

of Mr. Justice Anglin in the Divisional Court in the *Brenner* case with the view of Mr. Justice Duff in the Supreme Court in the same case. Mr. Justice Anglin had propounded the question thus:—

“Assuming that the degree of momentum which the motor-man found himself unable to overcome should be ascribed to his failure to shut off power at an earlier point of time, and that such omission should be deemed negligence, can that omission, which occurred before the plaintiff's danger manifested itself, though its operation and effect continued up to the very moment of injury, be deemed negligence which renders the defendants liable, notwithstanding the plaintiff's contributory negligence, because in the result of the former might, but for this continuing though anterior negligence, have avoided the mischief?”

This question Mr. Justice Anglin had, after an exhaustive review of the authorities, answered as follows:—

“Not without hesitation, because of the volume of American authority opposed to this view, and of the manifest difficulty which it may occasion in some cases in drawing a clear distinction between primary and ultimate negligence, I have reached the conclusion that negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute “ultimate” negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. Such anterior default of the defendant is, in my opinion, “ultimate” negligence, when it renders inefficient to avert injury to the plaintiff means employed by the defendant after danger became apparent, and which would otherwise have proved adequate to prevent the mischief, or renders the defendant wholly incapable of employing such means, though time was afforded for his using them efficaciously but for such disabling negligence.”

Later, in the same case in the Supreme Court, Mr. Justice Duff had put the matter in this way:—

“The principle is too firmly settled to admit, in this court,