

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, this mishap, in which the injury was received, would not have occurred."

As between these conflicting views Mr. Justice Hodgins preferred that of Mr. Justice Duff.

With great deference I venture to suggest the inquiry whether Mr. Justice Duff has not stated the proposition too broadly. Take the case of a man crossing the street at an intersection and negligently paying no attention to the street traffic. If he is struck by the rear corner of a street car, as he is about to step upon the track, he would probably not be entitled to recover, however negligently the car may have been driven. There would be "concurrent and simultaneous negligences of equal character by both parties." But I venture to suggest that different consideration will apply if he was struck as he was stepping off the track. In that case he was first in possession of the point of intersection of his line of advance and that of the street car, and his right was, notwithstanding his negligence, to cross without molestation from the street car. If under these circumstances the motorman runs him down, having approached the crossing at an excessive speed and negligently, though he did everything he could do to avoid the accident after discovering the pedestrian's peril, will the railway company not be liable? The negligences were concurrent, but they were not equal, in that the pedestrian had for the moment the right of possession of the spot where the accident happened superior to that of the street car. He had a right to assume that his legal right would be respected. The Judicial Committee proceeded upon this assumption in the *King* case, as the Supreme Court had done in the *Gosnell* case. The "disabling negligence" referred to by Mr. Justice Anglin would include, as I apprehend it, such a case as I have indicated, that is to say the case of a motorman approaching a street crossing where pedestrians are passing back and forth, at an excessive speed.