[HIGH COURT OF AUSTRALIA.]

BELLAMBI COAL COMPANY LIMITED . APPELLANTS;
DEFENDANTS,

AND

MURRAY . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 16, 17, 18, 19. *Nov.* 26.

Griffith C.J., Barton and Isaacs JJ.

Negligence — Employer and workman — Action by workman against employer— Negligence of person entrusted with superintendence— Volenti non fit injuria— Contributory negligence—Knowledge of dangerous nature of work—Seaman on vessel receiving cargo—Employers' Liability Act 1897 (*N.S. W.*), (*No.* 28 *of* 1897), *sec.* 4, *sub-secs.* (*vi.*), (*vii.*), (*viii.*)

A vessel moored alongside a jetty for the purpose of loading coal, having shipped part of the cargo, was hauled or warped along the jetty into a position in which the loading could be completed. In the process of warping, which was carried on under the personal superintendence of the captain, part of the tackle that was being used gave way suddenly under the strain, and, recoiling, struck and injured one of the ship's officers who was taking part in the operation. The appliances used were of the kind ordinarily used on similar vessels under similar circumstances, and had been used regularly for the same purpose on the same vessel for a considerable time, and occasionally under conditions involving a greater strain on the tackle than on the day of the accident, and had been periodically examined without giving any indication of weakness or deterioration. The officer injured had had many years of experience, and had taken the same part in the operation at the same place with the same appliances for several years. After the accident the broken portion, a large iron hook, showed a clean break, without any sign of flaw in the metal.

In an action by the officer against the owners, for negligence at common law and under the *Employers' Liability Act*, the captain gave evidence that the plaintiff had been standing unnecessarily in a dangerous position though he had been warned not to do so ; the plaintiff denied that the position was

dangerous or that he had been told that it was, and said that it was the only position in which he could properly do his work. The jury negatived contributory negligence and found that the hook was defective in condition and that the defendants had been negligent in allowing it to become so ; and also found, under the Act, negligence in a person entrusted with superintendence and in a person to whose orders the plaintiff was bound to conform.

Held, on the evidence, that it was not a case of *res ipsa loquitur*, and that as there was no evidence of negligence in the defendants in employing incompetent persons, or in supplying unsuitable or defective appliances, or in omitting to take reasonable care to see that the appliances were safe, and no evidence of any defect or insufficiency in the tackle, except the happening of the accident, the plaintiff was not entitled to recover at common law ; and

Held, further (*per Griffith* C.J. and *Barton* J., *Isaacs* J. dissenting), that the risk of the accident which happened was necessarily inherent in the occupation, and obvious to any person with the knowledge possessed by the plaintiff, and had not been increased by any breach of duty on the part of the defendants ; that the plaintiff must be taken to have voluntarily incurred the risk ; and that, even accepting the version of the plaintiff as to the failure of the captain to warn him, and taking the finding of the jury as to negligence on the part of a person entrusted with superintendence to refer to that failure, there was no duty in the captain to warn the plaintiff of a risk of which he was fully aware, and, therefore, that the plaintiff was not entitled to recover under the Act.

Per Isaacs J.—There was evidence upon which the jury could find that the defendants had adopted a method of working to which the plaintiff felt himself bound to conform, and which unnecessarily created a danger of which the plaintiff was ignorant, but of which the captain was aware, and had omitted to warn the plaintiff, and, there being no specific finding that the plaintiff voluntarily incurred the risk even if he knew of its existence, the findings of the jury on the questions arising under the *Employers' Liability Act* were supported by evidence, and in view of the course of the trial should not be disturbed. If the question of *volenti non fit injuria* were allowed to be raised on the appeal, the case should be sent to a re-trial on that point.

Decision of the Supreme Court : *Murray* v. *Bellambi Coal Co. Ltd.*, 9 S.R. (N.S.W.), 309, reversed, by a majority.

APPEAL from a decision of the Supreme Court of New South Wales on a motion to make absolute a rule *nisi* for a new trial in an action for negligence.

The respondent, a seaman in the employ of the appellants, who had been injured in the course of his employment by the accidental breaking of a hook used in hauling a hawser on board his ship, brought an action against the appellant company for

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negligence, one count at common law and 9 counts under the *Employers' Liability Act* 1897, sec. 4, sub-secs. vi., vii., and viii. The pleadings, course of proceedings, and the facts appearing in evidence are sufficiently stated in the judgments hereunder. At the trial a number of questions were submitted to the jury raising various issues at common law and under the Act. The jury assessed the damages at £750 on all counts, and at £627 on the counts under the *Employers' Liability Act* only, and *Cohen* J., who presided at the trial, entered a verdict for the plaintiff for the damages assessed in accordance with the answers of the jury to questions submitted to them. The appellants obtained a rule *nisi* for a new trial on the grounds (1) that the verdict and findings were against evidence and the weight of evidence; (2) that there was no evidence of negligence in the defendants; (3) that there was no evidence that the appliance used was defective or not reasonably fit for the purpose for which it was used; and (4) that there was no evidence that the respondent was ignorant of, or that the appellants knew or ought to have known of the unfitness of the appliance.

The Supreme Court, after argument, discharged the rule with costs: *Murray* v. *Bellambi Coal Co. Ltd.* (1). From that decision the present appeal was brought.

