The Legal News.

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The subject of contempt of court is likely to obtain some prominence by an extraordinary decision pronounced on the 31st July, by Chief Justice Austin (formerly an advocate practising in Montreal) while sitting in the General Court of the Bahama Islands. It appears that on the 27th July, a prisoner named Thomas Taylor, after sentence was pronounced upon him for some offence, committed a serious assault upon the Chief Justice. Four days later, the Chief Justice pronounced the following sentence upon the prisoner for the contempt so committed:—

"*In re* Reg. *vs.* Thomas Taylor, for Contempt of Court.

"The Writ of Habeas Corpus addressed to the Keeper of the Nassau prison commanding him to produce before this Court or the Chief Justice or Judge of this Court the body of Thomas Taylor, a prisoner in said Nassau prison, and in obedience to said Writ the said Keeper of said prison having produced the body of the said Thomas Taylor.

"And the said Thomas Taylor standing now before me in Court.

"The Court by the mouth of the said Chief Justice makes and pronounces the following Judgment and Order.

"That you the said Thomas Taylor being then a prisoner under sentence in and before the said Court on the Twenty-seventh day of July instant, presiding in said Court the said Chief Justice, of the said General Court of the Bahama Islands (to wit Her Majesty the Queen's superior Court of Justice in and for our said Bahama Islands,) while sitting on the Bench holding said Court, in open Court did make a murderous assault by attacking the said Chief Justice on the Bench and did beat and strike the said Chief Justice on his body with a weapon drawing blood, and did then and there strike other blows aimed at the head and body of the said Chief Justice, the same being and each of said acts and blows and strikings upon the said Chief Justice or aimed at him, being Contempts and a Contempt of Court to wit, of the said General Court of the Bahama Islands and against Her Majesty the Queen's General Court of the said Bahama Islands, Her Majesty's Superior Court of Justice in our said Bahama Islands;

"It is hereby ordered and adjudged that for said contempts the said Thomas Taylor be whipped and do receive on his back within the precincts of the prison walls of said Nassau prison, in the City of Nassau on the Thirty-first day of July instant, between the hours of four and five o'clock in the afternoon, thirty lashes.

"And it is hereby further ordered and adjudged that the said Thomas Taylor be held and kept in penal servitude hereafter for and during the term of his natural life."

In 3 L.C. Law Journal, 26, will be found the report of a case where the judge increased the sentence of prisoners who attacked the gaolers in open court after sentence had been pronounced. This was supported by a reference to a case in Dyer's Reports, A.D. 1631, where the right hand of a prisoner who threw a brick-bat at the judge who had sentenced him, was ordered to be amputated. Another case of increase of sentence for contempt, which occurred in New Jersey, is noticed in 5 Leg. News, 241. Notwithstanding these precedents, the exercise of such powers by the judge aggrieved, without the safeguard of a jury, must be regarded with grave apprehension.

The great battle which has been fought in the courts over the case of *The Bernina; Mills* v. *Armstrong*, 10 Leg. News, 68, 173, has been terminated by the decision of the House of Lords reported in the present issue. The doctrine laid down in *Thorogood* v. *Bryan*, by which a passenger was indentified with the owner of a public conveyance selected by him, to the extent of enabling another person guilty of negligence to defend himself against an action by such passenger by the allegation of contributory negligence on the part of the driver of the conveyance, has now been finally overruled. The decision of the House

of Lords agrees with the conclusion arrived at by the Supreme Court of the United States in *Little* v. *Hackett*, 9 Leg. News, 106.

CIRCUIT COURT.

HULL, (county of Ottawa) March 27, 1888.

Before WURTELE, J.

ROY, petitioner, and BELCOURT et al., respondents.

