So far no proposals of this kind have been made, nor have we been given any reason to believe that they are being considered in official quarters. Until such action is taken we have no ground whatever for saying that Canada has obtained any recognized status as a unit of international law, even though the control of London over Canadian foreign policy may have dwindled to little more than a right of consultation and remonstrance.

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Note:—The discussion provoked by the Treaty of Lausanne has arisen too late for treatment in this article. I venture to submit that the questions involved should be approached in the light of the precedents already established.—H. A. S.

"CARE" IN THE LAW OF NEGLIGENCE.

There is no branch of the law with which our courts are so frequently called upon to deal, and none which presents such difficulty in presentation and determination, as that relating to injury to person or property incurred through negligence; and there is none which has been subjected to so much variety, in jurisprudence and terminology, in the course of judicial development.

When the student examines the many decisions from *Coggs* v. *Bernard*[1] in 1703 to the present time, and tries to follow the reasoning by which cases are followed, disapproved, distinguished, overruled, and when he encounters in this pursuit expressions such as "Contributory negligence," "Ultimate negligence," "Proximate cause," "Causa causans," "Causa sine qua non" *et hoc genus omne,* he must be inclined to exclaim with Lord Dundreary that "this is one of the things no fellow can understand."

Care, or the precautions which should have been taken to avoid causing the injury complained of, is an essential feature of every case of negligence, and the following views are presented in the belief that it has been dealt with by writers and referred to by judges in a way calculated to perplex rather than enlighten the student, and in the hope that to some slight extent this confusion may be lessened.

Of our writers on the Law of Negligence, while Addison and Pollock have dealt with it somewhat fully in their works on the generic subject of Torts, the late Mr. Beven is the only modern author who deals with it exclusively, and it is certain views of his which will constitute the text of this article.

[1] 2 Ld. Raym. 909; 1 Smith, L. C., 12th ed., 191.

In the last edition of his work, published in 1908, the second chapter of volume 1 is devoted to a consideration of the three degrees of negligence "slight, ordinary and gross" which for a century and a half were recognized as a feature of this branch of the law. The author admits that his discussion of the degrees is only academic but believes that his analysis "cannot fail of practical suggestions."

Mr. Beven bases his claim for the existence and recognition of these degrees on the ground that as the circumstances in which acts of negligence are committed call for "care" in varying degrees, the negligence must vary accordingly. His argument may be formulated thus—

Negligence is "want of care according to the circumstances."

Variations of the conditions call for different degrees of care.

Therefore the "negligence" must vary as the required care varies.

The concrete form of stating this is that where the circumstances call for a slight measure of care the injuring party is liable for "gross negligence" only; "ordinary negligence" is the want of "ordinary care"; and when the greatest care is necessary "slight negligence" will suffice.

This would be quite sound if "ordinary care" and "ordinary negligence" were fixed quantities. Otherwise they are only confusing without elaborate explanation of their meaning and effect which should be avoided if a more simple mode of expression is available.

Moreover, as Mr. Beven himself says, the logical course would be to group subjects with reference to the amount of care required in their management; and he adds "on the ground of convenience only this is not done." With all respect to the learned author I submit that this is not the only, nor the real, ground, which is that such a grouping could not be effected. It is almost, if not quite, impossible to conceive a situation in which a man could be placed where he could not commit injury by negligence. It might be done even by one who is asleep. And to take all the gradations between that case and the one that requires very great precautions and form any intelligible group from them is out of the question.

The rejoinder I make to Mr. Beven's formula is that the doctrine of the degrees of negligence was only a legal theory and not capable of application in the administration of the law; the only position of "care" in this connection was to explain such theory.

The three degrees were brought into our law by *Coggs* v. *Bernard*, (*supra*). In that case the court dealt with the liability of a gratui-

tous bailee for loss of the bailment through negligence, and Holt, C.J., delivered an exhaustive and valuable opinion on the law of bailments and an equally exhaustive pronouncement on negligence of a bailee.

