# CASE AND COMMENT.

CONSTITUTIONAL LAW—TAXATION—PRIORITY—DOMINION—PROVINCE—INDIVISIBLE CROWN.—The judgment in *In re Silver Bros., Ld.*[1] may be said to add rather more to our knowledge of Canadian constitutional law than to the reputation of the Privy Council as the final interpreter of it. A question of legislative power, which did not have to be settled, was settled, and a decision on the question at issue was reached without reference to a relevant statute. In addition the Judicial Committee said some rather doubtful things about the indivisibility of the Crown in the Canadian constitution.

The question was to decide, as between the Dominion and the Province of Quebec, whether a claim for excise taxes on the part of the one should have priority over a claim for a corporation tax on the part of the other in the bankrupt estate of Silver Bros., Ld., there being insufficient assets to pay both claims and a statutory right to priority being asserted for each government. The Dominion priority was based upon section 17 of the *Special War Revenue Act*, 1915, and amendments,[2] which stated that "Notwithstanding the provisions of the *Bank Act* and the *Bankruptcy Act*, or any other statute or law," the liability to the Crown of any person for the payment of these excise taxes was to have priority over "all other claims of whatsoever kind heretofore or hereafter arising," certain law costs alone being excepted. The Provincial claim rested on article 1357 of the Revised Statutes of Quebec, 1909, which simply declared that "All sums due to the Crown in virtue of this section (the section dealing with taxes on commercial corporations) shall constitute a privileged debt ranking immediately after law costs." The trustee in bankruptcy ranked the Dominion claim first on his dividend sheet. The Province contested his ruling, and asked that the two claims be paid *pari passu*.

The wide variety of judicial opinion evoked by the case shows how little agreement there is upon these difficult problems of our constitutional law. The action of the trustee in preferring the Dominion claim was upheld by the Bankruptcy Court (Panneton J.)[3] on the ground that where there was a conflict between Dominion and Provincial legislation, as in this case, the former must prevail. He further held that section 16 of the Dominion *Interpreta-*

[1] [1932] A.C. 514; [1932] 2 D.L.R. 673.
[2] 5 Geo. V., c. 8; 12 & 13 Geo. V., c. 47. The section has since been repealed: 15 & 16 Geo. V., c. 26, s. 9.
[3] 7 C.B.R. 515.

*tion Act,*[4] which lays down the well-known rule that the Crown is not to be bound without express mention, was incompatible with section 17 of the *Special War Revenue Act,* and therefore the latter, being the later statute, must prevail: *posteriora prioribus derogant.* This judgment was reversed in the Quebec Court of Appeal,[5] Guerin, J. dissenting, on the ground that the rights of the Crown in the Province in matters of privileged debts could not be modified by a Dominion law—Dorin, J., in the course of his judgment, enunciating the novel and quite untenable doctrine that whether a Dominion statute prevailed over a conflicting Provincial one might depend upon which was put first on the statute book. The Court considered that the two privileges were created by authorities equally sovereign, and applied the rule of Art. 1985 of the Civil Code of Quebec to the effect that "Privileged claims of equal rank are paid rateably;" thus begging the question, which was, are the claims of equal rank? In the Supreme Court of Canada, Duff and Rinfret, JJ. dissenting,[6] the Quebec Court of Appeal was reversed and the original judgment of Panneton, J. restored. The majority of the learned judges considered that section 17 of the *Special War Revenue Act* was *intra vires* the Dominion; that the effect of the words "notwithstanding the provisions of the *Bank Act* and the *Bankruptcy Act,* or any other statute or law" was to exclude from operation here all other statutory provisions giving or preserving preferred claims, including Art. 1357 of R.S.Q. 1909; that the same words also excluded section 16 of the Dominion *Interpretation Act,* and therefore that the Dominion claim was to rank first. The dissenting judges, Duff and Rinefret, JJ., thought that the Dominion had no power to create an absolute priority; Duff, J. further contending that section 125 of the B.N.A. Act, which declares *inter alia* that property of a province shall be exempt from taxation, should be construed in a sense wide enough to include the *jus in re* which the Province of Quebec here claimed against the bankrupt estate.