Procedure—Insolvent Act of 1875, *S.* 39—*Undischarged insolvent—Security for costs.*

HELD:—*That an undischarged insolvent under the Insolvent Act of* 1875, *cannot proceed in a suit until he has given security for costs, when it has been asked for; but that the court will not fix a delay within which sureties must be furnished under pain of non-suit.*

PER CURIAM.—Some time ago one Marston obtained a judgment against his tenant Roy, and the latter has now disavowed his attorney, Mr. Belcourt. The petitioner in disavowal is an undischarged insolvent, under the Insolvent Act of 1875; and the respondent, Belcourt, has moved that he be therefore held to give security for costs. At the argument the respondent contended that a delay should be fixed within which the security should be given under pain of non-suit.

The application is made under section 39 of the Insolvent Act, which provides that an undischarged insolvent, who institutes any proceeding, shall give to the opposite party "such security for costs as shall be ordered "by the court, . . . before such party shall "be bound to appear or plead." Different in that respect to article 129 of the Code of Civil Procedure, respecting the security for costs to be given by non-residents, the law requiring undischarged insolvents to give security for costs does not order a delay to be fixed, nor provide for a judgment of non-suit in case of default to give the security; it simply orders a stay of proceedings until the security be given.

I am not authorized to fix a delay and grant a non-suit in case of default. I order security to be given to the extent of $50.00, but without fixing any time to do so; and this judgment will stay the proceedings until such security is furnished. Should the petitioner fail to give security, the respondent, after the lapse of three years without any proceeding being had, will be entitled to obtain a judgment of peremption. (3 Carré & Chauveau, Q. 1421.)

Motion granted and security to the extent of $50.00 ordered to be given.

A. X. Talbot, for petitioner.

A. McConnell, for respondent *Belcourt*.

CIRCUIT COURT.

HULL, (county of Ottawa), March 27, 1888.

Before WURTELE, J.

GREENSHIELDS et al. v. DUHAMEL.

Goods supplied to minor—Necessaries—Burden of proof.

HELD:—*That a merchant who sells clothes to a minor without an order from his father, can only recover the price from the father when the minor himself had a right to compel his father to provide him therewith; and that it devolves upon the merchant to show that the clothes supplied were necessary, and that the minor was unable to provide himself therewith.*

PER CURIAM. The plaintiffs seek to recover $18.00 from the defendant for the price of a coat and vest sold by them to his minor son.

The parties admit that the clothes were sold and delivered without the defendant's order or knowledge, and that the minor, although he was living with his father, had a situation under the government and was in the receipt of a salary of $400.00 a year. The case has been submitted without further proof.

The action is founded on article 165 of the Civil Code, which obliges parents to maintain their children, and on article 1046, which obliges a person whose business has been attended to by another to re-imburse the latter for all useful expenses. Aubry & Rau say, in section 547; "Les tiers qui "ont pourvu, quoique sans mandat du père, "mais sans intention de libéralite, à l'entre-"tien et à l'éducation d'enfants mineurs, ont, "contre ce dernier, une action *negotiorum* "*gestorum*, pour se faire rembourser les "dépenses utiles qu'ils ont faites." And the

obligation to maintain includes clothing; Rolland de Villargues, under the word Aliments, says, at No. 41 : " L'obligation des " aliments comprend tout ce qui est néces- " saire à la vie, c'est-à-dire la nourriture, le " vêtement, le logement."

There is therefore a clear right of action on the part of a merchant, who provides a minor with necessary clothing, against the minor's father who has profited by the transaction, for the price of the clothing supplied.

But the action only lies if the expenditure, for which the merchant has provided, was one which the father was bound to make, and was therefore a useful expense. Laurent, in volume 20, at No. 329, on this point says : " Si le gérant fait ce que le maître lui- " même aurait fait, il a droit à être complè- " tement indemnisé.... On peut dire qu'il " enrichit le maître, par cela seul qu'il fait " ce que le maître aurait fait s'il avait été " sur les lieux, car le maître aurait dû faire " la dépense que le gérant a faite; il a donc " épargné cette défense, en ce sens il s'enri- " chit." Pothier, in his Treatise du Quasi-Contrat *Negotiorum gestorum*, No. 220, explains the nature of the obligation thus: " Pour que celui pour qui..... on a fait " une affaire, contracte l'obligation de rem- " bourser des frais de sa gestion celui qui l'a " faite, il faut..... que ce fût une affaire " indispensable, qu'il n'eut pas manqué de " faire lui-même ; autrement..... il ne con- " tractera aucune obligation envers celui qui " l'a faite, lequel n'aura aucune action contre " lui."

