[HIGH COURT OF AUSTRALIA.]

ROGGENKAMP . . . . . APPELLANT;
PLAINTIFF,

AND

BENNETT . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *June* 14, 15, 23.

McTiernan, Williams and Webb JJ.

Negligence—Accident—Gratuitous passenger in motor car—Claim against driver for injuries—Drunkenness of driver and passenger—Duty of driver to passenger—Acceptance of risk—Volenti non fit injuria—Motor Vehicles Insurance Acts 1936 *to* 1945 (*Q.*) (1 *Edw. VIII. No.* 31—9 *Geo. VI. No.* 27), *s.* 3 (2).

In an action for damages for personal injuries sustained in an accident to a motor car by the plaintiff, a gratuitous passenger, it appeared that although the accident was due to the intoxication of the driver, the passenger was also intoxicated and had been in the company of the driver for several hours, drinking liquor with him, and continuing the trip whilst both were drinking intoxicants at intervals.

The trial judge found that the plaintiff knew of the driver's intoxication and voluntarily encountered the obvious risk associated with the drunken condition of the driver and that there was no breach of duty by the driver to him and gave judgment for the defendant.

Held that the findings of the trial judge should not be disturbed; by *McTiernan* and *Williams* JJ. on the ground that the defence of *volenti non fit injuria* had been established, as the passenger knew and appreciated the danger of the situation and voluntarily consented to take the obvious risk associated therewith; by *Webb* J. on the ground that in the circumstances there was no breach of any duty owed by the driver to the passenger.

Insurance Commissioner v. *Joyce*, (1948) 77 C.L.R. 39, applied.

Decision of the Supreme Court of Queensland (*Matthews* J.) affirmed.

APPEAL from the Supreme Court of Queensland.

An action was commenced in the Supreme Court of Queensland by Stanley Adrian Roggenkamp against Albert George Bennett claiming damages for injuries sustained whilst a passenger in a

motor car owned by the defendant and negligently driven by the defendant's son Noel James Bennett. Under the provisions of s. 3 (2) of *The Motor Vehicles Insurance Act* 1936 *to* 1945 for the purpose of a claim for personal injuries the son was deemed to have driven the car in the course of the defendant's service.

The defence was a denial of the negligence alleged and also raised the following: *Volenti non fit injuria*, contributory negligence and that in the circumstances there was no breach by the driver of any duty owed to the plaintiff.

The action was tried by *Matthews* J., without a jury, who gave judgment for the defendant. The facts appear from the following portions of his Honour's judgment:—

On the evidence before me I find that on the day in question the plaintiff and the defendant's driver who had known each other in Java and who had not met for a period of about two years came together at some time during the forenoon of 20th May; they made arrangements to go for a few days to Southport, or the South Coast, if they could get some petrol for the journey; they were together at the Embassy Hotel about lunch-time and there had some liquor; during the course of the afternoon they were together at the Royal Yacht Club and had more liquor, and somewhere between 4 and 5 o'clock they procured from some other person some tickets for petrol. They had a meal at a cafe near the Embassy Hotel and proceeded on a journey to Southport, a distance of forty-eight miles from Brisbane; they had more liquor at the Holland Park Hotel about five miles from Brisbane; they had more liquor at the Glen Hotel about ten miles from Brisbane, some more liquor at Beenleigh about twenty-two miles from Brisbane, and some more liquor at Yatala, the latter place being about half-way to Southport. A little after 8 o'clock that evening they were seen by a man named James Sebastian McCollom who was a bus driver at Southport, at the Grand Hotel, Southport. McCollom was setting down a passenger near the Grand Hotel when he noticed two men come out of the hotel. He identified the plaintiff and the driver of the car as being the two men he saw, and I accept his evidence in this regard. He said they seemed to be very happy with one another—they did not seem to be very bad friends; he was under the impression that they had had a few drinks; they seemed to be a little unsteady on their feet. After they got in their car the car started off at a very fast pace with no lights and proceeded towards the bus; the car veered off from the front of the bus and crossed over the edge of a garden plot that was there, and as they still had no lights on the car McCollom watched and saw the car veer across

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the road towards the river; they went very close to the river bank; they then turned and proceeded towards Southport and he did not see any more of them, but on the way back on his run he saw a black sedan car in the drain on the Brisbane side of Loder's Creek, which is somewhat less than a mile from the Grand Hotel.