This judgment of the Supreme Court of Canada in its turn was upset on appeal to the Judicial Committee,[7] not for the reason that the Dominion legislation was *ultra vires*—on the contrary their Lordships went out of their way to approve the opinion of the majority in the Supreme Court on this point—but because section 16 of the Dominion *Interpretation Act* operated, so it was held, to make section 17 of the *Special War Revenue Act* read as though

[4] R.S.C. 1906, c. 1, s. 1.
[5] 43 K.B. 234; [1929] 1 D.L.R. 681.
[6] [1929] S.C.R. 557; [1930] 1 D.L.R. 141.
[7] [1932] A.C. 514; [1932] 2 D.L.R. 673.

there were added to it the words "but this priority shall not operate against any right in the Crown in a Province, where such right would be diminished by the priority being asserted against it." The all-embracing words of the Dominion Act ("Notwithstanding the *Bank Act* and the *Bankruptcy Act*, or any other statute or law") were held not to exclude the *Interpretation Act*, since by the *ejusdem generis* rule the "other statutes or laws" must be of a like nature to the *Bank Act* and the *Bankruptcy Act*, i.e., must be statutes dealing with preferences.[8] According to this view the Province had given itself an unqualified priority, whereas the Dominion had asserted its priority only against persons other than the Province. There was therefore no conflict between the statutes. In strict logic this would seem to leave the Province with an over-riding priority, but their Lordships preferred not to discuss the point, seeing that counsel for the Province was content to ask that the debts rank *pari passu*.

One point of considerable importance seems to emerge—if somewhat indirectly—from this holding. The Dominion Parliament has the legislative power to enact that claims for taxes validly imposed by it shall take precedence over all other claims, whether of private persons or of the Crown in right of a Province; provided only, in the latter case, that the intention to affect the provincial crown be expressly stated. Viscount Dunedin remarked[9] that this would be true whether the Dominion priority were based on the bankruptcy power or whether it were considered as a natural concomitant of taxation. Two taxations, Dominion and Provincial, can stand side by side without interfering with each other, but where there are concomitant privileges of absolute priority they cannot subsist together and must clash; consequently the Dominion priority must prevail through the application of the rule that Dominion legislation is paramount in the case of overlapping and conflicting powers. It is curious to note that their Lordships were willing here to decide a point that need never have been discussed—precisely what they did not think it "advisable or proper" to do in the case of *Regent Taxi* v. *Petits Freres de Marie*,[10] which raised, but unfortunately did not settle, an extremely important problem in the Quebec law of delictual responsibility.

While this *dictum* is to be welcomed as clarifying our knowledge

[8] Just why these words did not therefore exclude the Provincial taxing statute was not discussed, yet the latter is certainly within the category of statutes "dealing with preferences."

[9] [1932] A.C. 514 at p. 521.

[10] [1932] A.C. 295.

of the Dominion's taxing powers, the reasons for the judgment of the Privy Council are open to serious criticism. Lord Dunedin argued that to give the Dominion an absolute priority would be to create a prejudice for the Provincial Crown which, in view of the Dominion *Interpretation Act,* could not be done without express words, and these were not found. He concluded that the Dominion had not asserted a priority against the Provincial Crown, and therefore that the Provincial and Dominion statutes could "live together." But the noble lord, while commenting upon the "scant attention" paid to this question of the *Interpretation Act* in the Courts below, and saying that it had not been dealt with in the "serious way which it demanded" [11] appears to have been ignorant of the fact that there exists in the Province of Quebec a rule of interpretation for provincial statutes affecting the Crown precisely similar to that found in the Dominion *Interpretation Act* and used by him against the Dominion. The Provincial rule is to be found both in Art. 9 of the Civil Code and in Art. 42 of the Quebec *Interpretation Act.* [12] It provides that "no statute shall affect the rights of the Crown unless they are specially included." This qualifies the Quebec claim to priority under Art. 1357 of R.S.Q. 1909, just as the Dominion priority under the *Special War Revenue Act* is qualified by the Dominion *Interpretation Act.* The express intention to affect the rights of the Crown is thus to be found in neither taxing statute. The waiver of privilege, as between the two governments, is mutual. A correct statement of the position therefore is this, that the Dominion has given itself a priority, but has said through its *Interpretation Act* that no right of a Province is to be affected, and the Province has given itself a priority, but has said through its *Interpretation Act* that no rights of the Dominion shall be affected. Since there is no attempt on the part of either government to assert a priority against the other, most of the *ratio decidendi* of their lordships' judgment is irrelevant to the case in point. A totally new question arises; viz., what happens when a Dominion claim for taxes, unprivileged as against a Province, conflicts with a Provincial claim for taxes, unprivileged as against the Dominion?

