

i.e., the lie of the ground, the narrowing of the road, etc., either that he was probably about to cross the track or would approach dangerously near to it, and saw this far enough away to have reduced the speed of the car or even to have stopped it, before reaching the spot where the deceased would enter the track or approach dangerously near to it, it was his duty to have done whatever was then in his power to so manage the car as to avoid injuring him."

Mr. Justice Garrow, on the other hand, re-states the doctrine of paramount right thus: "They (that is the railway company) were not bound to slow down until it became apparent that the deceased had resolved at all hazards to cross." It is to be observed that this decision which was handed down in June, 1908, followed in point of time the judgment of the Judicial Committee in the *King* case which was handed down in March, 1908.

The *O'Leary* case went to the Supreme Court of Canada where again it had the misfortune to divide the court equally, with the result, under a rule of that court, that it was not reported.

It is sometimes said that where the accident is the result of the "joint negligence of the plaintiff and the defendant there can be no recovery."²¹ But as pointed out by the Chancellor in the *Jones* case, the cases in which that doctrine is properly applicable are "those in which there were concurrent and simultaneous negligences of equal character by both parties in which the defendants had no possible opportunity of avoiding the consequences of the plaintiff's carelessness." Such were the facts in the English case already cited²² and in the *Omnibus* case,²³ which is always cited in support of the proposition that there can be no recovery where the negligences of the parties are equal, concurrent and simultaneous.

In the *Herron* case²⁴ Mr. Justice Hodgins contrasts the view

21. Per Boyd, C., in *Rice v. Toronto Ry. Co.* (1910), 22 O.L.R. 448.

22. *Allen v. North Metropolitan Tramways Co.* (1880) 4 Times L.R. 561.

23. *Reynolds v. Thomas Tilling Limited* (1903), 19 Times L.R. 139, 20 Times L.R. 57.

24. *Herron v. Toronto Railway Co.* (1913), 28 O.L.R. 59.