Broomfield and *D. G. Ferguson*, for the appellants. The plaintiff was not entitled to recover at common law. There was no evidence to support the finding of negligence in respect of the employment of persons to see to the fitness of the tackle, nor was there any evidence of negligence on the part of any person for whom the defendants were responsible, in respect of seeing to its fitness. The plaintiff sought to show that an unsuitable appliance was used, and called witnesses for that purpose, but the jury negatived that contention, and found that the only negligence was in not supplying tackle in reasonably good condition. There was no evidence to support the finding as to its condition. There was a regular proper examination, and there was no evidence of any defect or of anything to lead to the inference that there were defects which could have been discovered by

(1) 9 S.R. (N.S.W.), 309.

reasonable examination. There was no serious attempt made to establish such a case. In *Webb* v. *Rennie* (1), which was relied upon by the Supreme Court, there was evidence of negligence in not examining the appliance which broke and caused the injury, but it was assumed that, in the absence of evidence of a defect which would have been discovered by a reasonable examination, there was no negligence. The plaintiff must show by evidence that something more than was done should have been done by the defendant to avoid accident. The jury are not entitled to act on their own opinion without evidence.

[Isaacs J.—There must be evidence unless it is a matter within common knowledge.

Griffith C.J. referred to *Richardson* v. *Great Eastern Railway Co.* (2).]

The usual practice was followed here, and there was no evidence that anything beyond the ordinary was required. There was no evidence that continued use of the tackle with proper supervision would tend to weaken it, or that this tackle had been too long in use. The finding that the hook was not strong enough must be read in the light of the other finding as referring to condition, not calibre. Mere failure to test or examine for a defect would not be sufficient unless there were evidence that a test or examination would have brought some defect to light: *Moffatt* v. *Bateman* (3). The only evidence of insufficiency was the happening of the accident. This is not a case in which *res ipsa loquitur*.

[Barton J. referred to the *Navigation Act* 1901, sec. 34.]

Even if there was evidence of negligence sufficient to bring the case within the *Employers' Liability Act* if the plaintiff were a workman within its meaning, the evidence shows that the ship was not moored or at anchor within the meaning of sec. 4, and therefore sub-secs. vi., vii. and viii. of that section do not apply to him. The ship was being navigated and the work in which the plaintiff was engaged was connected with navigation, not with receiving or discharging cargo. Seamen are only within the Act when they are doing what may be classed as land work. No

(1) 4 F. & F., 608.
(2) 1 C.P.D., 342.
(3) L.R. 3 P.C., 115, at pp. 123, 124.

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negligence having been shown on the part of the defendants themselves, the defence of common employment applies and the plaintiff must fail. [They referred to *Chislett* v. *Macbeth & Co.* (1).

Reid K.C. (*J. A. Browne* with him), for the respondent. The jury found that the hook was not strong enough and that the defendants were negligent in not employing competent persons to see to its fitness. There was evidence to support that finding and it should not be disturbed. The evidence as to another kind of appliance was directed towards showing lack of strength in that which was used. It is immaterial whether the deficiency in strength was in the original hook or had arisen from use. Either is in accord with the jury's finding. The defendants were under a duty to have the appliances at all times efficient and safe. The jury have found that they were negligent in not doing so. The plaintiff is entitled to retain his verdict at common law. The happening of the accident under circumstances as to which the defendants had abundant means of knowledge, and which were under their control, imposed upon them the onus of explaining it in some way consistent with the exercise of due and proper care on their part: *Christie* v. *Griggs* (2). The jury were of opinion that they did not discharge that onus. The question of credibility was purely for them, and they may not have believed the evidence as to precautions taken by the defendants. There was no evidence of any unusual or unexpected strain. In *Richardson* v. *Great Eastern Railway Co.* (3) the ground of the decision was that an examination of the mechanism in every case would have been impracticable. There is no suggestion that that is the case here. The dangerous nature of the work in the present case and the risk of sudden strain threw a greater burden than usual upon the defendants. The evidence showed that the hook broke under circumstances in which a proper hook should not have broken. [He referred to *Scott* v. *London and St. Katherine Docks Co.* (4).]

[GRIFFITH C.J. referred to *Blyth* v. *Birmingham Waterworks Co.* (5).

(1) 25 T.L.R., 286.
(2) 2 Camp., 79.
(3) 1 C.P.D., 342.
(4) 3 H. & C., 596.
(5) 11 Ex., 781.

ISAACS J. referred to *Russell* v. *London and South Western Railway Co.* (1)].

The jury had a view of the vessel and were thus made aware of the nature of the strain cast upon the tackle. That is an important element in considering their findings of fact. It was not necessary for the plaintiff to give exact proof of a defect: *McArthur* v. *Dominion Cartridge Co.* (2); *Bridges* v. *North London Railway Co.* (3); *Hyman* v. *Nye* (4).

[GRIFFITH C.J.—The last case may have rested on the special duty of a person supplying a carriage for hire].

The duty of a master who employs a workman in dangerous work to guard against unnecessary danger is just as high. [He referred to *Hammack* v. *White* (5); *Beven on Negligence*, 3rd ed., pp. 116, 117; *Smith* v. *Baker & Sons* (6); *Wilson* v. *Merry* (7); *Murphy* v. *Phillips* (8).] It was a reasonable inference for the jury that the accident was caused by the negligent omission to provide for a proper examination of the appliances.

[GRIFFITH C.J.—A jury are not entitled to say of their own accord that the methods ordinarily followed by employers in similar circumstances show negligence on the part of the employer: *Titus* v. *Bradford, &c. Railroad Co.* (9) cited in *Beven on Negligence*, 3rd ed., p. 614.

ISAACS J. referred to *Hanrahan* v. *Ardnamult Steamship Co.* (10)].