It may not be altogether a waste of time to venture upon a solution to this new problem. The solution must depend upon whether or not the two taxing statutes can, in Lord Dunedin's phrase,

[11] [1932] A.C. at p. 522. As a matter of fact, the attitude taken by the Canadian courts towards the Dominion *Interpretation Act* made it unnecessary to ask whether there was an equivalent rule in the Province.

[12] R.S.Q. 1925, c. 1, s. 42.

"live together." Both statutes being admittedly *intra vires* their respective parliaments, each must be enforced unless and until it comes into conflict with the other; and if there is a conflict the Dominion statute must prevail according to the established rule applicable in the case of overlapping powers. Is there a conflict in this instance? The Dominion has said, in so many words: "We have a privileged claim against Silver Bros. Ld. for sales tax, but this claim is not to affect any right in the Crown in the Province." The Province has said: "We have a privileged claim against Silver Bros. Ld. for corporation tax, but this claim is not to affect any right in the Crown in the Dominion." It is submitted that there is an irreconcilable conflict here, since the estate of Silver Bros. Ld. did not contain sufficient to pay both claims. Neither government can be paid anything without the right of the other being adversely affected. The right to $x$ dollars cannot "live together" with another person's right to $y$ dollars if the total amount of dollars available is less than $x$ *plus* $y$. Even if the claims are paid *pari passu* there is still less coming to each claimant than that to which they have a statutory right. The statutory incompatibility is therefore just as great as that existing where there are two claims to priority, and we now know that in such a case the Dominion prevails. Once the two claims are on an exactly equal footing, and there is not enough to go round, there is a conflict. It is only where, for example, the Province claims a priority and the Dominion waives its rights as against the Province that there is an absence of conflict —which is exactly the situation that the Privy Council, ignorant of the Quebec *Interpretation Act,* thought to exist in the *Silver Bros.* case. As has been said, logic demands that in such circumstances the only privileged claim should rank first, and this thought was obviously in Lord Dunedin's mind when he commented upon the fact that the province "was content that the two debts should rank *pari passu.*"

There is another aspect to this question of the *Interpretation Acts* which is important from the point of view of the Crown in Canada. We now know that the Dominion *Interpretation Act,* in safeguarding His Majesty from statutes not expressly mentioning him, afforded protection not only to the Dominion Crown but also to the Provincial Crown. But for this necessary implication of the judgment in *Silver Brothers* case it might have been interesting to ask whether this was ever the purpose or meaning of the Act. The same doubt would arise in regard to the Provincial Act: was it meant to protect the Dominion Crown? It is so much more reasonable to

suppose that each Parliament intended only to protect its own Crown rights. The doctrine of the indivisibility of the Crown, however, operated here so as to extend this ancient rule of the English common law to a federal system where the aspect of the Crown which is being affected is not the same as the aspect of the Crown which assented to the statute. This is understandable enough, if the doctrine of indivisibility is to be strictly adhered to. And yet, when counsel for the Dominion raised the contention that the rule about the Crown not being bound without express words applies only where the Crown is adversely affected, and argued that the statute in question (the *Special War Revenue Act*) was conferring a benefit, their lordships replied:[13]

> *quoad* the Crown in the Dominion of Canada the Special War Revenue Act confers a benefit, but *quoad* the Crown in the Province of Quebec it proposes to bind the Crown to its disadvantage. It is true that there is only one Crown, but as regards Crown revenues and Crown property by legislation assented to by the Crown there is a distinction made between the revenues and property in the Province and the revenues and property in the Dominion. There are two separate statutory purses. In each the ingathering and expending authority is different.

This passage seems necessarily to involve an abandonment of the doctrine of indivisibility which has just been applied in interpreting the *Interpretation Act*. For it is impossible to conceive of a single person being legally benefited and yet legally prejudiced by one and the same statutory enactment. There must be some sort of divided personality to permit of opposite effects being contemporaneous. *In re Silver Bros. Ld.* may therefore be cited as authority for the statements that the Crown is indivisible and that it is divisible.

