION —NOXIOUS MATTER SECRETLY DISCHARGED INTO PUBLIC SEWER—INJURY TO CROPS GROWN ON SEWAGE FARM—STATUTE OF LIMITATIONS (21 JAC. 1, C. 16)—(R.S.O. C. 75).

Liverpool v. *Coghill* (1918) 1 Ch. 307. This was an action by a sanitary authority to restrain the discharge into the plaintiff's sewers of noxious matter which had an injurious effect on crops grown on the plaintiff's sewage farm, over which the sewage was distributed. The defendants claimed an easement under the Statute of Limitations (21 Jac. 1), (R.S.O, c. 75) by reason of uninterrupted user for upwards of twenty years. It appeared, however, by the evidence that the noxious matter had been usually discharged at night and that neither the plaintiffs nor their predcessors in title had any notice of it until 1908, when the deleterious effects on the crops first began to be apparent. Eve, J., who tried the action found on the expert evidence adduced, that the matter discharged was in fact injurious, but that the plaintiffs had no notice of it prior to 1908, and that the defendants secret user of the sewers for the purpose gave them no prescriptive right of easement as against the plaintiff, and that the plaintiffs were therefore entitled to an injunction as prayed. He also throws out the doubt, whether, having regard to the plaintiff's statutory duty to deal effectively with the sewage, they could make such a grant as would be implied by the prescriptive right claimed by the defendants.

WILL—SOLDIER ON ACTIVE SERVICE—INFANCY OF TESTATOR—EXERCISE OF POWER OF APPOINTMENT—VALIDITY OF WILL—WILLS ACT 1837 (1 VICT. c. 26) ss. 7, 11 (R.S.O. c. 120, s. 14.)

In re Werhner, Werhner v. *Beit* (1918) 1 Ch. 339. This case has already been referred to, see *ante* p. 121. It is here, therefore, only necessary to say that Younger, J., gave effect to an appointment made by the will of a soldier on active service under the Wills Act (see R.S.O. c. 120, s. 14) although the testator was an infant, because the will had been admitted to probate, but at the same time intimated that he thought steps should be taken to recall the grant, being strongly of the opinion that the Act does not enable minors to make wills.

INSURANCE—POLICY ON JEWELLERY—"LOSS, DAMAGE OR MISFORTUNE"—CONSIGNMENT FOR SALE ABROAD OR RETURN—OUTBREAK OF WAR WITH COUNTRY OF CONSIGNEE—INABILITY OF CONSIGNEE TO DEAL WITH GOODS—LIABILITY OF INSURER.

Moore v. *Evans* (1918) A.C. 185. This was an appeal from the decision of the Court of Appeal (1917), 1 K.B. 458 (noted *ante* vol. 53, p. 228.). The action was brought on a policy of insurance against "loss, damage or misfortune" respecting a parcel of jewellery consigned by the insurer to persons in Frankfort for sale or return. After the goods had been sent to Frankfort, the war with Germany broke out, and the consignees became unable to deal with the goods,—but there was no evidence that they had not remained in the possession of the consignees except those which were shewn to have been placed by the consignees in a bank for safe-keeping. The House of Lords (Lords Atkinson, Parker, Parmoor and Wrenbury) agreed with the Court below, that, as the policy was on goods and not on the adventure, the evidence did not establish any loss on the policy.

MONEY-LENDER—BUSINESS CARRIED ON ELSEWHERE THAN AT REGISTERED ADDRESS—MONEY-LENDERS ACT 1900 (63-64 VICT. c. 51), s. 2, SUB-S. 1 (*b*)—(R.S.O. c. 110, s. 11 (*b*).)

Cornelius v. *Phillips* (1918) A.C. 199. This was an appeal from the decision of the Court of Appeal in *Finegold* v. *Cornelius* (1916) 2 K.B. 719 (note *ante* vol. 53, p. 47). The appellant carried on business as a money-lender and in an isolated transaction had lent money on the security of a promissory note at a hotel which was not his registered place of business. The Court below held that his so doing subjected him to a penalty under the Act, but did not invalidate the transaction. The House of Lords (Lord Finlay, L.C., and Lords Haldane, Dunedin, Atkinson and Parmoor), came to the conclusion that this mode of doing business rendered

the transaction null and void, and consequently the decision of the Court of Appeal was reversed.