As to the findings under the *Employers' Liability Act*, there was ample evidence to support the finding of negligence in a person entrusted with superintendence. The work was dangerous to the knowledge of the captain, and the plaintiff was ignorantly standing in a position of unnecessary danger, and should have received warning from the captain. The jury were entitled to accept any portions of the evidence, and might have believed the captain's statement as to the danger and disbelieved him as to his having warned the plaintiff. The omission to warn the plaintiff was negligent. [He referred to *Young* v. *Hoffman Manufacturing*

(1) 24 T.L.R., 548, at p. 551.
(2) (1905) A.C., 72.
(3) L.R. 7 H.L., 213.
(4) 6 Q.B.D., 685.
(5) 11 C.B.N.S., 588, at p. 592.
(6) (1891) A.C., 325.
(7) L.R., 1 Sc., 326.
(8) 35 L.T.N.S., 477.
(9) 136 Pa. St., 618; 20 Am. St. R. 944.
(10) 22 L.R. Ir., 55.

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Co. Ltd. (1); *Dawbarn on Employers' Liability Act*, 3rd ed., p. 43; *Rooney* v. *Allans* (2); *Burrell* v. *Tuohy* (3).] There was also evidence of negligence in superintendence in another sense, that is, the failure of the person charged with superintendence of the appliances to see that they were in a proper condition.

The plaintiff was clearly within sec. 4 of the Act. The operation of receiving cargo was still going on when the accident occurred. [He referred to *Lysons* v. *Andrew Knowles & Sons Ltd.*; *Stuart* v. *Nixon & Bruce* (4)].

Broomfield, in reply. The finding as to negligence in superintendence cannot be construed in the way suggested by the plaintiff. The plaintiff's case was that he was standing in a proper position. Even if the finding can be so read there was no evidence to support it. There was no duty to warn the plaintiff. He knew as much of the risks as the captain. He was not a novice or stranger: *Young* v. *Hoffman Manufacturing Co. Ltd.* (1); *Cribb* v. *Kynoch Ltd.* (5). [He referred also to *Hammack* v. *White* (6); *Manzoni* v. *Douglas* (7).]

[ISAACS J. referred to *Williams* v. *Birmingham Battery and Metal Co.* (8); *Readhead* v. *Midland Railway Co.* (9).]

Cur. adv. vult.

The following judgments were read:—

November 26.

GRIFFITH C.J. This was an action brought by the respondent, who had been second officer of the appellants' steam collier *Werfa*, for damages for injuries sustained by him while in their service. The first count of the declaration alleged negligence (1) in respect of the management of the vessel, (2) in and about providing unsafe and insufficient tackle, (3) in and about employing unskilful persons to work the tackle, (4) in and about the examining the tackle from time to time, and (5) in and about allowing it to become unsafe; by reason whereof a hook forming part of the

(1) (1907) 2 K.B., 646.
(2) 10 Retty, 1224.
(3) (1898) 2 I.R., 271.
(4) (1901) A.C., 79.
(5) (1907) 2 K.B., 548.
(6) 11 C.B.N.S., 592.
(7) 6 Q.B.D., 145, at p. 150.
(8) (1899) 2 Q.B., 338, at p. 345.
(9) L.R. 2 Q.B., 412, at p. 420.

tackle gave way, whereby the plaintiff, who was then lawfully upon the ship, was injured. The other counts of the declaration were based on the *Employers' Liability Act* of New South Wales, which extends to seamen. Counts 2 to 6 were based on the assumption that the plaintiff was not a seaman, but as they were abandoned I need not refer to them. The 7th and 8th counts alleged negligence in respect of a defect in the condition of the tackle. The 9th count alleged that personal injury was caused to the plaintiff by reason of the negligence of a person in the defendants' service who had superintendence intrusted to him whilst in the exercise of such superintendence. The 10th count set up negligence of a person in defendants' service to whose orders and directions the plaintiff was bound to conform, and did conform, and alleged that the injuries resulted from his having so conformed.

The defendants by their pleas put all material facts in issue. They also set up, under the plea of not guilty, contributory negligence on the part of the plaintiff.

The actual facts of the case are not substantially in dispute. The *Werfa* was a steam collier about 220 feet long, trading from Sydney to the Southern coal ports, one of which is South Bellambi. At this place there is no harbour, but the colliers lie and take in cargo at a jetty projecting into the open sea. On 6th June 1908 the *Werfa* was moored to the north side of the jetty, head to sea, having her port anchor down with 60 or 70 fathoms of cable out. She had taken in 300 or 400 tons of coal, and in order to complete her loading it became necessary to shift her further inshore, so as to bring another hatch opposite a coal-shoot on the jetty. For this purpose a ten-inch hawser was passed over the port side of the stern and made fast to a permanent attachment shorewards, so that by hauling in the hawser, the head lines and moorings being loosened, the vessel would be moved aft as desired. In order to connect the hawser with the steam winch a girdle or strop of five-inch rope was made fast around it. In a loop in the strop was fixed a large iron hook attached to an iron block with a single sheave, through which another five-inch rope, called the messenger rope, was rove, and made fast at one end, the other end being led forward to a winch,

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by which the hawser was drawn inboard in the usual manner. At the break of the poop was a post, called a Sampson post, round which the hawser, which lay along the poop deck, was coiled as it was drawn in, three men, of whom the plaintiff was one, being stationed on the poop near the Sampson post to coil it. There is generally some swell at the jetty, and sometimes a back-wash or under-tow from the shore, which occasionally puts a considerable jerking strain upon the hawser and the ropes and tackle by which it is hauled inboard. This method is the one usually followed in colliers trading to the open coal jetties on the coast of New South Wales, and had been followed in the case of the *Werfa* for the period of two years during which the plaintiff had been second officer. The operation had taken place on an average once or twice a week during that period.

