

vances the maxim *res ipsa loquitur*. Lord Justice Moulton discusses the latter in his judgment. He takes the view that the principle only applies "when the direct cause of the accident or so much of the surrounding circumstances as was essential to its occurrence were within the sole control and management of the defendants or their servants, so that it is not unfair to attribute to them a *prima facie* responsibility for what happened. An accident in the case of traffic on a highway is in marked contrast to such a condition of things. Every vehicle has to adapt its own behaviour to the behaviour of other persons using the road." I observe that Moulton, L.J., was the only judge who entered into this question. The other judges did not even refer to it, and with due respect I venture to say, rightly so. In my opinion that maxim is altogether inapplicable to the present case, though for some other reason than that the case related to traffic.

The maxim *res ipsa loquitur*, the origin of which I am unable to trace, and which I believe is absent from Continental jurisprudence, is apparently only an expedient which the sense of equity in our courts has created, as a relief against the rigid principle *affirmanti non neganti incumbit probatio* for cases in which, to use the language of Pollock, C.B., in *Byrne v. Bondle*, 2 H. & C. 722, "it would have been preposterous to put upon the plaintiff the obligation to prove the defendant's negligence." In other words, some fact or facts which under ordinary circumstances would have to be proved by the plaintiff, in order to complete the chain of his evidence, would in such cases have to be proved or disproved by the defendant.

Now in the present case there were no facts to be proved. All the essential facts were absolutely clear and beyond dispute, and no shifting of the *onus probandi* on the basis of that maxim was needed or indeed possible. The only question was: Does the user of a motor omnibus on a wet road constitute negligence (or a nuisance)? Such a question, however, is not in the nature of a fact but in that of an opinion formed on facts (for judge or jury, as the case may be, to pronounce). For