In the present case, was the expense one which the defendant was bound to bear ? Article 169 of the Civil Code lays down the rule that " maintenance is only granted in " proportion to the wants of the party claim- " ing it"; And Aubry & Rau, in section 553, amplify this text thus: " Les aliments " ne sont dus qu'aux personnes qui se trou- " vent dans le besoin, c'est-à-dire à celles " qui ne peuvent pourvoir à leur subsistance, " ni au moyen de leur revenu, ni à l'aide de " leur travail." Laurent, in volume 3, at Nos. 69 & 71 says: " Celui qui réclame les " aliments..... doit se trouver dans l'im- " possibilité de pourvoir lui-même à sa sub- " sistance, en tout ou en partie..... Le " travail est aussi un capital. Il est certain " que celui qui peut se procurer les choses " nécessaires à la vie en travaillant n'est pas " dans le besoin."

It has not been shown that the clothes sold to the defendant's son were necessary, but, supposing that they were, it is admitted that the young man was in the receipt of a salary fully sufficient to enable him to provide for his wants; and he could not therefore claim to be provided with the clothes in question by his father. The expense is not one which the defendant is bound to bear, and the outlay made by the plaintiffs, not being beneficial to the defendant, cannot, consequently be recovered by them from him. They may have an action against the minor, who bought and received the clothes, but under the circumstances of the case they have none against the defendant.

In actions of this kind the plaintiff is bound to prove that the clothing supplied was necessary, and that the position of the minor entitled him to claim a maintenance. Laurent, in Volume 3, at No. 72, says : " C'est au demandeur à prouver qu'il est " dans le besoin..... C'est au demandeur " à faire connaître l'état de sa fortune." And Aubry & Rau, in section 553, lay down the same principle : " C'est, en principe, à " celui qui forme l'action alimentaire à éta- " blir l'existence du fait qui sert de fonde- " ment à sa demande." In this case the plaintiffs have not made any such proof; on the contrary, it is admitted that the minor had sufficient means of his own, produced by his labour in the service of the government.

Action dismissed, with costs.

Arthur McConnell, for plaintiffs.

Rochon & Champagne, for defendants.

HOUSE OF LORDS.

February 28, 1888.

MILLS v. ARMSTRONG ; THE BERNINA.*

Negligence—Imputable—Passenger on ship.

An ordinary passenger by a ship or public conveyance is not affected either in a question with contributory wrong-doers or with in-

*58 L. T. Rep. (N.S.) 423. See 10 Leg. News, 68, 173.

nocent third parties, by the negligence of the master and crew by whom the ship is navigated, or of the driver, unless he actually assumes control over their actions and thereby occasions mischief. And, therefore, in the case of a collision between two ships causing loss of life where both ships were in fault: Held, that the personal representatives of a passenger or seaman not on duty who was killed could recover damages against the owners of the other ship in an action under Lord Campbell's Act.

This was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lindley and Lopes, L. JJ.) reported in 56 L. T. Rep. (N.S.) 258, and 12 Prob. Div. 58, who had reversed a judgment of Butt, J., reported in 54 L. T. Rep. (N.S.) 449, and 11 Prob. Div. 31, upon a special case.

The action was brought under Lord Campbell's Act (9 & 10 Vict., chap. 93) against the owner of the ship *Bernina* by the personal representatives of two persons who were on board the *Bushire*, a British ship, and were killed in consequence of a collision with the *Bernina*, which was also a British ship. The collision was the fault of both ships, but the deceased persons had nothing to do with the negligence which caused the accident.

The facts, which were not disputed, are fully set out in the reports in the courts below.