Leslie George Swaby, a truck driver, on the evening of 20th May, some time between 8 and 8.30 p.m. was riding his bicycle along the Pacific Highway near Loder's Creek proceeding in the direction of Southport. As he was going along he heard a car coming behind him—looked round and saw a car with no lights coming towards him; it was on its incorrect driving side. He rode his bicycle as hard as he could to get out of the danger zone. After he had gone a little distance he heard a crash. He estimated the speed of the car when he saw it as fifteen miles per hour. When he heard the crash he turned his bicycle and went back to where the car had gone over a culvert; he saw defendant's driver behind the steering wheel and plaintiff in the front passenger seat between the door and the seat of the car; both men were unconscious and he smelt a strong smell of liquor; both men in the car smelt of liquor. As both men were unconscious he was not able to say whether either or both were under the influence of liquor.

The plaintiff's memory was affected by the accident and he did not remember and was not able to give any evidence of the events after leaving the Yacht Club, and he was very vague as to events prior to leaving the Yacht Club.

The defendant's driver gave evidence as to the events above related and found by me up to the time of their leaving Yatala, but he did not remember anything that happened to himself or the plaintiff after they left Yatala. He swore to their having had at least eighteen drinks during the course of the afternoon and up to the time of leaving Yatala.

I accept his evidence as far as it goes.

The evidence for the plaintiff as to the events after the pair had left the Yacht Club and up to the time of the accident consisted solely of the evidence of the witness Swaby, and as to the events immediately after the accident, of Joseph Keith Webster, an Ambulance Bearer, on 20th May last year at the Southport Ambulance Centre. This witness also smelt alcohol on the driver, but in his opinion the driver was not under the influence of liquor. The driver was suffering from concussion; he said alcohol was present, but in his estimation concussion was his greatest injury; he said the driver's voice was thick and his answers to questions were couched in what he called "Air Force Jargon."

Whilst I had some doubt as to the sufficiency of the case made by the plaintiff as to the driver's negligence no application was made by the defendant's counsel before me in regard to the matter at the close of the plaintiff's case. When questioned by me during his closing address as to whether he admitted that negligence had been shown on the part of the defendant's driver, he conceded that in the absence of explanation by the defendant a court might be entitled to find negligence against the driver if the approach were as suggested by *Dixon* J. in *Insurance Commissioner* v. *Joyce* (1). He substantially rested his defence on the matters raised in the defence as amended.

The driver was questioned by an insurance inspector whilst in hospital four days after the accident but made no admission or statement that on the day in question he had taken intoxicating liquor to excess. Subsequently on a visit to Southport with the insurance officer he had admitted to the insurance officer that he had taken intoxicating liquor on 20th May 1948.

On the evidence before me I am satisfied that when the plaintiff and the driver of the car left the Grand Hotel on the night in question they were both considerably affected by liquor and that their state at that time was caused through their having together at the various places mentioned partaken of a considerable amount of intoxicating liquor. I think the plaintiff was a voluntary participant in the trip ; that he participated in causing the driver's intoxication by drinking with him and continuing the trip while he was at intervals drinking the intoxicants. He therefore knew of the driver's intoxication and that he had helped to bring it about.

In view of my findings above set out I think the defendant has proved his defence as amended and that on authority of *Insurance Commissioner* v. *Joyce* (1) I am bound to enter judgment for the defendant. I think the plaintiff voluntarily encountered the risk which was obviously associated with the drunken condition of the driver and that there was no breach of duty by the defendant's driver to him. Also that in view of the fact that the car was apparently driven for some distance—possibly three-quarters of a mile—after leaving the Grand Hotel, without lights, no reasonably prudent man having a regard for his own safety would have allowed himself to be driven by a driver in such a condition that he would drive any distance on a dark night without lights even if the lights had been out of order.

From this decision the plaintiff appealed to the High Court.

(1) (1948) 77 C.L.R. 39.