It is submitted that it would have been less paradoxical to have held either that the Dominion *Interpretation Act*, section 16, referred only to statutes affecting the Dominion Crown, or else to have clung firmly to the doctrine of indivisibility and have held that, as the Crown received the same amount of money in any case from the bankrupt estate, the *Special War Revenue Act* did not adversely affect His Majesty and consequently escaped the application of the *Interpretation Act* altogether. To introduce the ill-considered remarks about ingathering and expending authorities merely confuses the issue, since while a Provincial tax-collector and a Dominion tax-collector may be different persons, they both collect His Majesty's taxes. The prejudice, if there be one, can only be to the collectors and not to His Majesty if money goes into one public account rather than another, for all "statutory purses" are Crown purses. And is not

[13] [1932] A.C. at p. 524.

the only authority which can expend money the Crown, even though the advice to spend may come from different ministers? The "expending authoritites" are therefore not different in the Dominion and in the Province, unless the words merely mean "persons with authority to recommend the expenditure of Crown monies," in which case they are irrelevant to the point in issue. The line of argument used in this part of the judgment appears to be quite incompatible with the picture of the Crown and its governments given in the classic case of *Williams* v. *Howarth*.[14] There, it will be remembered, the plaintiff was engaged by the New South Wales Government as a soldier at the rate of 10 shillings a day. During the period of his service he was paid only 5/6 a day by the Government which engaged him, the balance of 4/6 a day being paid by the Imperial Government. He claimed from the New South Wales Government the balance (4/6 a day) which they had contracted to pay him. The Privy Council held that whether the man was paid out of the funds granted to the Crown by the Imperial Parliament or out of the funds granted to the Crown by the Colonial Parliament was immaterial; the Crown had paid. No question could arise as to whether the two governments were agents of each other since both were agents of the Crown and the Crown had satisfied its obligation through one or other of them. Thus according to *Williams* v. *Howarth* it made no difference from which government the money came, but according to *In re Silver Bros. Ld.* it made all the difference into which government the money went. It benefits His Majesty to pay through one as much as through another, but injures him to receive through one rather than another.

These complications are likely to remain in our constitutional law unless we attain to the simplicity of the American theory which endows the States of the Union with sufficient corporate personality to enable them to sue and be sued. We have Maitland's authority[15] for the statement that this is the result to which English law would naturally have come, if the "foolish parson" in his legal shape of corporation sole had not led it astray. As it is we have no legal personality in our Provinces or in our Dominion; they are simply geographical and administrative areas. They own nothing and can exercise no rights.[16] The only "person" behind the governments is the single Crown. Consequently when the problem arises of deciding whether His Majesty's servants in the Dominion or his servants

[14] [1905] A.C. 551.
[15] *Collected Papers*, (1911), III p. 266.
[16] See the extensive discussion of this point in 34 Harv. L. Rev., p. 846, and Jour. Comp. Leg., 3rd Series, Part IV, p. 157.

in a Province have control over a particular piece of royal property, or have the power to advise His Majesty to make a particular law, we are driven to the device of a lawsuit where plaintiff and defendant are the same person or to the fiction that the indivisible Crown has "aspects" which differ from one another sufficiently to enable litigation to be carried on between them. This works well enough in daily practice, but leads courts and counsel to the difficulties illustrated in the *Silver Brothers* case, of interpreting and applying traditional rules regarding the Crown to political conditions differing radically from those under which they evolved. It is perhaps not surprising that the development of case-law on this point does not seem to be making for clarity.

In conclusion, the social utility of our existing methods of settling these disputes may be questioned when it takes nine years for sixteen judges in four courts to decide how to distribute some $2,000 of public money between two sets of public officials. It would be interesting to know what the public paid in fees, costs and ocean transport for this use of the machinery of justice.

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Tort—Imputed Negligence—Identification of Infant with Custodian.—A legitimate offspring of the bastard doctrine of identification brought forth by the Court of Common Pleas in 1849 in the case of *Thorogood* v. *Bryan*[1] recently had its day in court in England and was, it is to be hoped, as thoroughly interred by a Divisional Court[2] in 1932 as was its ancestor by the House of Lords in the *"Bernina"*[3] in 1888.