The learned Chief Justice, as was customary at the early date of that decision (1703), went very fully into the whole law relating and cognate to the matter to be decided and discussed, not only the legal duty, and consequent liability for its non-observance, of a gratuitous bailee, but also of every other class and explained when a bailee would incur liability for "slight," when for "ordinary" and when for "gross" negligence. This is valuable matter but would be much more so were it not that in any case necessarily only one kind of negligence can be in question, and the terms "ordinary negligence" and "gross negligence" cannot be defined.

These degrees continued to be recognized as pertaining to the law of negligence until well into the nineteenth century, the judiciary frequently using the terms "slight," "ordinary" and "gross," one of which was considered convenient to designate the duty and liability of the defendant in each case that had to be decided. The first discordant note was struck by Rolfe, B. (Lord Cranworth) in *Wilson* v. *Brett*,[2] when he said he "could see no difference between negligence and gross negligence"; that the latter was "the same thing with the addition of a vituperative epithet." There were many more judicial utterances to the same effect and, in 1920, when any recognition of the three degrees had practically ceased, we find the following in Pollock on Torts, 11 ed., page 445, after the author had pointed out that the legal duty of every man in using his property is to act as a prudent and reasonable man in the circumstances.

"Beyond this our law has no hard and fast rules as to different degrees or kinds of negligence notwithstanding the use of such epithets as 'gross,' 'ordinary' or 'slight,' and the misplaced ingenuity that has been expended on endeavours to bring our system into line with either real or imaginary distinctions in ancient or modern Roman law." And he adds a citation from *Milwaukee, etc., Ry. Co.* v. *Arms*[3]: "Gross negligence is a relative term. It is doubtless to be understood as meaning a greater want of care than is employed by the term 'ordinary negligence'; but after all it means the absence of the *care that was necessary under the circumstances.*"

Mr. Beven in further support of his contention relies on the judicial use of the expressions "gross" and "ordinary" negligence, and judicial reference to "care" as varying with the conditions. As

[2] 11 M. & W. 115.
[3] 91 U. S. R., 489, at page 495.

to the use of terms these were only intended to express the carelessness of the defendant under circumstances of one kind and his great carelessness under those of another, and it is plain that they have, and no doubt would have, been so used if the three degrees had never been heard of. As to the reference to "care" an examination of some of the cases relied on will be necessary.

In *Gregory* v. *Piper*,[4] the defendant had ordered his servant to pile up rubbish near the plaintiff's wall, but so that it would not touch it. It did touch the wall and the plaintiff brought an action in trespass and at the trial defendant moved for a non-suit on the ground that an action on the case only was maintainable.

Mr. Beven had been comparing reported cases in which the standard of diligence required was that of the good man of business and claiming that frequently a higher standard was called for. As an instance of this he gives two quotations from the above case of *Gregory* v. *Piper*. One, "the servant by extraordinary care might have prevented the rubbish touching the plaintiff's wall," was a remark by counsel in supporting the rule for a non-suit; the other was quoted from one of the three judges who heard the rule argued: "the servant used ordinary care in course of executing the master's order and, notwithstanding that, the rubbish ran against the wall." This can only mean that, as the learned judge also said, since the defendant could not expect the servant to use more than ordinary care he must be deemed to have contemplated the consequences of the order being so carried out, which is just what was held by the other two judges who, however, made no reference to care.

But what is "ordinary" or "extraordinary" care in the piling up of rubbish? The servant was given certain material and had no right to add any other such as cement or mortar to prevent the accident, and that is probably the only way he could use "extraordinary" care if there can be such a thing.

The case seems far from being one in which greater diligence is called for than that of the "good man of business," the test applied by our author, or that of the "reasonable and prudent man" in Baron Alderson's definition in *Blythe* v. *Birmingham Waterworks Company*.[5]

Another case relied on is *Chadwick* v. *Trower*.[6] The action arose from injury to the plaintiff's vault by the act of the defendant in pulling down his wall which had stood at the boundary line of the two properties. In one count of his declaration it was alleged that

[4] 4 Man. & Ry. 500.
[5] 11 Ex. 784.
[6] 6 Bing. N. C. 1.

defendant did not give notice of his intention to pull down his wall, nor take proper care in doing it. On error assigned to this count Parke, B., holding that the conditions should be stated, said that "one degree of care would be required where . . . the soil is left in its natural . . . state; another where there is a vault; and another and . . . greater where the adjoining vault is . . . weak."