Butt, J., held that he was bound by the decision in the case of *Thorogood* v. *Bryan*, 8 C. B. 115, and gave judgment for the defendants, but his decision was reversed as above mentioned.

The owners of the *Bernina* appealed to the House of Lords.

Lord HERSCHELL. My Lords: This appeal arises upon a special case stated in actions in which the respondents are plaintiffs. They are both actions brought under Lord Campbell's Act to recover damages against the appellants for the loss sustained owing to the deaths of the persons of whom the respondents are the personal representatives; and it is alleged that they lost their lives through the negligence of the appellants. The appellants are the owners of the steamship *Bernina*, between which vessel and the steamship *Bushire* a collision took place, which led to the loss of fifteen persons, who were on board the latter vessel. It is admitted that the collision was caused by the fault or default of the master and crew of both vessels. J. H. Armstrong, whose administratrix one of the respondents is, was a member of the crew of the *Bushire*, but had nothing to do with its careless navigation. M. A. Toeg, of whom the other respondent is administratrix, was a passenger on board the *Bushire*. The question arises, whether under these circumstances the appellants are liable. The appellants having, as they admit, been guilty of negligence from which the respondents have suffered loss, a *prima facie* case of liability is made out against them. How do they defend themselves? They do not allege that those whom the respondents represent were personally guilty of negligence which contributed to the accident. Nor again do they allege that there was contributory negligence on the part of any third person standing in such a legal relation toward the deceased men as to cause the acts of that third person, on principles well settled in our law, to be regarded as their acts as, *e. g.*, the relation of master and servant or employer and agent acting within the scope of his authority. But they rest their defense solely upon the ground that those who were navigating the vessel in which the deceased men were being carried were guilty of negligence, without which the disaster would not have occurred. In support of the proposition that this establishes a defense, they rely upon the case of *Thorogood* v. *Bryan*, 8 C. B. 115, which undoubtedly does support their contention. The case was decided as long ago as 1849, and has been followed in some other cases; but though it was early subjected to adverse criticism, it has never come for reversion before a court of appeal until the present occasion. The action was brought under Lord Campbell's Act against the owner of an omnibus by which the deceased man was run over and killed. The omnibus in which he had been carried had set him down in the middle of the road instead of drawing up to the curb, and before he could get out of the way he was run over by the defendant's omnibus, which was coming along at

too rapid a pace to be able to pull up. The learned judge directed the jury that "if they were of opinion that want of care on the part of Barber's omnibus in not drawing up to the curb to put the deceased down, or any want of care on the part of the deceased himself, had been conducive to the injury, in either of those cases, notwithstanding the defendant, by her servant, had been guilty of negligence, their verdict must be for the defendant." The jury gave a verdict for the defendant, and the question was then raised, on a rule for a new trial on the ground of misdirection, whether the ruling of the learned judge was right. The court held that it was. It is necessary to examine carefully the reasoning by which this conclusion was arrived at. Coltman, J., said: "It appears to me, that having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and his servants, that if any injury results from their negligence he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is travelling, that want of care of the driver will be a defense of the driver of the carriage which directly caused the accident." Maule and Vaughan Williams, JJ., also dwelt upon this view of the identification of the passenger with the driver of the vehicle in which he is being carried. The former thus expressed himself: "I incline to think that for this purpose the deceased must be considered as identified with the driver of the omnibus in which he voluntarily becomes a passenger, and that the negligence of the driver was the negligence of the deceased." Vaughan Williams, J., said: "I think the passenger must for this purpose be considered as identified with the person having the management of the omnibus he was conveyed by." With the utmost respect for these eminent judges, I must say that I am unable to comprehend this doctrine of identification upon which they lay so much stress. In what sense is the passenger by a public stage coach, because he avails himself of the accommodation afforded by it, identified with the driver? The learned judges manifestly do not mean to suggest (though some of the language used would seem to bear that construction) that the passenger is so far identified with the driver that the negligence of the latter would render the former liable to third persons injured by it. I presume that they did not even mean that the identification is so complete as to prevent the passenger from recovering against the driver's master, though if "negligence of the owner's servants is to be considered negligence of the passenger," or if he "must be considered a party" to their negligence, it is not easy to see why it should not be a bar to such an action. In short, as far as I can see, the identification appears to be effective only to the extent of enabling another person whose servants have been guilty of negligence to defend himself by the allegation of contributory negligence on the part of the person injured. But the very question that had to be determined was whether the contributory negligence of the driver of the vehicle was a defense as against the passenger when suing another wrongdoer. To say that it is a defence because the passenger is identified with the driver, appears to me to beg the question, when it is not suggested that this identification results from any recognized principles of law, or has any other effect than to furnish that defense, the validity of which was the very point in issue. Two persons may no doubt be so bound together by the legal relation in which they stand to each other, that the acts of one may be regarded by the law as the acts of the other. But the relation between a passenger in a public vehicle and the driver of it certainly is not such as to fall within any of the recognized categories in which the act of one man is treated in law as the act of another. I pass now to the other reasons given for the judgment in *Thorogood* v. *Bryan*. Maule, J., says: "On the part of the plaintiff it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He enters into a contract with the owner, whom by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance he is not obliged to avail himself of it. But as regards the present plaintiff he is not altogether without fault; he chose