The operation of warping a vessel, either to a wharf or jetty or forward or aft alongside a wharf or jetty, is a common one, with the incidents of which all seamen must be assumed to be acquainted. It is common knowledge that in such an operation a great strain is put upon the tackle, which has to bear the weight of the ship, and that if the rope or hawser or any other part of the hauling gear breaks, the broken ends will rebound and are likely to do serious injury to any one standing in the way. I should think that this was common knowledge to any one who had seen such an operation. Certainly such knowledge must be imputed to a certificated officer of many years' standing. It is equally obvious that if the operation is conducted in the open sea the risk of excessive or sudden strain is greater, and more caution is required, both on the part of those superintending the operation and those immediately taking part in the handling of the ropes and hawsers and other appliances.

On 6th June, while the operation was proceeding, the hook suddenly broke in the middle of the curve, and the block, which was suspended above the deck by the strain, flew forward towards the Sampson post, and struck the plaintiff, knocking him off the poop and inflicting serious injuries. The master of the ship was on the bridge and was superintending the operation, the men engaged in it being under his observation.

The case which the plaintiff endeavoured to establish by

evidence was that a hook was an unsuitable appliance for use as part of the tackle for warping a vessel astern under such circumstances of place and weather, and that instead of the hook and block actually used, an appliance called a shackle-block should have been used, which, it was said, would have been stronger and safer. Alternatively, he endeavoured to establish that the system of warping a ship astern by means of a hawser over the stern was defective and dangerous, and that the operation should have been conducted by means of a hawser attached to the piles of the jetty. The case on this point, however, broke down, and it was shown that the suggested method was impracticable. No evidence was offered to show incompetence on the part of the master or of any one who had charge of the appliances used on the ship, but it appears to have been contended that the defect, if any, in the hook could have been discovered by examination, and that the fact of its breaking was consequently evidence of negligence on the part of the person or persons who was or were charged with the duty of seeing to its fitness.

The following questions were submitted to the jury and answered as stated :—

3. Were the defendants negligent in employing an incompetent person to see to the fitness of the block for the purposes for which it was used ? Yes.

4. Were the defendants negligent in supplying a block not reasonably fit for such purposes ? Yes, as to condition. No, as to suitability.

5. Was there a defect in the block by reason of its not being a shackle-block or because of the block not being sufficiently strong ? The hook was not sufficiently strong.

6. Was there such a defect as in the last question mentioned ? Yes. And if there was did it remain undiscovered and unremedied through the negligence of a person in the employ of the defendants entrusted by them with the duty of seeing that the block was in proper condition ? Yes.

7. Was personal injury caused to the plaintiff by reason of the negligence of a person in the service of the defendants who had superintendence entrusted to him, and whilst in the exercise of such superintendence ? Yes.

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8. Was personal injury caused to the plaintiff by reason of the negligence of a person in the service of the defendants to whose orders and directions the plaintiff at the time of the injury was bound to conform and did conform, and did the injury result from his having so conformed? Yes.

9. Was the plaintiff guilty of contributory negligence in standing at the starboard side of the Sampson post when shifting the *Werfa?* No.

10. Was the plaintiff ignorant that the block was unfit for the purposes to which it was applied? Yes.

11. Did the defendants know or ought they to have known that it was so unfit? Yes.

It follows from the answers to questions 4 and 5 that the defect from which the accident arose was not a defect in the system of warping by means of a hook, but a defect in the particular hook itself.

The other forms of negligence laid in the first count were not supported by any findings, or by any evidence.

It is contended by the appellants that there was no evidence to support the finding as to negligence in supplying a hook not reasonably fit in condition.

As to the hook not being strong enough, it is of course apparent that it was not strong enough to bear the strain to which it was actually subjected, for if it had been it would not have broken. The hook was in fact of about the same diameter as the rope through the loop of which it was put and the messenger rope, and was apparently much stronger than other parts of the block to which it was attached. It appeared from the plaintiff's own evidence that it had been used for the same purpose once or twice a week for more than two years, and had been subjected to greater jerking strains than those to which it was subjected on the day of the accident. It was also sworn, and not contradicted, that hooks of the same size were used for larger and heavier ships, and it did not appear that such a hook, of that size and construction, had ever been known to break under such circumstances.

The default, therefore, not being in the system, and the unsuitability of the appliance being negatived, the only negligence that

could be suggested, so long as the system was in practice, was such as appeared from the fact of the accident. It was contended for the plaintiff that the mere fact of the accident showed that the tackle was defective and so established a *primâ facie* case of negligence, casting upon the defendants the burden of exculpating themselves. The only negligence suggested in this regard, the actual practice being followed, was the omission to take proper care to see that the hook was strong enough by periodically testing its strength and condition. There was nothing in the evidence to suggest that there was any patent defect in the condition of the hook, or any latent defect which could have been discovered by testing, or that the internal condition of such a hook can be discovered by such means. The only evidence on the point was that the fracture was a clean one.