CRIMINAL LAW—EVIDENCE—CHARGE OF GROSS INDECENCY WITH BOYS—EVIDENCE OF POSSESSION OF POWDER PUFFS AND INDECENT PHOTOGRAPHS OF BOYS.

Thompson v. *The King* (1918) A.C. 221. This was an appeal from the decision of the Court of Criminal Appeal (1917), 2 K.B. 630 (noted *ante* p. 62). The House of Lords (Lord Finlay, L.C., and Lords Dunedin, Atkinson, Parker, Sumner and Parmoor) unanimously affirmed the decision.

ALIEN ENEMY—OUTBREAK OF WAR—PARTNERSHIP—DISSOLUTION —BUSINESS SUBSEQUENTLY CARRIED ON WITH ENEMY CAPITAL —RIGHT OF ALIEN ENEMY TO SHARE OF PROFITS.

Stevenson v. *Akiengesgelschaft, etc.* (1918) A.C. 239. This was an appeal from the decision of the Court of Appeal (1917), 1 K.B. 842 (noted *ante* vol. 53, p. 329). A partnership had existed between the plaintiffs and defendants prior to the war; the defendants being alien enemies, the partnership was dissolved by reason of the outbreak of the war and the business was thereafter carried on by the plaintiffs and the capital to which the defendants were entitled was utilized in so doing: and the question was whether the defendants were entitled to a share of the profits realized by the employment of their capital, and the Court of Appeal held that they were—with which conclusion the House of Lords (Lord Finlay, L.C., and Lords Haldane, Dunedin, Atkinson and Parmoor) agree.

CONTRACT FOR SALE OF GOODS TO BE DELIVERED BY INSTALMENTS —OUTBREAK OF WAR—TRADING WITH ENEMY—SUSPENSORY CLAUSE IN CONTRACT IN EVENT OF WAR—PUBLIC POLICY— SUSPENSION OR ABROGATION OF CONTRACT.

Bicber v. *Rio Tinto* (1918) A.C. 260. The question involved in this case was the effect of war in regard to a contract made between the plaintiffs and defendants for the sale of iron ore to be delivered by instalments, subject to a clause that in the event of war the deliveries should be suspended. The vendees were German subjects, and the vendors claimed that notwithstanding the suspensory clause, the outbreak of the war had the effect of absolutely dissolving the contract, and the Court of Appeal so held, and with this decision the House of Lords (Lords Dunedin, Atkinson, Parker, and Sumner) agree, their Lordships holding that even if the suspensory clause applied to the war now existing between Germany and England, which they doubt, it would nevertheless be void as being against public policy.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ.] [40 D.L.R. 238.

ROGERS v. CALGARY BREWING & MALTING CO.

Bills and notes—Cheque—Unreasonable delay—Payment with draft —Dishonour—Discharge of maker.

The maker of a cheque is discharged from his liability if the agent of the payee, instead of insisting on prompt payment out of funds then available, allows an unreasonable time to elapse, and then accepts a draft which is dishonoured, on another bank, immediately after which the drawee goes into insolvency.

Calgary Brewing & Malting Co. v. *Rogers*, 34 D.L.R. 252, affirming 33 D.L.R. 173, reversed.

J. A. Ritchie, for appellant. *P. M. Anderson*, for respondent.

ANNOTATION ON ABOVE CASE FROM D.L.R.

Cheques—Delay in presenting for payment.

The Bills of Exchange Act, 1890 (53 Vict. c. 33) was a re-enactment with little modification of the English Bills of Exchange Act, 1882. In the revision of 1906, however, many alterations were made in the arrangement and constitution of the sections. Many of the sections of the new Act consist of sub-sections of the old Act and even more frequently sections of the old Act have been divided into parts and sub-sections and now appear in separate sections of the new Act.