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R. King (with him *F. Connolly*) for the appellant. In order that the defendant should succeed in the defences raised at the trial it must be proved that the driver was drunk and so much under the influence of alcohol as to be incapable of exercising effective control of the car. It must further be proved that the plaintiff knew at the material time that the driver was so much under the influence of alcohol as to be incapable of driving the car properly. It must also be proved that the plaintiff knew the risk he was running and that he consented to the taking of that risk. If the plaintiff were drunk then he was incapable of knowledge and consent. In *Insurance Commissioner* v. *Joyce* (1), *Latham* C.J. states that if a passenger drinks himself into a state of stupidity thereby disabling himself from avoiding the consequences of the driver's negligence, he is guilty of contributory negligence. This proposition is expressly rejected by *Dixon* J. (2) and impliedly by *Rich* J. (3). Therefore the implication from *Insurance Commissioner* v. *Joyce* (4) is that in this case the plaintiff by his drunkenness was not guilty of contributory negligence. The evidence shows clearly that the accident was the result of negligence. In this case the negligence is proved by the nature of the accident itself: *Barkway* v. *South Wales Transport Co.* (5); *Charlesworth's Law of Negligence*, 22nd ed. (1947), at p. 33. On a charge of manslaughter there is no contributory negligence if a person gets into a vehicle knowing that the driver is drunk: *R.* v. *Jones* (6). Unless there is some causal connection between the plaintiff's presence in a car and the accident the defence of contributory negligence is not available: *Calper* v. *Edmonton Dunvegan & British Columbia Railway Co.* (7); *Walters* v. *Pfeil* (8). The defendant could not succeed on the defence of contributory negligence. The defendant did not establish the defence of *volenti non fit injuria*. It must be shown that the plaintiff clearly knew and appreciated the nature and character of the risk he ran and that he voluntarily incurred it. Until both are established the maxim *volenti non fit injuria* cannot apply: *Canadian Pacific Railway Company* v. *Frechette* (9). Further it has to be proved that the plaintiff had knowledge when he got into the car that the driver was unfit to drive: *Keane* v. *Knowles* (10); *Finnie* v. *Carroll* (11). The plaintiff could not know of any risk until the driver actually drove off and the car proceeded only a short distance

(1) (1948) 77 C.L.R., at p. 47.
(2) (1948) 77 C.L.R., at p. 60.
(3) (1948) 77 C.L.R., at p. 49.
(4) (1948) 77 C.L.R. 39.
(5) (1948) 2 All E.R. 460.
(6) (1870) 11 Cox C.C. 544.
(7) (1922) 70 D.L.R. 540.
(8) (1829) M. & M. 362 N.P. [173 E.R. 189].
(9) (1915) A.C. 871, at p. 880.
(10) (1942) S.A.S.R. 13.
(11) (1927) 27 S.R. (N.S.W.) 495; 44 W.N. 182.

when the accident occurred. The last opportunity the plaintiff had of going or staying was at the Grand Hotel. The only evidence of drunkenness on the part of the driver was after the car left the Grand Hotel, when it was too late for plaintiff to make any choice. Moreover on the evidence the trial judge could not find that the driver was so intoxicated that he could not drive the car safely. If the driver were drunk, then the passenger was also drunk, and too drunk to know and appreciate the danger. Therefore the defences raised were not made out.

M. B. Hoare for the respondent. The evidence is such that knowledge on the part of the plaintiff and his voluntary acceptance of the risk can reasonably be inferred. The onus would then pass to the plaintiff to rebut such knowledge and acceptance, which he failed to do. If a person by his own act deprives himself of all knowledge, he should not be in a better position than a person who has conducted himself properly and is in possession of all his faculties. As there had been continuous drinking during the afternoon and on the trip, the events at the Grand Hotel cannot be taken as the last opportunity the plaintiff had of deciding to take the risk. The plaintiff had over a period of hours opportunities of observing the condition of the driver. As was said by *Rich* J. in *Insurance Commissioner* v. *Joyce* (1) the greater probability was that both had enough consciousness to be aware of what they had been doing, although not enough judgment and discretion to drive. In that case it was more difficult to draw inferences as neither the driver nor the passenger gave evidence. Here they both gave evidence as to the events leading up to the accident. There was a prima-facie case from which inferences could be drawn by the trial judge: *Joyce* v. *Kettle & Insurance Commissioner* (2); *Delaney* v. *City of Toronto* (3). There was no breach of any duty owed to the plaintiff by the driver.