Mr. Beven's deduction from this is that "there is no doubt on the part of the Exchequer Chamber of how many degrees of negligence there are, and how they may be discriminated."

In this case Baron Parke was not dealing with the law of negligence. He used the expressions quoted in a mere matter of pleading. As a reason why the plaintiff should have set out the conditions in his declaration was what was meant by the reference to care. Had the merits of the action been before him for trial he could not have made this comparison. It would be worse than useless to instruct a jury that if the conditions had been different the measure of care called for would also have been different.

Then, with all respect to his lordship, the comparison which he makes as to care does not seem a happy use of terms. In the first place the employment of the word "degree" may be confusing to the student as implying that there is a regular gradation in the care called for; secondly, it is not clear that the comparison is correct. The defendant had to guard against committing a trespass and in pulling down a wall the care necessary to avoid it in the one case would be equally effective in the other. The only justification for such a comparison would be to regard the defendant as reasoning thus: I do not care if I trespass as it will cost me little; or, I must be careful not to trespass for it will be expensive.

In any view of it this case again fails to support the claim made for it of a judicial recognition of the three degrees.

Then reliance is placed on another instance of the same kind of business being carried on under different conditions. Thus, a driver carrying a passenger gratuitously is not responsible for the condition of his vehicle; a railway company is only bound to take the precautions which experience has shewn to be adequate; other carriers for hire must have their vehicles safe "as far as human skill and foresight can render them."

Mr. Beven, taking again as the test the diligence of a good man of business, says that if the case of either of the second and third classes was the case of the "good man" the other must be either more or less. This depends on what is meant by a "good man of business." It cannot mean merely a man of good business capacity,

or a successful man of business. The author himself tells us. His full definition is "the lack of such diligence as a good business man would shew in a transaction similar to that being investigated, *such transaction relating to his business.*" Therefore, in respect to railway companies it must be a competent railway man, and to carriers a competent man in that business. That being so how can the two be either compared or contrasted? In the operation of a railway an employee should take the precautions usually taken by railway companies, while a carrier must provide a vehicle as fit for the purpose for which it is hired as human skill and foresight can render it. It might be considered that the two are identical. Railway companies will, in their own interest as well as in that of their passengers, make their cars and locomotives as reliable as human skill and foresight can make them and use the means to keep them so which have been found sufficient. But assuming there is difference between them how can it be said that more care is called for in the carrier's case than in the other. Each has to use the care necessary to make reliable vehicles and operate them properly; nothing more is required. Comparison is impossible.

On another point I am afraid the author has fallen into error. He quotes Dr. Wharton as saying "the test is that of the good, not the perfect, business man; . . . because . . . no perfect business man exists." But, says Mr. Beven, the difference between the cases of railway companies and carriers is the difference between the good and the perfect man of business. But is that so even assuming, a very large assumption, that there can be a perfect business man? The carrier must supply a vehicle as fit as human skill and foresight can render it. The very expression implies a vehicle short of perfection and can one say that the perfect man can produce an imperfect result? There certainly can be no such thing as a perfect vehicle nor does the law require one. The claim for the perfect man in the carrying business must fail. Even if it were sound the test in any case is not that of the man of exceptional ability but only that of the ordinarily competent man.

Enough has been said, I believe, to establish my position that the three degrees of negligence with the complementary degrees of care are merely scholastic theories of the law of negligence and of no practical use. I have only a word to add on this branch of that law. There is, if one chooses to call it so (I prefer reasonable or proper care) the one element of ordinary care which is a distinct feature in each case calling for judicial investigation. It may be expressed by an adaptation of Baron Alderson's definition: the care

which would have been taken by the ordinarily reasonable, prudent and competent man in the circumstances.

Then can these observations serve any useful purpose in respect to the law of negligence? I said at the outset that the treatment of care in relation to this law by writers and references to it by judges were calculated to perplex the student of the law. If the above views are sound I think they establish that Mr. Beven's discussion of the three degrees had this effect and was also of no utility. Other writers may be subjected to a similar criticism.