Now, in order to constitute negligence as a ground of legal liability, there must be the omission to do something that a reasonable man would do, or the doing of something that a reasonable man would not do: *Blyth* v. *Birmingham Waterworks Co.* (1). So far as regards the first count, the second alternative is put out of the question by the jury's findings. What then ought a reasonable man to have done to assure himself that the hook was strong enough ? It was an appliance commonly used for the purpose. Similar hooks were commonly used for a like purpose, and the hook which broke had been subjected with safety to breaking and jerking strains greater than the strain to which it was exposed on the occasion of the accident. The law on the subject is thus stated by the Supreme Court of the United States in the case of *Washington and Georgetown Railroad Co.* v. *McDade* (2): —" Neither individuals or corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employés. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails

(1) 11 Ex., 781.

(2) 135 U.S., 554, at p. 570.

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in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been, known to him, and was unknown to the employé or servant."

The principle is more fully stated in a passage from the judgment of the Supreme Court of Pennsylvania: *Titus* v. *Bradford &c. Railroad Co.* (1), quoted in Mr. *Beven's* work on *Negligence* (3rd ed., p. 614).

"The master performs his duty when he furnishes machinery of ordinary character and reasonable safety, and the former is the test of the latter; for in regard to the style of implement or nature of the mode of performance of any work, 'reasonably safe' means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community."

I accept this as a correct statement of the law, with the qualification that the word "ordinary" is to be taken as meaning that the ordinary practice has been shown by experience to be in general not unsafe.

The dictum of Lord *Macnaghten* in *McArthur* v. *Dominion Cartridge Co.* (2), when applied to the facts of that case, is not inconsistent with this view, and the Irish case of *Hanrahan* v. *Andnamault Railway Co.* (3) strongly supports it.

(1) 20 Am. St. R., 554; 136 Pa. St., 618. (2) (1905) A.C., 72.
(3) 22 L.R. Ir., 55.

Applying these principles to the present case, I think that, so far as regards the defect in the condition of the hook, there was no evidence of any omission by the defendants to do anything which a reasonable man would do, and that the verdict on the first count cannot be supported. Although the case seems to have been presented to the jury as one in which *res ipsa loquitur*, that view was not pressed before us, and cannot in my opinion be accepted.

With regard to the counts under the *Employers' Liability Act* there is perhaps more difficulty. In order to understand this branch of the case it is necessary to refer in some detail to the position in which the plaintiff and the seamen engaged in coiling the hawser round the Sampson post were stationed. They were necessarily near the post. The seamen stood on the port side of the poop, the plaintiff standing on the starboard side of the post, on which side the hawser was led.

The plaintiff in his evidence deposed that during the whole period of his employment in the *Werfa* the operation had always been conducted in the same way, that he had always stood in the same place, and that neither the master or chief officer had ever given him instructions to the contrary. In cross-examination he said that he would have been of no assistance if he had stood at the other side of the post, that one man must stand on the starboard side of it, that the slack of the hawser could not be got in if all the men were on the same side, and that the block (if it gave way) would strike him if he were on the port side of the post. He also said that the block was three or four feet or more from him when it gave way, and that a block giving way under such circumstances might hit either side of the post. He did not pretend to be ignorant of the ordinary risk in this respect. A witness called by the plaintiff, as an expert, to prove that the appliance comprising a hook was unsuitable, said in cross-examination that under certain conditions both sides of the hawser would be safe or unsafe places for the men to stand, and that one could not say in what direction the block would fly in the event of a breakage. The only other witness called for the plaintiff on this part of the case was called as an expert to prove the unsuitability of the appliance and system. He said in cross-examination that it was

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not practicable for three men to stand on the same side of the rope in conducting such an operation. No evidence was offered as to negligence in directing the movements of the winch.

It seems to me that the only case of negligence in superintendence that could be suggested upon the case thus made by the plaintiff was of negligence in such superintendence as was necessary to secure the safe condition of the hook.

The defendants called evidence, in which they set up contributory negligence, the negligence suggested consisted in the plaintiff's standing in a position which he must have known to be dangerous. The master deposed that the plaintiff was standing in front (which I understand to mean in the direct line of pull) of the block, and that he had cautioned the plaintiff not to stand in front, but always to stand well on one side. He and other witnesses said that all the men should stand on the port side of the Sampson post.

The answer of the jury to the ninth question negatived this contributory negligence.

So far as regards the 7th and 8th counts the case turned upon the alleged defect in the hook, with which I have already dealt.

As to the 10th count, the only orders and directions that can be suggested, apart from the system itself, are such as may be inferred from the fact that the master did not direct the plaintiff to change his position while carrying out the work.

With regard to the answer to the eighth question, it is contended that the jury meant that the accident was caused by the omission of the master to direct the plaintff to change his position from one which the plaintiff did not, and the master did, think dangerous, and it is said that this point was put to them. If so, it must have been raised for the first time in the plaintiff's counsel's speech in reply. Two questions are thus raised: (1) whether this is the meaning of the jury's finding; and (2), if it is, whether there is any evidence to support it.

Mr. *Broomfield* says no such case was raised at the trial.

It is clear that it was not part of the plaintiff's original case; for if, as he maintained, the position taken up by him was the usual and only possible one, any such direction would have been absurd. On the other hand, the evidence that such a position

was usual and necessary, though dangerous, was very relevant to the contention that the system of warping by means of a hawser over the stern was defective and dangerous. But this contention was abandoned. The only other hypothesis in support of the view that this is what the jury meant is that the plaintiff, after the evidence was closed, abandoned his own contention as to the propriety of his occupying such a position and elected to rely upon that of the defendants.

If this view can be accepted, the question arises whether there was any evidence of a duty on the part of the master to give such a direction. The case, as already said, seems to have been conducted on the assumption that the happening of the accident was *primâ facie* evidence of negligence on the part of someone. If it was intended to rely on any negligence in superintendence in conducting the actual operation, as distinguished from the system, the suggestion must have been that, as the operation itself was superintended by the master, the negligence thus assumed, whatever it was, must have been his. It would be manifestly unfair to construe the verdict as finding a kind of negligence which had not been in debate at the trial.