R. King in reply. There was not sufficient evidence on which the trial judge could find that the plaintiff freely and voluntarily took the risk with full knowledge of the nature and extent of the risk he ran: *Osborne* v. *London & North Western Railway Co.* (4); *Smith* v. *Baker* (5). Under s. 289 of *The Criminal Code* (Q.) there is a duty on a person in charge of a dangerous thing such as a motor car to exercise reasonable care. One person could not in law

(1) (1948) 77 C.L.R., at p. 49.
(2) (1948) Q.S.R. 139.
(3) (1921) 64 D.L.R. 122.
(4) (1888) 21 Q.B.D. 220.
(5) (1891) A.C. 674.

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consent to another committing a breach of the criminal law: *Charlesworth's Law of Negligence*, 22nd ed. (1947), at p. 456; *Hoffman* v. *Neilsen* (1). There cannot be contributory negligence unless there is some causal relationship between the negligence and the accident: *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* (2); *Admiralty Commissioners* v. *Owners of Steamship Volute* (3); *Symons* v. *Stacey* (4).

Cur. adv. vult.

June 23.

The following written judgments were delivered.

McTIERNAN and WILLIAMS JJ. This was an action of negligence in which the appellant was the plaintiff and the respondent the defendant. The appellant claimed damages for injuries which he alleged he suffered in consequence of the negligent driving of a motor car by the respondent's son.

The respondent was the owner of the car and by s. 3 (2) of *The Motor Vehicles Insurance Act* 1936 *to* 1945 (Q.) the son is deemed to have driven the car in the course of the respondent's service.

The respondent's statement of defence put the allegation of negligence in issue and set up the following defences: *volenti non fit injuria*, contributory negligence and that in the circumstances there was no breach by the defendant's driver of any duty owed to the appellant.

The action was tried by *Matthews* J. without a jury in the Supreme Court of Queensland and he gave judgment for the defendant. This appeal is brought by the appellant against this judgment.

It appears from the reasons for judgment of *Matthews* J. that at the trial the respondent did not dispute that it was a correct inference from the evidence that the appellant's injuries were caused by the failure of the respondent's son to exercise proper care in the management and control of the car. The respondent relied upon the defences of *volenti non fit injuria*, contributory negligence and that there was no breach of any duty owed to the appellant. *Matthews* J. decided that these defences were made out and his judgment is based upon his finding for the respondent on those defences.

As defences to an action for damages for injuries caused by the negligent driving of a motor car, these three defences are discussed in the case of *Insurance Commissioner* v. *Joyce* (5). The instant case is like that case in that there is evidence that the driver's

(1) (1928) Q.S.R. 364.
(2) (1943) 1 K.B. 223, at p. 237.
(3) (1921) 38 T.L.R. 225, at p. 227.
(4) (1922) 30 C.L.R. 169, at p. 177.
(5) (1948) 77 C.L.R. 39.

failure to control the motor car was due to intoxication and the appellant was a gratuitous passenger.

The evidence shows that the appellant and the driver of the car had been pilots in the R.A.A.F. in Java: they met for the first time after two years in Brisbane about midday on 20th March 1949. The accident in which the appellant sustained the injuries for which he claims damages in this action was the sequel to the celebration of this reunion by excessive drinking. They had drinks at a hotel and a club and went on a pleasure trip in the respondent's motor car to Southport. During the first half of the journey they stopped at four hotels on the road and had more drinks. The final stop before the accident was made at about 8 p.m. at an hotel at Southport. When they left this hotel to get into the car to resume the trip both of them showed signs of being under the influence of liquor; each had his arm around the other and was unsteady on his feet. When they entered the car it started off at a fast pace; the lights of the car had not been switched on; it ran an erratic course across the road towards the river bank. The car was then driven on the wrong side of the road in the direction of Southport. A crash was heard; the car ran over a culvert and came to a stop in a drain. The driver was found behind the steering wheel and the appellant was in the front seat. Both men smelt of liquor and were unconscious. The appellant was gravely injured.

This evidence clearly proves that the respondent's son was the driver and was in control of the car at the time of the accident and that there was negligence on his part in the driving and control of the car which resulted in the appellant sustaining injury.