In a recent number of the CANADIAN BAR REVIEW[7] Angus MacMurchy, K.C., writes on Contributory Negligence, and a few of his citations from writers and judges will complete what I have to say on this head. Thus he quotes Beach's definition of Contributory Negligence as "such an act or omission on the part of a plaintiff, amounting to a want of *ordinary care*" as concurring with defendant's negligence is a proximate cause of the injury. If I am permitted to digress here I would suggest, with much diffidence, a more concise definition, namely, Negligence of the plaintiff without which the injury would not have been caused. But to resume, what I object to in Mr. Beach's text is the use of the expression "ordinary care" which Mr. MacMurchy himself employs in commenting on the matter quoted. If it is used in the sense indicated above as an element in each case well and good. But if used as it often seems to be as a self-explanatory term it is objectionable.

Then there is a quotation by Mr. MacMurchy from Huddy on Automobiles.[8] "It is clear that greater precautions and diligence are required of an 'automobile' than . . . from the driver of a horse drawn conveyance." Conventionally speaking that is so, but in law, as I have said above, the two cannot be compared.

Instances are given by Mr. MacMurchy of judicial utterances also. I will content myself with a reference to one and a judicial comment on it which supports my position.

In *Grayson* v. *Ellerman*[9] Lord Birkenhead states the common law formula as "if both parties were guilty of negligence could the appellants (defendants) in the result, by the exercise of ordinary care and diligence, have avoided the mischief?" Lord Justice O'Connor, writing in the *Law Quarterly Review,* says that this appears to add a similar question in respect to the plaintiff and suggests that instead of formulæ *confusing alike to judge and jury* the question should be "Was the defendant's negligence the main or real cause of the accident?"

[7] 1 C. B. Rev. 844. [8] 1 C. B. Rev. 860.
[9] (1920) A. C. at p. 472.

CONTRIBUTORY AND CUMULATIVE NEGLIGENCE.

The little that I have to say on this head relates to what is called "Cumulative Negligence" of which "Contributory" is a necessary feature. The rule as to this is perfectly plain but the term "Cumulative" and the formula expressing it, especially as applied to its latest development, are somewhat confusing.

The rule is this—The defendant is guilty of negligence and the plaintiff of contributory negligence; if the defendant, by the exercise of reasonable care, could have avoided the consequences of the contributory negligence, his is the final negligence involving liability. This final negligence is termed cumulative.

This rule goes back at least to the decision in *Davies* v. *Mann*.[10] For a long time it was considered that the defendant's cumulative negligence must consist of some fresh act or omission subsequent to the contributory negligence. This made the rule perfectly logical and the terminology perfectly correct. But in *Brenner* v. *Toronto Ry. Co.*,[11] Mr. Justice Anglin delivering judgment for a Divisional Court, held that the same rule applies where the defendant by his primary negligence had incapacitated himself from avoiding the consequences of the contributory negligence. This opinion was approved, and this latest application of the legal rule sanctioned by the Judicial Committee in *British Columbia Electric Ry. Co.* v. *Loach*.[12]

Space will only permit me to point out what I consider objectionable in the terms as applied to this new phase of the law.

It seems to me illogical in two respects to retain, as their Lordships do, the same formula in respect to it. First, where there is only the one act of negligence, to call it primary or initial at one stage and ultimate at another; and secondly, to apply the rule that defendant to escape liability, must avoid the consequences of the plaintiff's negligence by the exercise of reasonable care to cases in which they could not be avoided by any means. This is only an objection to phraseology, it is true, but that is important in formulating a rule of law.

If the judges by their diction, and the reporters in their headnotes, had refrained from using the formula for the rule they might have expressed it in some such form as this:—Contributory negligence does not bar the plaintiff's action if the defendant's negligence continues up to the moment when the accident occurred.

Ottawa. C. H. MASTERS.

[10] 10 M. & W. 546.

[11] 13 O. L. R. 423.

[12] (1916) 1 A. C. 719.