S. 166 of the Act of 1906 (R.S.C. 1906, c. 119) corresponds with s. 74 of the English Act of 1882. Clause *a* is as follows:—

(*a*) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right, at the time of such presentment, as between himself and the bank, to have the cheque paid, and suffers actual damage through the delay, he is discharged, to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such bank, to a larger amount than he would have been had such cheque been paid. This clause was passed to mitigate the rigour of the common law rule. At common law the omission to present a cheque for payment did not discharge the drawer until six years had elapsed, unless some injury resulted to him from the delay. *Robinson* v. *Hawksford* (1846), 9 Q.B. 51; *Laws* v. *Rand* (1857), 3 C.B.N.S. 442. But by the common law if a cheque was not presented within a reasonable time and

the drawer suffered actual damage by the delay, the drawer was absolutely discharged, even though the damage suffered was less than the amount of the cheque, *e.g.*, where the bank failed, but ultimately paid a substantial portion of its liabilities, *Alexander* v. *Burchfield* (1842), 7 M. & G. 1061. It will be seen that the former part of the common law rule is impliedly preserved by the Act, namely, that if the drawer does not suffer damage by the delay, the holder may present a cheque within any period not exceeding the period of limitation of action. The drawer of a *bill of exchange* payable on demand is, however, by s. 86 of the Act, discharged if the bill is not presented for payment within a reasonable time after its issue. But see *Vermette* v. *Fortin*, 52 Que. S.C. 229, where it was held that more than two years was a reasonable time under the circumstances. The drawer of a *cheque* in such case is discharged only if he had the right at the time of presentment, as between himself and the bank, to have the cheque paid, and suffers actual damage through the delay and only to the extent of such damage.

In *Revelstoke Sawmill Co.* v. *Fawcett*, 8 W.W.R. 477, F., in settlement of a claim for material supplied, sent to R. a cheque drawn on the Dominion Trust Co. R. did not present the cheque for five days. Upon presentation it was dishonoured, the Dominion Trust Co. having suspended payment. It was held that if the Dominion Trust Co. was an incorporated bank so as to come within the definition of bank contained in the Bills of Exchange Act, F. was discharged, as to the amount of actual damage suffered by him through the delay in presentation, and R. under s. 166, sub-sec. (*b*) of the Act, became a creditor in lieu of F. of the Dominion Trust Co. But if the Dominion Trust Co. was not an incorporated bank as defined by the Act, not only was F. discharged, in respect of the bill, but he was also discharged from his liability on the original consideration for which it was given.

Clause B. of s. 166: The holder of such cheque, as to which such drawer or person is discharged, shall be a creditor, in lieu of such drawer or person of such bank to the extent of such discharge, and entitled to recover the amount from it.

This clause has adopted the principle of the civil law and modified the general rule of s. 127, that a cheque does not operate as an assignment of funds in the hands of the bank. If the drawer is discharged under clause (*a*) the holder may recover from the bank out of the drawer's funds, to the extent to which the drawer is discharged, *Banque Jacques-Cartier* v. *Limoilou* (1899), 17 Que. S.C., at p. 223. If, however, the drawer had no funds to his credit, but was authorized to overdraw, the drawer would still be discharged, but the holder could not prove against the bank.

If the delay in presentment is pursuant to an agreement between the drawer and the holder, the drawer would have to bear the loss resulting from the failure of the bank in the meantime.

Marreco v. *Richardson*, [1908] 2 K.B. at 593: The holder should present the cheque within a reasonable time of its issue, not only to guard against the contingency of the bank failing (see *Revelstoke Sawmill Co.* v. *Fawcett*, *supra*) but to guard against any possible revocation of the bank's authority to pay-as by its receiving notice of the customer's death, the holder should also bear in mind that he may be put to much trouble and inconvenience by his neglect to present the cheque within a reasonable time because banks in general

understand it as a rule of business not to pay old cheques without enquiry. The drawer's account may be overdrawn, or he may have ceased to have an account with the bank, or might have become insolvent in the interval.

REASONABLE TIME.—Sub-sec. 2 of s. 166 is as follows:—"In determining what is a reasonable time, within this section, regard shall be had to the nature of the instrument, the usage of trade and of banks and the facts of the particular case."

This clause considerably relaxed the stringency of the old common law rule and became necessary in view of the increase in the circulation of cheques in place of cash or bank notes. The old cases laid down the following principles, and in so far as they embody the present usages of trade and banks they will still control the meaning of the words "reasonable time" in the statutory definition:

(1) If a person who receives a cheque, and the banker on whom it is drawn are in the same place, the cheque must in the absence of special circumstances be presented for payment on the day after it is received, *Alexander* v. *Burchfield* (1842), 7 M. & Gr. 1061.