The defences set up by the respondent depend upon the evidence of excessive drinking by the driver. It is argued for the appellant that there is no support for the defences in the evidence because the evidence does not prove that the driver was so much under the influence of liquor that he could not drive the car safely, or, if he were, that the appellant was also too drunk to appreciate the danger.

The finding which *Matthews* J. made was that when the appellant and the driver got into the car for the last time before the accident "they were both considerably affected by liquor and that their state at the time was caused through their having together at the various places mentioned (the hotels on the road) partaken of a considerable amount of intoxicating liquor." His Honour took the evidence of the driver into account in reaching this conclusion. The evidence was that he and the appellant had at least eighteen

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drinks in the afternoon before they arrived at the hotel which was the last place where they called before the accident. The evidence, as already stated, proves that they left this hotel walking unsteadily and holding on to one another. Counsel for the appellant argued that the learned trial judge should have rejected the driver's evidence that they had drunken to excess because he made an unsworn statement after the accident and before the trial that he was sober at the time of the accident. The case is predominantly one of oral evidence and therefore one of those cases in which "an appellate court can never recapture the initial advantage of the judge who saw and believed": *Powell* v. *Streatham Manor Nursing Home* (1). The independent evidence of the behaviour of the car shortly before the accident corroborates the driver's evidence. We do not think that we would be justified in setting aside the finding of fact made by the trial judge on the issue of drunkenness. On the contrary we think that the finding is consistent with the evidence and a correct finding.

Taking the defence of *volenti non fit injuria*, the onus was on the respondent to prove this defence. The elements of the defence are conveniently stated in *Halsbury's Laws of England*, 2nd ed., vol. 23, at pp. 716-718. There it is said that: "In order to establish the defence, the plaintiff must be shown not only to have perceived the existence of danger, for this alone would be insufficient, but also that he fully appreciated it and voluntarily accepted the risk. The question whether the plaintiff's acceptance of the risk was voluntary is generally a question of fact, and the answer to it may be inferred from his conduct in the circumstances. The inference may more readily be drawn in cases where it is proved that the plaintiff knew of the danger and comprehended it, as, for example, where the danger was apparent, or proper warning was given of it, and there was nothing to show that he was obliged to incur it, than in cases where he had knowledge that there was danger but not full comprehension of its extent, or where, while taking an ordinary and reasonable course, he had not an adequate opportunity of electing whether he would accept the risk or not."

Matthews J. made the following findings: "I think the plaintiff was a voluntary participant in the trip: that he participated in causing the driver's intoxication by drinking with him and continuing the trip while he was at intervals drinking the intoxicants. He therefore knew of the driver's intoxication and that he had helped to bring it about"; and "I think the plaintiff voluntarily encountered the risk which was obviously associated with the drunken

(1) (1935) A.C. 243, at p. 255.

condition of the driver and that there was no breach of duty by the defendant's driver to him. Also that in view of the fact that the car was apparently driven for some distance—possibly three-quarters of a mile—after leaving the Grand Hotel, (the last hotel at which they called before the accident) without lights, no reasonably prudent man having a regard for his own safety would have allowed himself to be driven by a driver in such a condition that he would drive any distance on a dark night without lights even if the lights had been out of order."

In our opinion these findings are reasonable and proper and well supported by the evidence. The case is one in which the court may readily draw the inference that the appellant knew and appreciated the risk of riding in the car with the driver and consented to undertake the risk.

The appellant and the driver made the journey for pleasure and the appellant was under no necessity of riding in the car or continuing the trip. He was much under the influence of liquor when he got into the car for the last time before the accident, but the evidence does not warrant the inference that he was so drunk that he was not aware that the driver was also very drunk, or that he was not conscious of the risk of riding in the car with his companion at the wheel. Perhaps it is not possible to say whether one was more under the influence of liquor than the other. The appellant also would no doubt have been too drunk to drive safely. It does not follow that he was not conscious of his companion's drunken condition, or that he did not know that it was very risky to continue the trip with him as driver, or that he could not consent to incur the risks which were obviously associated with the continuation of the jaunt. The appellant could not but have been fully aware that the driver had been participating with him in this drinking bout and that in going any further after their last stop he was exposing himself to the clearly perceptible risk that his companion would drive the car so recklessly or carelessly as to cause an accident, or be unable to drive or control it with sufficient care or skill to avoid an accident. Immediately before they got into the car they were unsteady on their feet and one was holding on to the other. It is an inescapable inference that the appellant knew and appreciated the danger of the situation and voluntarily consented to take the risk of the occurrence of an accident such as that which unfortunately happened. In our opinion the defence of *volenti non fit injuria* was clearly made out. This is a good defence to the action.