In this view of the case the plaintiff is confronted with the same difficulties as in his case under the first count. The system adopted, including the standing of one man on the starboard side of the hawser, was shown by many years experience to be safe, so that the only fact which can be relied on to show negligence is the difference of opinion between the master and the plaintiff.

The plaintiff had held a foreign-going chief mate's certificate since 1897, and had had a second mate's certificate for 9 or 10 years. His general experience was, therefore, little, if at all, inferior to the master's, and must have included a knowledge of the common risk from the breaking of hawsers or other tackle exposed to a hauling strain in mooring operations. His opinion and that of the master differed as to the danger of the position in which he was standing. Under these circumstances, in order to make out a case of negligence by omission on the part of the master, it must be shown (1) that the position was in fact unnecessarily dangerous, and (2) that it was the duty of the master to warn the plaintiff of a danger which, according to the

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plaintiff's case, was an ordinary and necessary risk, assuming the system to be proper and the appliances used to be reasonably fit for the purpose.

To ascertain the master's duty regard must be had to the manner in which operations on shipboard are ordinarily carried on. In one sense the master is in charge of the ship, and all that goes on upon it. In this case the master had the anxious duty of watching the incoming swell and outgoing backwash and the consequent strain upon the hauling gear, and to see that the winch was manipulated accordingly. Was it also his duty to see that the men engaged in conducting such an ordinary operation were, in his opinion, properly stationed? There is no evidence to show that it is the practice of masters to supervise the positions of the men engaged in carrying out daily manœuvres with which they are as familiar as, if not more than, the master himself. I doubt whether a witness acquainted with ships and their management could be found to depose that it is the practice for a master under such circumstances to superintend either his seamen or officers in this sense. No such witness was called. I should have thought that it was a matter of common knowledge that there is no such practice. It is not for the jury, any more than it is for the Court, to invent new obligations to be imposed upon masters of ships. The existence of such obligations cannot be determined by *á priori* reasoning or abstract propositions, but must depend upon the lessons to be derived from actual experience. Otherwise, the only measure of duty would, as said by *Bowen* L.J. in *Thomas* v. *Quartermaine* (1), be the benevolence of a jury exercised at the expense of the pockets of other people.

I do not think that the Court ought to lay down that it is the duty of a master, on every occasion in which an officer of experience equal to his own differs from him in opinion as to the danger of standing in a particular place while conducting an operation of ordinary routine, to impose upon him his own opinion at the peril of being found guilty of negligence in superintendence.

If the kind of negligence now suggested to have been affirmed

(1) 18 Q.B.D., 685, at p. 693.

by the jury was intended by them, it is difficult to reconcile their finding with that on the issue of contributory negligence. Moreover, although they were asked to say whether the plaintiff was ignorant of the unfitness of the block and whether the defendants knew or ought to have known of it, no similar questions were put to them as to the plaintiff's and the master's respective knowledge of the danger of the plaintiff's position. If such findings were desired it is strange that the questions were not definitely asked.

In my opinion the finding on the 9th count can only be taken as referring to the negligence set up by the plaintiff, that is, either to the negligence found in answer to the third question, or to negligence in superintendence with regard to the general system of warping the vessel; as to both of which the plaintiff has failed. If, however, it is to be taken to bear the meaning now suggested, it cannot, in my opinion, be supported upon the evidence. When the facts show that the employer has greater means of knowledge than the employé a greater burden falls upon him. But if the knowledge is equal on both sides the burden is equal. An employer is not bound to make such provisions as to dispense with all forethought on the part of his men.

In such a case the observations of Lord *Watson* in *Smith* v. *Baker & Sons* (1), are applicable:—"There are many kinds of work in which danger is necessarily inherent, where precautions such as would ensure safety to the workman are either impossible, or would only be attainable at an expense altogether incommensurate with the end to be accomplished. In all such cases the workman must rely upon his own nerve and skill; and, in the absence of express stipulation to the contrary, the risk is held to be with him and not with the employer."

The question is in each case one of fact, and in my judgment the facts in the present case point to one conclusion only—that the plaintiff knew just as much about the danger as the master, and voluntarily undertook the risk of standing where he did.

To use the words of Lord *Halsbury* L.C. in *Membery* v. *Great Western Railway Co.* (2):—"The man obviously encountered a

(1) (1891) A.C., 325, at p. 356. (2) 14 App. Cas., 179, at p. 186.

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known risk which he had encountered for seven"—in this case, two—"years, and therefore is not entitled to recover, upon the ground that he was voluntarily incurring the risk—he knew that the risk existed."

If, as the plaintiff maintained, it was necessary for him to stand where he did, the risk was one incidental to his occupation. If, on the other hand, it was not necessary, he voluntarily exposed himself to the unnecessary risk.

I think, therefore, that the appeal must be allowed.