(2) If the person who receives a cheque and the banker on whom it is drawn are in different places, the cheque must in the absence of special circumstances be forwarded for presentment on the day after it is received, and the agent to whom it is forwarded must in like manner present it or forward it on the day after he receives it. *Hare* v. *Henty* (1861), 20 L.J.P.C. 302, *Prideaux* v. *Criddle* (1869), L.R. 4 Q.B. 455, *Heywood* v. *Pickering* (1874), L.R. 9 Q.B. 428.

(3) In computing time, non-business days must be excluded, and when a cheque is crossed, any delay caused by presenting the cheque pursuant to the crossing is probably excused. As to unreasonable delay in presentment of cheques in view of the evidence as to the usage of trade, see *Banque Jacques-Cartier* v. *Limoilou, supra*, where it was held that a cheque issued on the 11th of the month and presented on the 15th was not presented within a reasonable time; see also *Legarè* v. *Arcand* (1895), 9 Que. S.C. 122, where one day's delay was held to be unreasonable in view of the fact that there had been a run on the bank and that suspension was likely to follow.

Province of Nova Scotia.

SUPREME COURT.

Russell and Longley, JJ., and Ritchie, E.J.] [40 D.L.R. 90.

HERDMAN v. MARITIME COAL, RAILWAY AND POWER CO., LTD.

Negligence—Railway track—Habitual user by public—Extra engine on dark night without lights.

A railway company which permits the public to habitually use its track, as a short cut, knowing it to be so used, is guilty of negligence, if without giving the public warning it runs an engine,

without lights and with a defective whistle, over the track on an extra trip, on a dark and windy night.

Lowery v. *Walker*, [1911] A.C. 10, followed.

H. Mellish, K.C., and *A. C. Mackenzie*, for defendant, appellant. *F. L. Milner*, K.C., and *J. A. Hanway*, for plaintiff, respondent.

Annotations on the above Case from D.L.R.

Ultimate Negligence.

There have been several recent important cases on this subject. The first is *Brenner* v. *Toronto R. Co.* (1907), 13 O.L.R. 423, 6 Can. Ry. Cas. 261, 15 O.L.R. 195; 8 Can. Ry. Cas. 100 and (1908), 40 Can. S.C.R. 540, 8 Can. Ry. Cas. 108. Then follow *Herron* v. *Toronto R. Co.* (1913), 11 D.L.R. 697, 28 O.L.R. 59; 15 Can. Ry. Cas. 373; *Loach* v. *British Columbia Electric R. Co.* (1914), 16 D.L.R. 245, 19 B.C.R. 177; 17 Can. Ry. Cas. 21 and *British Columbia Electric R. Co.* v. *Loach*, [1916] 1 A.C. 719, 23 D.L.R. 4, 20 Can. Ry. Cas. 309. With these cases should be read not only the case of *Columbia Bitulithic* v. *British Columbia Electric R. Co.*, 23 B.C.R. 166, 31 D.L.R. 241, and in the Supreme Court in the decision now reported, 37 D.L.R. 61, 55 Can. S.C.R. 1, 21 Can. Ry. Cas. 243, but also *Smith* v. *Regina*, 34 D.L.R. 238; *Critchley* v. *Canadian Northern R. Co.*, 34 D.L.R. 245; *Banbury* v. *City of Regina*, 35 D.L.R. 502, and *Honess* v. *British Columbia Electric R. Co.*, 36 D.L.R. 301. These last all contain recent instances of discussion upon "ultimate negligence" and may be useful where one is confronted with a somewhat similar state of facts.

