TORT: NEGLIGENCE—VOLENTI NON FIT INIURIA.

A well-known proverb speaks of the respective merits of the pot and the kettle. In a recent High Court case,[1] one Joyce claimed from Kettle damages for injuries alleged to be caused by Kettle's negligent driving. For reasons about which it is interesting to speculate, neither the plaintiff nor the defendant gave evidence. All the material before the court was that at 5 p.m. the two men left home perfectly sober, Kettle at the wheel. The car two hours later was involved in an accident, when it hit a stationary truck and a fence. No one saw the accident. The passenger was taken to hospital—he smelt of alcohol but his injuries were such that his exact degree of sobriety was not ascertained. The driver was not found till two hours after the accident when he was found sleeping under the lantana bushes on a neighbouring allotment. He was then drunk.

In the state of the evidence, the utmost latitude was given to speculation. Was the driver guilty of negligence in driving the car ? Did the maxim *volenti non fit iniuria* apply, because the passenger knew that the driver was drunk and willingly accepted the risk ? Or was the passenger so drunk that he could not be said to appreciate the risk at all ?

In the Court of first instance, judgment was given for the defendant. On appeal the Full Court of the Queensland Supreme Court entered judgment for the plaintiff. The High Court by a majority restored the judgment for the defendant, on the ground that there was no clear evidence that the defendant was negligent. Latham C.J. considered that if the plaintiff was sober enough to appreciate the danger, then he was prevented from suing by the doctrine either of contributory negligence or of *volenti*. If he was not sober enough to appreciate the danger, then he was still guilty of contributory negligence, as the drunkenness was self-induced. Dixon J. (dissenting) in a penetrating judgment discussed the three ways in which this problem could be approached : (*a*) from the angle of duty—one who knowingly places himself in the position of a passenger in a vehicle driven by a drunken driver can expect only the care which such a driver could show—negligence connotes a duty to a particular person in a particular association ; (*b*) *volenti non fit iniuria* ; (*c*) contributory negligence. Dixon J. preferred the first formulation—the circumstances in which the driver accepts his passenger should determine the measure of the duty. It seems clear from the judgments that *Dann v. Hamilton*[2] was not regarded as an impressive authority.

G.W.P.

1. *Insurance Commissioner v. Joyce*, [1948] 2 A.L.R. 356.
2. [1939] 1 K.B. 509.