BARTON J. In this case the defendant company appeal against the judgment of the Supreme Court of this State refusing to disturb a verdict given against them in an action by the plaintiff, now respondent, for negligence causing injury to him. The claim was made both under the common law and under the *Employers' Liability Act*, No. 28 of 1897. The first or common law count is for injury caused by the negligent breach of the following duties: (1) proper care, control and management of a ship, (2) provision of proper, safe and sufficient tackle and gear on board, (3) the employment of skilful and sufficient persons to work the same, (4) the examining of the same from time to time, and (5) the keeping of the same in a proper and safe state of repair. It was alleged that the plaintiff was ignorant of, but that the defendants knew or ought to have known of each of these breaches of duty. The real attack was as to the 2nd, 4th and 5th of them. On the appeal it was not seriously contended that the appellants had not used due care in their choice of a shipmaster, or that the master, who of course supervised the operation of moving the *Werfa* aft at the jetty for the purpose of bringing her main hatch under the shoot, was in any way incompetent to be placed in charge of the ship. Nor could it be maintained, in the absence of any evidence of lack of competence, that on the occasion of the accident—assuming for the moment that evidence of some negligent act or omission by the master had been given—the act or omission itself was evidence against the appellants of negligent selection of a master. Such an act or omission could be made available under the counts based on the *Employers' Liability Act*, but as negligence of a fellow servant

it could not go to make a case under the common law count. Under that count, then, the respondent's claim primarily rests on the insufficiency of the appliance furnished—namely, the hook which broke—either as it was originally supplied, or as it was on the day of the accident. In answer to specific questions the jury found that the appellants were negligent in supplying a block not reasonably fit for its purpose in point of condition. They upheld its suitability apart from the question of its state on the day. It was defective, they found, because it was not strong enough. That fact was obvious, seeing that the hook of the block failed to resist the strain put upon it, and that failure caused the injury to the respondent. The finding was, then, that the appellants were guilty of a breach of duty in supplying a hook deficient in strength for use on 6th June 1908. This is not a case in which the doctrine of *res ipsa loquitur* could be held to apply. Looking at the nature of the employers' duty, the inference of negligence cannot be drawn from the mere breaking of the hook without proof of other circumstances explicitly showing some breach by the appellants of that duty. It was, I believe, urged at the trial that the case came within the doctrine. That contention, however, was, correctly as I think, relinquished on the appeal. Mr. *Beven,* indeed, in his work on *Negligence,* 3rd ed., p. 130, says that the maxim does not apply in master and servant cases. Whether that is a correct view of the law in all such cases may be open to argument. But it is enough to say that there is no room for the application of the doctrine in the present instance.

The respondent in his evidence could not give, nor does there appear in the case, any reason for the failure of the hook on 6th June 1908 except the strain put upon it; a jerking strain arising from the backwash of the surge taking the ship forward and outward again. This strain was not as great that day as it had been previously, so that in its use theretofore, for two years or more, this appliance, which had been used in the same way at the same jetty at least once a week, had answered every test of strength to which this regular use had subjected it, even when the test of the jerking strain had been greater than it had now to bear. There was no evidence that it had worn thin; where it

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broke the fracture was a clean one, and the appellants had no reason to doubt its efficiency on that day, for there is no evidence of any circumstance tending to raise such a doubt. The defect, if there was one, was latent, and it is impossible to say that any examination in the meantime would have disclosed it. But a defendant cannot be held liable for a defect as existing through his negligence if he has not interfered to alter the condition of a thing habitually used with safety in the past, unless the mischief could reasonably have been foreseen. If there is nothing to show that it could have been foreseen there is no evidence of negligence. It was indeed contended that the appliance should have been examined and tested from time to time. It is indisputable that, as laid down by Lord *Cranworth* C., in *Paterson* v. *Wallace & Co.* (1), "It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure when in fact the master knows, or ought to know, that it is not so": and the jury have found that the appellants did know, or ought to have known, that the block, meaning no doubt the hook, was "unfit." The word "unfit" must be read with their prior finding that, though the hook was suitable, it was unfit as to condition, and in view of its adequacy up to the last trip before 6th June, that must mean an unfitness on that day, for a finding of unfitness extending to the time of any prior user would have been merely imaginative. There is not a shred of evidence to support the finding that the appellants knew of this unfitness. And to show that they ought to have known it there should have been at least evidence of the omission of some precaution that a reasonable man would have taken to ascertain the condition of the appliance. The chief officer examined the "messenger," the block, &c., after each trip. He did so after the last trip previous to the accident. To him at least no defect was visible. The appliance had been sent to the blacksmith, and if necessary repaired, every six months, while the ship was laid up for her general overhaul. Some alteration had been made in it at the plaintiff's request. But it is for the plaintiff to "show with reasonable certainty what particular precaution should have been taken": *per Willes* J., *Daniel* v.

(1) 1 Macq. H.L. Cas., 748, at 751.

Metropolitan Railway Co. (1). Not only was there no such evidence, but even on the argument no suggestion was made of any reasonable means by which the appellants could have discovered a defect. As to the suggestion that the appliance should have been tested, it had at least once every week been tested, and sometimes at an even greater strain, in the most practical and searching way, that is, by subjecting it to similar strains in the course of loading. There was absolutely nothing either in the previous use of the hook or in its apparent condition to suggest a suspicion that it was unsound in itself or insufficiently strong for its accustomed work on 6th June. If a defect existed even a week before that day, it was latent, and mischief as the result of its use could not have been foreseen. In the words of *Smith* J., delivering the judgment of the Exchequer Chamber in *Redhead* v. *Midland Railway Co.* (2): "From the nature of things, defects must exist which no skill can detect, and the effects of which no foresight can avert." On the respondent's own case, this was at the best the position laid before the jury.