Decisions upon this point as well as upon the whole subject of negligence are really little more than discussions by persons learned in the law of what is usually a difficult question of fact, namely, who is responsible for some injury which one of the litigants has suffered. In its simplest aspect it embraces three enquiries: (1) Is anyone responsible or is it a mere accident involving no actionable negligence? If so, no one is liable. (2) Is the plaintiff responsible? If so, he cannot recover from the defendant. (3) Is the defendant responsible? If so, the plaintiff may recover. In practice, however, few cases resolve themselves into these simple elements. An accident causing injury usually is both unforeseen and happens under circumstances arousing violent emotions and throwing off their balance both the judgment and powers of observation of participants and onlookers. Consequently not only do those participating fail to do the right thing to avert an injury but everybody present is unable to describe accurately just what happened. The latter consideration is important only in weighing testimony but the former has introduced further elements into torts of this kind, and therefore we must also frequently enquire (4) Were both plaintiff and defendant at fault? If so, under our law, there is no sharing the loss but the injured person bears it all. This question frequently involves great difficulty in so unravelling the tangled skein of evidence as to decide whether one or both and if so, which one, is responsible and if the answer is that both are at fault then we are faced with the anomaly that one bears all the loss and suffering while both must share the blame. This in practice leads to one of two results: (*a*) The plaintiff is sometimes absolved from all blame when he is in part responsible (and in

these cases the jury will probably assess damage at a figure lower than the true measure of the plaintiff's injury), or (*b*) the courts institute a further enquiry to ascertain whether, though both were originally at fault in rendering the accident probable, yet the defendant had a "last chance" of averting the accident which he ought reasonably to have taken, but of which he did not avail himself. Out of number four, therefore, there develops an enquiry. (5) Whether, notwithstanding the defendant's negligence and the plaintiff's contributory negligence, the defendant could by the exercise of reasonable care have avoided the result of the plaintiff's contributory negligence? If the answer is "Yes" then the plaintiff recovers according to the decision in the Privy Council (*B.C. Elec. R. Co.* v. *Loach*, 23 D.L.R. 4), and we have in this fifth problem what is called the "doctrine" of "ultimate negligence." The doctrine may be put into a somewhat shorter formula as follows: The defendant was negligent and thus injured the plaintiff, therefore the plaintiff may recover; *but* the plaintiff might by the exercise of reasonable care have avoided the consequence of the defendant's negligence, therefore the plaintiff cannot recover; *but* notwithstanding the plaintiff's contributory negligence the defendants might "by the exercise of care have avoided the result of that negligence;" therefore the plaintiff can recover. This is a fair statement of the result of the cases on this point and the application of this relentless logic (which might be carried even further) to complicated states of facts imperfectly remembered and described by flustered eye-witnesses sometimes makes the law look rather silly. It is a strong argument either for some general scheme of insurance against accident or for a division of the loss between people who are mutually at fault. Taking, however, the law as we find it some further discussion of this question may tend to clarify our ideas and perhaps to simplify addresses and charges to the jury. At the outset one might suggest that in the discussion of negligence cases too great reliance has been placed upon other judgments which are decisions upon questions of fact. Cases are cited as being on "all fours" with the one under consideration which contain no new statement of principles but which describe an accident that has happened in a somewhat similar fashion. Such cases are most dangerous because, though there may be coincidences, it is impossible that all the circumstances can be the same and the facts reported may not and probably were not all the facts upon which a verdict was arrived at. The law of negligence might be much simplified if we eliminated ninety per cent. of the reported accident cases. Upon this subject the judgment of Meredith, C.J.C.P., in *Sükoff* v. *Toronto Ry. Co.* (1916), 29 D.L.R. 498, 36 O.L.R. 97, is most apposite. He says at pp. 501-2: "Recent cases in the higher courts of England and in the Supreme Court of Canada are much relied on in this case . . . and we are impressively told that a jury have a right to draw inferences and that this case or that case is stronger than or as strong as or nearly as strong as some case decided in one of those courts; forgetful of these two things, that it is as old as the law that a case may be established on circumstantial evidence and that no case decided on its facts is an authority for a finding of fact one way or other in any other cases to be decided on its facts, however helpful the reasoning in it may be; that no two cases can be quite alike in all their facts and circumstances and that the one question in all such cases as this must be: Could reasonable men upon the evidence

adduced in it find that the proximate cause of the injury done was the defendant's negligence?"

The first suggested simplification, therefore, in deciding actions for injuries is the elimination of most of the cases on "all fours" as to facts.

There is further a frequent confusion of ideas which added to the difficulty in presenting evidence in this class of action tends to cloud even more the issues in any particular case.