In *Thorogood* v. *Bryan* a passenger in a bus was killed as the result partly of the negligence of the driver of the bus in which he was being conveyed and partly that of the driver of the defendant's bus. It was held that a passenger is so far identified with the owner of the bus in which he is conveyed that the negligence of such owner or his servant is to be considered as that of the passenger, and the plaintiff, as Thorogood's personal representative, therefore was declared to have no cause of action. This decision established the proposition that negligence of another person, with whose acts he was assumedly identified, was imputable to a passenger in a vehicle

[1] (1849), 8 C.B. 115.
[2] *Oliver et al.* v. *Birmingham and Midland Motor Omnibus Co., Ltd.* (1932), 48 T.L.R. 540.
[3] *Mills* v. *Armstrong* (1888), 13 App. Cas. 1.

and available as a defence to an action by him against a negligent third party. It must be noted that the passenger was "identified with" and held bound by the acts of the driver though the latter was not his servant but that of the owner of the bus. This was an unwarranted extension of the principle of representation or vicarious liability, and the so-called doctrine of identification was repudiated in the *Bernina* in 1888. In that case a collision had occurred between two ships, the *Bushire* and the *Bernina* through the negligent navigation of each and two persons on board the *Bushire,* neither of whom were involved in the negligent navigation, were drowned. In actions for damage brought by their personal representatives against the owners of the *Bernina,* the latter rested "their defence solely on 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,"[4] and relied on *Thorogood* v. *Bryan.* The House of Lords held that the deceased were not identified in respect of negligence with those navigating the *Bushire* and that such negligence could not be imputed to them as contributory negligence disentitling them to recover against the owners of the *Bernina.* The doctrine of *Thorogood* v. *Bryan,* which Lopes, L.J., in the Court of Appeal[5] had characterized as "a fallacy and a fiction, contrary to sound law and opposed to every principle of justice," and of which Lindley, L.J.,[6] had said that "the proposition maintained in it is essentially unjust," "quite unintelligible" and "leads to results which are wholly untenable," was disapproved. Lord Herschell said:[7] "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 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 defence 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 recognised principles of law, or has any other effect than to furnish that defence, the

[4] Per Lord Herschell.
[5] 12 P.D. 58 at p. 59.
[6] *Ibid.,* at p. 87.
[7] (1888), 13 App. Cas. 1 at p. 7.

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 the passenger in a public vehicle and the driver of it certainly is not such as to fall within any of the recognised categories in which the act of one man is treated in law as the act of another."

Lord Watson said:[8] "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 . . . In my opinion an ordinary passenger by an omnibus, or by a ship, is not affected, either in a question with contributory wrongdoers 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."

In the result therefore the law now is, in the words of Salmond,[9] that "if a cab hired by the plaintiff comes into a collision with another vehicle by the negligence of both drivers, and the plaintiff is hurt, he can recover damages not only from his own driver, but also from the other"; and as held by the Supreme Court of Canada,[10] that the contributory negligence of the driver of a motor-car, when he is neither the servant nor the agent of a passenger injured, is no defence in an action brought by the latter against the party causing the accident. The test of the passenger's liability or of the imputability of contributory negligence to him, is the existence or exercise of a right of control over the manner of driving.[11] There must be something in the nature of the relationship of master and servant before the negligence of the driver can be imputed to the passenger.[12]

[8] *Ibid.*, at p. 18.

[9] Torts, 7th ed., p. 53. Accord: *Reynolds* v. *C.P.R.*, [1927] S.C.R. 505.

[10] *C.P.R.* v. *Smith* (1921), 62 Can. S.C.R. 134.

[11] See, generally, 7 C.E.D. (Ont.) 621-4; *Godfrey* v. *Cooper* (1920), 46 O.L.R. 565 (passengers in a "jitney"—no identification); *Gray* v. *Peterborough Radial Ry.* (1920), 47 O.L.R. 540; *Coop* v. *Robert Simpson Co.* (1918), 42 O.L.R. 488.

[12] See 6 C.E.D. (West) 367 and 3rd Supp. thereto, p. 460, for citation of cases. As to imputed negligence in the case of motor vehicle accidents, see generally, 8 C.E.D. (Ont.) 60; (1923), 1 C.B. Rev. 640; 78 U. Pa. L. Rev. 736; article, (1932), 41 Yale L.J. 831.

It is not within the scope of this comment to consider particular situations in which that relationship does not strictly exist but wherein a passenger may become associated with the negligence of a driver by reason of co-ownership[13] or joint enterprise[14] or negligently entrusting himself to the care of a known careless or drunken driver[15] or failure to protest against careless driving.[16]

The point is that negligence or contributory negligence can only be imputed to one personally blameless when the person negligent is one for whose acts he is personally responsible on the general principle of representation which has its roots in the existence of control over that other.[17] In default of such right of control or of liability on the ground of agency there is, in general, no principle upon which the contributory negligence of A may be imputed to B so as to bar B's action against C who has acted negligently towards him. At all events no mere identification of persons will suffice.