his own conveyance, and must take the consequences of any default on the part of the driver whom he thought fit to trust." I confess I cannot concur in this reasoning. I do not think it well founded, either in law or in fact. What kind of control has the passenger over the driver which would make it reasonable to hold the former affected by the negligence of the latter? And is it any more reasonable to hold him so affected because he chose the mode of conveyance, that is to say, drove in an omnibus rather than walked, or took the first omnibus that passed him instead of waiting for another? And when it is attempted to apply this reasoning to passengers travelling in steamships or on railways, the unreasonableness of such a doctrine is even more glaring. The only other reason given is contained in the judgment of Cresswell, J., in these words: "If the driver of the omnibus the deceased was in had by his negligence or want of due care and skill contributed to an injury from a collision, his master clearly could maintain no action. And I must confess I see no reason why a passenger who employs the driver to convey him stands in any better position." Surely, with deference, the reason for the difference lies on the very surface. If the master in such a case could maintain no action, it is because there existed between him and the driver the relation of master and servant. It is clear that if his driver's negligence alone had caused the collision he would have been liable to an action for the injury resulting from it to third parties. The learned judge would, I imagine, in that case have seen a reason why a passenger in the omnibus stood in a better position than the master of the driver. I have now dealt with all the reasons on which the judgment in *Thorogood* v. *Bryan* was founded, and I entirely agree with the learned judges in the court below in thinking them inconclusive and unsatisfactory. I will not detain your lordships further on this part of the case, beyond saying that I concur with the judgments of the learned judges in the court below, and especially with the very exhaustive judgment of Lord Esher, M.R. It was suggested in the course of the argument that *Thorogood* v. *Bryan* might be supported on the ground that the allegation that the negligence which caused the injury was the defendant's was not proved, inasmuch as it was the defendant's negligence in conjunction with that of the driver of the other omnibus. It may be, that as a pleading point, this would have been good. It is not necessary to express an opinion whether it would or not. I do not think it would have been a defense on the merits if the facts had been properly averred. If by a collision between two vehicles a person unconnected with either vehicle were injured, the owner of neither vehicle, when sued, could maintain as a defense, "I am not guilty, because but for the negligence of another person the accident would not have happened." And I do not see how this defense is any more available as against a person being carried in one of the vehicles, unless the reasoning in *Thorogood* v. *Bryan* be well founded. I have said that the decision in *Thorogood* v. *Bryan* has not been unquestioned. I do not think it necessary to enter upon a minute consideration of the subsequent cases, after the careful and accurate examination to which they have been subjected by the Master of the Rolls. The result may be summarized thus: The learned editors of Smith's Leading Cases, Willes and Keating, JJ., strongly questioned the propriety of the decision in the notes to *Ashby* v. *White*, 1 Sm. Lead. Cas. Parke, B., whose dictum in *Bridge* v. *Grand Junction Ry. Co.*, 3 M. & W. 244, Williams, J., followed in directing the jury in *Thorogood* v. *Bryan*, appears to have doubted the soundness of the judgment in that case. Dr. Lushington, in *The Milan* (Lush. 388), expressed strong disapproval of it; and though in *Armstrong* v. *Lancashire & Yorkshire R. Co.*, 33 L. T. Rep. (N.S.) 228; L. R., 10 Exch. 47, it was followed, and Bramwell and Pollock, BB., to say the least, did not indicate dissatisfaction with it, I understand that my noble and learned friend, Lord Bramwell, after hearing this case argued, and maturely considering it, agrees with the judgment of the court below. In Scotland, the decision in *Thorogood* v. *Bryan* was pronounced unsatisfactory in *Adams* v. *Glasgow & South-Western Ry. Co.*, 3 Ct. Sess. Cas. (4th series)