It is submitted that a mental catalogue of the main classes of action with some distinctions would help to clear up some of this confusion. Such a catalogue might be somewhat as follows:

1. Cases of injury where there is no negligence (or what is the same thing in law), no evidence of negligence causing the accident and where, therefore, there is no liability. Probably the leading modern case for this proposition is *Wakelin* v. *London & South Western Ry.* (1886), 12 App. Cas. 41. Under this heading we learn that not only must the defendant have been careless but his carelessness must cause the injury or it will not be negligence.

2. Cases where the carelessness is that of the person injured. This is not strictly "contributory negligence," but is a case of the injured person being the "author of his own wrong." It implied that the plaintiff alone is negligent and that the defendant is innocent. Instances of this are *Fawcett* v. *Canadian Pacific R. Co.* (1902), 32 Can. S.C.R. 721, and *Andreas* v. *Canadian Pacific R. Co.* (1905), 37 Can. S.C.R. 1. This class of case frequently arises where there is some defect in the employer's plant due to the negligence of the employee who has been injured; and where such cases arise now under the heading "Master and Servant" the intricate legal problems with which we were formerly familiar are now happily solved by some species of Employers Liability Insurance. It is a pity that the distinctive terms for cases where the plaintiff's negligence "contributed" together with the negligence of the defendant in causing the injury and those where they were the sole cause of the injury have not been more carefully employed.

3. Cases where the combined negligence of plaintiff and defendant caused the injury. It is in cases of this character that the greatest difficulties arise.

Theoretically one might argue for various solutions, for instance: (1) The persons most to blame should suffer, or (2) Both being to blame they should share the loss, or (3) The persons last to blame should suffer regardless of the degree of carelessness on the part of either, or (4) The person injured should not recover if he is at all to blame.

The first of these has much to be said for it in theory and the last seems illogical and unfair, but in fact the degree of culpability is seldom an element in English common law except perhaps in assessing damages, 21 Hals. 361; and the last has had much influence upon it. The second like the first has no place in the common law and the third has from time to time emerged and in Canada since the judgment in the *Brenner* case has been digested under the caption "Ultimate Negligence."

Our law in endeavouring to solve these problems has for its main enquiry conducted a search for what it called the "Proximate Cause" and in theory the results should have been simple and satisfactory. Certainly some such limitation of the enquiry is necessary for "it were infinite for the law to consider the causes of causes and their impulsion one of another:" Lord

Bacon quoted in *Metropolitan* v. *Jackson*, 3 App. Cas. 193, at 210. Therefore damages for injuries depend on the "proximate cause" of the injury somewhat as follows:—1. Was negligence the proximate cause of the injury at all? If not, then there is no cause of action. 2. Was the plaintiff's negligence the proximate cause? Then of course he cannot recover. 3. Was defendant's negligence the proximate cause? Then plaintiff recovers. 4. Was their joint negligence the proximate cause? If so, plaintiff cannot recover anything.

It is in respect of the third and fourth questions that the doctrines of "contributory" negligence and "ultimate" negligence arise. Even though it involves repetition it is worth while remarking that contributory negligence presupposes carelessness on the part of the defendant; but involves the proposition that as the plaintiff might have but did not avoid the consequences of defendant's negligence he contributed to his injury by his negligence, and so the proximate cause was not defendant's negligence but the negligence of the plaintiff in failing to do what he should have done to avert the consequences of the defendant's neglect. See Beven on Negligence, 2nd ed., 156 and 157.

Ultimate negligence in theory involves proof of facts which removes the "proximate cause" a step further from the initial wrongdoing. The defendant was negligent but that does not create the cause of action because of the plaintiff's subsequent want of care; the plaintiff was negligent but that does not deprive him of his claim because the defendant was careless in not averting the consequence of the plaintiff's earlier negligence so that is the proximate cause and so plaintiff recovers. For this proposition the case of *Davies* v. *Mann*, 10 M. & W. 546, is usually cited. There the plaintiff hobbled his donkey and turned him out on the highway. The defendant was driving at a "smartish pace" which was construed as being negligent driving and killed it.