What then of the case of the alleged imputability to B of the careless conduct of the person (A) in whose charge he was when injured by the combined negligence of his custodian (A) and a third party (C)? Since the doctrine of identification is dead, and since the plaintiff was not in control of, but under the control of, the custodian, it would seem clear, on principle, that no carelessness on the part of the latter should defeat his action against the negligent third party.

It is submitted that this principle is clearly established in the case of persons *sui juris*. The purpose of the remainder of this comment is to discover the bearing of the doctrine of identification (*Thorogood* v. *Bryan*) on the case of an infant or person not *sui juris* who is injured by the combined negligence of his custodian and a third party. In particular the solution turns upon the decision of the Exchequer Chamber in *Waite* v. *North Eastern Ry.*,[18] which was based on *Thorogood* v. *Bryan* and the effect thereon of the overruling of the latter case by the House of Lords in the *Bernina*.

"Before the decision in the case of the *Bernina*, the case of *Thorogood* v. *Bryan*, though more often acquiesced in than ap-

[13] *Hammer* v. *Hammer*, [1929] 3 D.L.R. 273.
[14] *Dixon* v. *G.T.R.* (1920), 47 O.L.R. 115; 45 C.J. 1020, 1031; 38 Yale L. Jour. 81; 78 U. Pa. L. Rev. 270, 748.
[15] *Delaney* v. *City of Toronto* (1921), 49 O.L.R. 245; Cf. *Plant* v. *Normanby* (1905), 10 O.L.R. 16.
[16] *Smythe* v. *Campbell*, [1930] 4 D.L.R. 376; 65 O.L.R. 597; *Gauley* v. *C.P.R.*, 65 O.L.R. 477, per Latchford, C.J. Generally as to the position of passengers, see O'Connor: The Highway Traffic Act, pp. 117-24.
[17] Pollock on Torts, 13th ed., pp. 82-7; Salmond on Torts, 7th ed., pp. 110-12; Jenks: Digest, vol. 1, pp. 350-2.
[18] (1858), E.B. & E. 719.

proved, and occasionally dissented from, was generally followed as an authority, binding tribunals below the rank of a Court of Appeal. . . . While this was regarded as law, an insuperable obstacle was presented to the recovery of damages by a child injured through the contributory negligence of a nurse or guardian when under the actual control of such nurse or guardian."[19] It was during this period that *Waite's* case came up for decision. The plaintiff was a child of five years of age under the care of his grandmother who purchased a ticket for him and another for herself at a railway station. While crossing the line at the station in order to get their proper train they were both knocked down and the grandmother was killed, and the plaintiff injured, by another train. The jury found that the defendant railway was guilty of negligence and that the grandmother was also guilty of negligence contributing to the accident. There was no negligence on the part of the plaintiff. A verdict was entered for the plaintiff. In the Court of Queen's Bench,[20] a rule was made absolute directing a verdict for the defendants on the ground that the child was identified with the contributory negligence of the grandmother, and that in procuring the ticket for him she impliedly promised that she would take ordinary care of the child. This judgment was affirmed by the Court of Exchequer Chamber[21] in judgments holding that the child being unable to take care of himself was *identified* with the negligence of the grandmother and/or he could not recover because of the grandmother's breach of an implied contractual term that she would take ordinary care of him.

This decision was briefly discussed in the *Bernina*. Lord Herschell[22] thought it clearly distinguishable. Lord Bramwell[23] thought it could not survive the reversal of *Thorogood* v. *Bryan*. Lord Watson[24] pointed out that it was relied on as support for the argument that passengers were affected by the negligence of their driver by reason of their being for the time under his dominion but said that "there was no analogy between the position of an infant incapable of taking care of himself and that of a passenger *sui juris*."

Many text-writers have attempted to expound the real ground of *Waite's* case itself and the effect of the *Bernina* case upon it.

[19] Beven: Negligence, 4th ed., 233.
[20] 113 R.R. 850.
[21] (1859), E.B. & E. 728; 113 R.R. 855.
[22] 13 App. Cas. 1 at p. 10.
[23] *Ibid.*, at p. 16.
[24] *Ibid.*, at pp. 18-19.