215. In America it has been followed in the courts of some states, but it has often been departed from, and upon the whole the view taken has been decidedly adverse to it. The latest case that I am aware of in that country is *Little* v. *Hacket*, 9 Davis (Sup. Ct. U. S.), 366. That was a decision of the Supreme Court of the United States, whose decisions, on account of its high character for learning and ability, are always to be regarded with respect. Field, J., in delivering judgment, examined all the English and American cases, and the conclusion adopted was the same as that at which your lordships have arrived. I have only this observation to add: The case of *Waite* v. *North-Eastern Ry. Co.*, E. B. & E. 710, was much relied on in the argument for the appellants, but the very learned counsel who argued that case for the defendants, and all the judges who took part in the decision were of opinion that it was clearly distinguishable from *Thorogood* v. *Bryan*, and did not involve a review of that case. I think they were right. As regards the other questions argued before your lordships, I have only to say that I think they were properly dealt with by the court below. I am requested by my noble and learned friend, Lord Bramwell, who was unable to remain to read the opinion which he had prepared, to state that he concurs in the motion which I am about to make. I move your lordships that the judgment of the Court of Appeal be affirmed, and the appeal dismissed, with costs.

Lord Watson. My Lords: The appellants conceded in argument that unless it can be shown that *Thorogood* v. *Bryan*, 8 C. B. 115, is a valid precedent, they cannot succeed in this appeal. Although nearly forty years have elapsed since the case was decided, I think the rule which it established must still be dealt with upon its own merits. The decision has not met with general acceptance, and it cannot be represented as an authority upon which a course of practice has followed, or upon which persons guilty, or intending to be guilty, of contributory negligence are entitled to rely. When the combined negligence of two or more individuals, who are not acting in concert, results in personal injury to one of them, he cannot recover compensation from the others for the obvious reason that but for his own neglect he would have sustained no harm. Upon the same principle, individuals who are injured without being personally negligent are nevertheless disabled from recovering damages if at the time they stood in such a relation to any one of the actual wrong-doers as to imply their responsibility for his act or default. That constructive fault, which implies the liability of those to whom it is imputable to make reparation to an innocent sufferer, must also have the effect of barring all claims at their instance against others who are *in pari delicto*, is a proposition at once intelligible and reasonable. If they are within the incidence of the maxim, *qui facit per alium facit per se*, there can be no reason why it should apply in questions between them and the outside public, and not in questions between them and their fellow wrong-doers. But the facts which were before the court in *Thorogood* v. *Bryan* do not appear to me to bring the case within that principle. My noble and learned friend, Lord Bramwell, who is so conversant with the intricacies of English pleading, suggested in the course of the argument a technical ground upon which the decision in *Thorogood* v. *Bryan* might be justified. In that view the case would not be an authority for the appellants, who accordingly supported the reason assigned for the judgment, which was simply this, that the deceased passenger, by taking the seat on the omnibus, became so far identified with its driver that the negligence of its driver was imputable to him in any question with the driver or owner of the other omnibus which ran over him and was the immediate cause of his death. Coltman and Cresswell, JJ., express themselves in terms, which if literally understood, would lead to the conclusion that he would also have been responsible for damage solely attributable to the fault of the driver. Coltman, J., said: "Having trusted the party by selecting the particular conveyance the plaintiff has so far identified himself with the owner and her servants, that if any injury results from their negligence he must considered a party to it." Maule, J., was careful to limit his observations to the case