A majority of the court assumed that plaintiff was negligent but said that the defendant might but for his later negligence have avoided the accident and so the defendant was made liable. The question there really was whether the animal was lawfully on the highway and if not what duty one owed to an animal not lawfully there. It would seem almost as though analagous decisions would be those bearing on one's duty to a trespasser rather than cases bearing on questions of negligence or contributory or ultimate negligence; but the decision has always since been cited as authority for the statement that though plaintiff may have been negligent yet if defendant might by exercising proper care have avoided the accident his negligence is the proximate cause. See *Radley* v. *London and North Western Ry.* (1876), 1 App. Cas. 754. Such a decision as this does not involve any element of antecedent negligence on the part of the defendant. It is not a question of who began to be negligent first; but merely whether (1) the carelessness of the contestants is severable and (2) which of them had the last chance of avoiding injury. If (1), the combined carelessness is not severable then the proximate cause is joint negligence and so neither can sue or recover from the other; but if (2), the carelessness is severable then the court enquires who is finally responsible and that is the proximate cause which enables the other careless person to recover. It was thought that when there has been contributory negligence on the plaintiff's part there must be some new (*i.e.*, later) negligence on de-

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*)

whether their careless acts are severable and (b) whose negligence was the proximate cause of the accident.

3. If the carelessness is severable the court will hold the defendant liable not only if he was the last one negligent, but also if by his prior carelessness he prevented himself from avoiding the consequences of the plaintiff's want of care.

Probably this formula will not help much more than others but it may avoid the introduction of new terms into the already redundant and confusing nomenclature of the law of negligence, a defect referred to by the Privy Council in the *Loach* case. To repeat what was said at the outset the difficulty is not in providing names or even rules applicable to the law of negligence, but in making the facts of each case actually tried fit into any formula.

Some day when we are more enlightened we shall insure against all accidents to the public not criminal just as we insure against injuries to servants and then these ill-fitting and complicated rules of negligence in accident cases will largely become obsolete.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Hon. William Egerton Perdue, a Puisne Justice of the Court of King's Bench, Manitoba, to be Chief Justice of the Court of Appeal for Manitoba, with the style and title of Chief Justice of Manitoba. (May 25, 1918.)

Albert Watson Bennet, of the Town of Sackville, in the Province of New Brunswick, to be Judge in the County Court for the Counties of Westmoreland and Kent, in the said Province. (May 27, 1918.)

War Notes.

LAWYERS AT THE FRONT.

KILLED.

Charles Bevers Scott, Lieutenant 166th Battalion, Windsor, killed, July, 1917.

Leonard Charles Jarvis, Lieutenant 142nd Battalion, London, killed, 1917.

George H. Ross, Winnipeg, Captain, killed, 1917.

Hugh J. Watson, Lieutenant, Student, Toronto, died of wounds received at Vim Ridge, Nov. 29th, 1917.

Howard Kilbourn Harris, Toronto, Captain Essex Regiment, Imperials won Military Cross, killed February, 1918.

Armour A. Miller, Lt.-Col. 134th Battalion, died of wounds, June 24th, 1918.

William Nelson Graham, Lieutenant 156th Battalion, Ottawa, killed May 27th, 1918.

Lt.-Col. S. S. Sharpe, D.S.O., Uxbridge, died on military service, June, 1918.

John Vincent Guilfoyle, York Foresters, Haileybury, died in military service, 29th Jan., 1918.

We are requested to publish the following:—

Owing to the enormous increase of government war work, the governmental departments at Washington are being flooded with letters of inquiry on every conceivable subject concerning the war, and it has been found a physical impossibility for the clerks, though they number an army in themselves now, to give many of these letters proper attention and reply. There is published daily at Washington, under authority of and by direction of the President, a government newspaper—*The Official U.S. Bulletin.* This newspaper prints every day all the more important rulings, decisions, regulations, proclamations, orders, etc., as they are promulgated by the several departments and the many special committees and agencies now in operation at the National Capital. This official journal is posted daily at Washington, and every postoffice in the United States, more than 56,000 in number, and may also be found on file at all libraries, boards of trade and chambers of commerce, the offices of mayors, governors, and other federal officials. By consulting these files most questions will be found readily answered; there will be little necessity for letter writing; the unnecessary congestion of the mails will be appreciably relieved; the railroads will be called upon to move fewer correspondence sacks, and the mass of business that is piling up in the government departments will be eased considerably. Hundreds of clerks, now answering correspondence, will be enabled to give their time to essentially important work, and a fundamentally patriotic service will have been performed by the public.