Beven[25] thinks that the grandmother broke the contract in such circumstances as to discharge the company; but if considered from the aspect of tort then there was negligence in succession and that of the grandmother was the decisive factor. Pollock[26] puts it on the ground that, since the negligence of the grandmother was the proximate cause, the child was disentitled to recover for the reason that the company did not cause the injury. Whether this be the correct explanation of the decision or not, it does not elucidate the question as to whether a child may have imputed to him the merely contributory negligence of his custodian which is not the *proximate* cause.[27] Indeed the problem does not arise where the proximate cause is the act of the custodian for, apart from any question of imputability of a custodian's negligence, the child must in any event prove not merely negligence but decisive or proximate negligence. Kenny[28] indicates that it may still be valid on the ground of identification, notwithstanding the rejection of that doctrine in the *Bernina* case, and on the further ground of proximity of causation. Salmond[29] quite clearly believed that *Waite's* case was indistinguishable from *Thorogood* v. *Bryan* and fell along with it. Underhill[30] doubts whether *Waite's* case is consistent with the *Bernina* case, pointing out that the person in charge is not the agent of the child but of its parent or guardian.

In the United States, "it is generally held that the negligence of a parent which concurs with that of a third person in causing injury to a child is not imputed to the child. The same rule obtains with reference to the negligence of persons other than the parents who are charged with the care of the injured child at the time the injuries are sustained."[31] But there is also a minority rule, adhered to by the Courts of New York, Massachusetts and some other States, whereby the negligence of a parent or other person in charge of a young child is imputed to the child.[32]

In the recent English case,[33] referred to in the first paragraph, a Divisional Court (Swift and Macnaghten, JJ.) held (in the words of the headnote) that where, in crossing a road, a child in charge of an adult is injured by the negligent driving of a vehicle, the con-

[25] Negligence, 4th ed., pp. 226, 232.
[26] See 113 R.R. p. vi.; Pollock: Torts, 13th ed., p. 489. Accord: Jenks, Digest, vol. I, p. 333.
[27] Cf. Street's Foundations of Legal Liability, vol. I, p. 143.
[28] Select Cases on Torts, 5th ed., p. 586.
[29] Torts, 7th ed., p. 54.
[30] Torts, 11th ed., p. 182.
[31] 45 Corp. Jur. 1022. See also Burdick: Torts, 3rd ed., 501.
[32] *Ibid.*, p. 1024.
[33] *Oliver et al.* v. *Birmingham etc. Omnibus Co.* (1932), 48 T.L.R. 540.

tributory negligence of the adult is no defence to the child's claim for damages. The facts were that the plaintiff, a boy of four, was walking with his grandfather. The grandfather, with whom the boy was walking hand-in-hand, proceeded to cross a road without keeping a proper lookout, when he suddenly found himself confronted by an omnibus which had negligently approached without warning. The grandfather let go of the child's hand and jumped out of danger back to the sidewalk, but the child was struck and injured. In an action by the child, by his next friend, before Judge Ruegg of the Birmingham County Court, the jury found the defendant's driver guilty of negligence and the grandfather of contributory negligence and assessed the damages at £200. The defendants appealed on the ground that the learned judge had misdirected the jury in directing them that the contributory negligence of the infant plaintiff's grandfather was no bar to the plaintiff's claim, and further that, on the finding that the grandfather was guilty of contributory negligence, he wrongly gave judgment for the plaintiff. As counsel for the defendants put it, the real point was whether Judge Ruegg was right in the view expressed by him at the trial that, since the *Bernina* case, the decision in *Waite's* case was no longer law, and that therefore the infant could not be "identified" with the contributory negligence of the grandfather. Both Swift and Macnaghten, JJ., held that His Honour was correct in this view and that the effect of the *Bernina* case was to over-rule *Waite's* case as well as *Thorogood* v. *Bryan.*

Swift, J., held that whether *Waite's* case was regarded as turning on the terms of a contract or on the principle of identification, it must be taken as over-ruled by the *Bernina* case. Macnaghten, J., concurred in this view. Swift, J., thought there was no ground for the suggestion that *Waite's* case was to have the "effect that, whilst no other person is deprived of his rights against a third party because of the negligence of someone to whom he has committed the care of himself, an infant of such tender years that it cannot look after itself is deprived of those rights, and that for an infant of tender years the doctrine of identification continues." And Macnaghten, J., was prepared to hold that the doctrine of identification is equally inapplicable to other classes of people who are incapable of taking care of themselves on a public highway such as the aged, the halt, the maimed and the blind, and generally all who by reason of their infirmities have to go out under the care of somebody else.

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