before him. "I incline to think," said the learned judge, "that for this purpose (*i.e.*, recovering damages from the defendant) the deceased must be considered as identified with the owner of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased." I do not think the very eminent judges who decided *Thorogood* v. *Bryan* intended to affirm that the deceased, by taking his seat in the omnibus, incurred the same responsibility for the negligent acts of the driver as if the latter had been his servant. If they did mean to do so their conclusion might be perfectly logical, but their premises would be directly at variance with the principles laid down in *Quarman* v. *Burnett*, 6 M. & W. 489, which I have always regarded, and still regard, as a sound and authoritative precedent. If they did not, then they have affirmed that a passenger, travelling by a public conveyance, may be so unconnected with the driver as to be exempt from liability for his negligence, and yet be so identified with him as to lose all right of action against wrong-doers whose negligence, in combination with that of the driver, has occasioned personal injury to himself. This is a proposition which it is very difficult to understand. It must be a singular kind of relationship, and created by very exceptional circumstances, which results in the superior being affected by his inferior's negligence, in a question with wrong-doers, and not in a question with persons who are themselves free from blame. It humbly appears to me that the identification upon which the decision in *Thorogood* v. *Bryan* is based has no foundation in fact. I am of opinion that there is no relation constituted between the driver of an omnibus and its ordinary passengers which can justify the inference that they are identified to any extent whatever with his negligence. He is the servant of the owner, not their servant; he does not look to them for orders, and they have no right to interfere with his conduct of the vehicle, except, perhaps, the right of remonstrance when he is doing, or threatens to do, something that is wrong and inconsistent with their safety. Practically they have no greater measure of control over his actions than the passenger in a railway train has over the conduct of the engine-driver. I am therefore unable to assent to the principle upon which the case of *Thorogood* v. *Bryan* rests. In my opinion an ordinary passenger by an omnibus, or by a ship, is not affected, either in a question with contributory wrong-doers or with innocent third parties, by the negligence in the one case of the driver and in the other of the master and crew by whom the ship is navigated, unless he actually assumes control over their actions, and thereby occasions mischief. In that case he must, of course, be responsible for the consequences of his interference. Counsel for the appellants endeavored to support *Thorogood* v. *Bryan* upon a totally different principle from that assigned by the learned judges who decided the case. They argued alternately that the maxim *respondeat superior* does not apply, and that passengers are affected by the wrongful acts of the driver, not because he is in any sense their servant, or subject to their control, but by reason of their being for the time under his dominion. *Waite* v. *North-Eastern Ry. Co.*, E. B. &. E. 719, was the authority relied on in support of this branch of the argument. But there is no analogy between the position of an infant incapable of taking care of itself and that of a passenger *sui juris*; and the theory that an adult passenger places himself under the guardianship of the driver, so as to be affected by his negligence, appears to me to be absolutely without foundation, either in fact or law. I therefore concur in the judgment which has been moved.

LORD MACNAGHTEN. My Lords: I concur in the motion which has been proposed and in the reasons upon which it has been founded.

Order appealed from affirmed, and appeal dismissed with costs.

GENERAL NOTES.

THE MEASURE OF DAMAGE.—Counsel: "What do you consider the value of the boots you lost?" Complainant: "Let me see—they cost me new sixteen and six, and I've had them soled and heeled twice, that was five shillings; that makes one pound one and six. One pound one and sixpence, sir."—*Irish Law Times.*