It is therefore unnecessary to deal with the other defences. We would add that in our opinion the facts establish that the appellant

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made default in his duty to take due care for his own safety; having participated with the driver as his companion in this drinking bout which practically destroyed the driver's ability to drive or control the car, he again boarded it with him and resumed the pleasure jaunt with him as driver. It is established that he failed to take due care for his own safety; his negligent conduct in getting into the car and resuming the journey materially contributed to his injuries.

At the end of his reply counsel for the appellant raised for the first time in the case the point that by reason of s. 289 of *The Criminal Code* (Q.) the defence of *volenti non fit injuria* was not an admissible defence to this action. The Court inquired of counsel for the appellant whether he wished to apply to amend the pleadings in order to add a count based on that section. He said that he did not wish to amend. The pleadings in the case do not raise this point and it was never a question in the case. We express no opinion on the question whether a breach of s. 289 could be the foundation of a civil action at the suit of an injured person: if such breach would give rise to a civil remedy and that is the remedy which the appellant now wishes for the first time to pursue, the defence of contributory negligence would defeat his case.

In our opinion the appeal should be dismissed.

WEBB J. I would dismiss the appeal.

Allowing for the advantage that the learned trial judge possessed in seeing the witnesses give their evidence and observing their demeanour I can find no reason for differing from his findings that the plaintiff voluntarily participated in the trip to Southport and in causing the driver's intoxication by drinking with him before and during the trip, and that the plaintiff was aware of the driver's intoxication. There was the evidence of eye-witnesses as to the behaviour of the driver and the plaintiff as they proceeded with their arms around one another and with somewhat unsteady gait to enter the car at the Grand Hotel Southport after 8 p.m. and as to the swift and erratic movements of the car without lights before it was driven from the road at Loder's Creek with resulting injuries to the plaintiff. There were also the admissions of the driver and the plaintiff that they were drinking together at several hotels before and during the trip, and the further admission of the driver that he had consumed eighteen glasses of beer. In this respect the case differs from that of *Insurance Commissioner* v. *Joyce* (1) in which the learned trial judge *Philp* J. drew the conclusion that the driver of the car was drunk at the time of the

(1) (1948) 77 C.L.R. 39.

accident from the fact that he was very drunk about two hours later—a finding that was sustained by this Court after it had been set aside by the Full Court of Queensland, although *Dixon* J. thought there was no evidence that the plaintiff Joyce had sufficient knowledge or appreciation of the fact that the driver had so far impaired his competence to drive the car that it was dangerous to proceed as his passenger. *Dixon* J. thought it was all speculation or guesswork (1).

Philp J. held that the plaintiff Joyce failed for lack of proof of a breach of any duty owed to him by the driver, the defendant Kettle.

Then as the driver of this car was drunk and the plaintiff was aware of the fact as they proceeded to enter the car at the Grand Hotel I think the learned trial judge *Matthews* J. rightly held that in view of *Joyce's Case* (2) he should find as he did for the defendant Bennett on the ground that there was no breach of duty by the driver—or the defendant—to the plaintiff. *Latham* C.J. held in *Joyce's Case* (3) that there was no breach of duty to the plaintiff Joyce. *Rich* J. may, I think, be taken to have been of the same opinion as he did not say or suggest that he found any fault with the finding or reasoning of *Philp* J. *Dixon* J. (4) also expressed the view that if a passenger knowingly accepts the voluntary services of a driver affected by drink he cannot complain of improper driving caused by his condition, because it involves no breach of duty.

It is unnecessary to deal with the defences of *volenti non fit injuria* or of contributory negligence.

Appeal dismissed with costs.

Solicitor for the appellant: *Cyril Murphy.*
Solicitors for the respondent: *Sholto Douglas & Morris.*

B. J. J.

(1) (1948) 77 C.L.R., at p. 60.
(2) (1945) 77 C.L.R. 39.
(3) (1948) 77 C.L.R., at p. 46.
(4) (1948) 77 C.L.R., at p. 57.