I do not attach any importance to the evidence of Captains Hay and Bird, retired shipmasters, given for the respondent, because it was entirely directed to the purpose of showing that the appliance and the system used were unsuitable. There was countervailing testimony on these points, and the findings of the jury disposed of both contentions in favor of the appellants. Moreover this system of using the hook attached to a block was apparently general in the course of loading the steamers with coal as they lay at the open jetties on the South coast. No larger or thicker hook had been used for the purpose ; on the other hand, hooks of no larger dimensions, and apparently no stronger, had been safely used for the same purpose on vessels larger than the *Werfa*. No instance was quoted of the use in this trade of a shackle-block such as the two captains suggested, or of any other system than the one adopted. On the evidence given I cannot find that there was any case on which the jury could have reasonably found the appellants guilty of negligence at common law.

But there is a further ground on which it appears to me that

(1) L.R. 3 C.P., 216, at p. 222, affirmed L.R. 5 H.L., 45.
(2) 9 B. & S., 519.

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the appeal must succeed, and it covers the respondent's case both under the common law count and under the *Employers' Liability Act*. I mean, on the 7th, 8th, 9th and 10th counts; for the counts alleging that the respondent was "a workman other than a seaman" were abandoned. The *Employers' Liability Act* renders it no longer possible in certain specified circumstances for an employer to raise what is known as the defence of common employment. *Smith* J., in *Weblin* v. *Ballard* (1), and Lord *Esher* M.R. in *Thomas* v. *Quartermaine* (2), appear to have thought that the Act also took away the defence under the maxim *volenti non fit injuria*, but in the later case of *Yarmouth* v. *France* (3), the last-named Judge expresses without hesitation the opinion that the Act "does not prevent the proper application of the maxim." In his judgment in *Thomas* v. *Quartermaine*, *Bowen* L.J. expresses the latter view with emphasis. He says (4):—"An enactment which distinctly declares that the workman is to have the same rights as if he were not a workman, cannot, except by violent distension of its terms, be strained into an enactment that the workman is to have the same rights as if he were not a workman, and other rights in addition. It cannot in the case of a defect in the employer's works be distorted into the meaning that a new standard of duty is to be imposed on the employer as regards a workman, which would not exist as regards anybody else. If the language of the section were not even so precise, the point would be concluded, one might well think, by the observation that if the Act had intended to prescribe some new measure of duty, the least one might expect would be that it should define it. What sort of duty could that be which does not exist at law, and which is not defined by Statute? . . . The true view in my opinion is, that the Act, with certain exceptions, has placed the workman in a position as advantageous as but not better than that of the rest of the world who use the master's premises at his invitation on business." To the same effect *Fry* L.J. says (5):—"If the workman is to have the same rights as if he were not a workman, whose rights is he

(1) 17 Q.B.D., 122.
(2) 18 Q.B.D., 685.
(3) 19 Q.B.D., 647, at p. 654.
(4) 18 Q.B.D., 685, at pp. 692-3.
(5) 18 Q.B.D., 685, at p. 700.

to have? Who are we to suppose him to be? I think that we ought to consider him to be a member of the public entering on the defendant's property by his invitation." And as under such circumstances the maxim would in a proper case apply, both of the Lords Justices held that it could be applied in a case under the *Employers' Liability Act*, and they proceeded to apply it to the facts before them. In the case of *Yarmouth* v. *France* (1), where the plaintiff sued under the Act, the injury was inflicted by a vicious horse, which, for the purpose of the case, the majority of the Court of Appeal held to be part of the "plant" used in the defendant's business of a wharfinger, the vice being, as they also held, a "defect" in that plant. The plaintiff objected to drive this horse, and told the foreman of the stable that it was unfit to be driven. The foreman replied that the plaintiff must go on driving it, and that if any accident happened his employer would be responsible. The horse, which the plaintiff continued to drive as he was ordered, kicked him and broke his leg. The majority of the Court of Appeal (Lord *Esher* M.R. and *Lindley* L.J.) held that on these facts there was evidence of negligence on the part of the foreman, on which a jury might find the defendant liable, and the circumstances did not conclusively show that the risk was voluntarily undertaken by the plaintiff, inasmuch as there was evidence from which a jury might reasonably conclude that the plaintiff was not *volens*. *Lindley* L.J. took it as settled (*inter alia*) by *Thomas* v. *Quartermaine* (2) that in each of the cases specified in sec. 1 of the English Act (sec. 4 of the N.S.W. Statute, which incorporates, on terms similar to those given to ordinary workmen, remedies for workmen who are seamen when the ship is moored or at anchor receiving or discharging cargo, coals, &c.), "the maxim, *Volenti non fit injuria* is applicable, and that, if a workman, knowing and appreciating the danger and the risk, elects voluntarily to encounter them, he can no more maintain an action founded upon the Statute than he can in cases to which the Statute has no application" (3). He goes on to say that the question whether in any case a plaintiff was *volens* or *nolens* is a question of fact and not of law. In the

(1) 19 Q.B.D., 647. (2) 18 Q.B.D., 685.
(1) 19 Q.B.D., 647, at p. 659.

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case of *Smith* v. *Baker & Sons* (1) the House of Lords recognized that the defence founded on the maxim was not taken away by the *Employers' Liability Act*, and Lord *Watson* said that in the circumstances of that case the question whether the plaintiff had accepted the risk was one of fact; that there was no arbitrary rule of law which decided it; while Lord *Herschell* said that he found himself unable to concur in the view that this question could properly be held, under the circumstances, as a matter of law. These utterances, it will be observed, are confined to the circumstances of the particular case. There the danger arose from an operation in another department of the works, under the same employer, which it was impossible for the workman to influence by any action of his own. Moreover, one of his fellow workmen had in the plaintiff's hearing complained to the ganger of the danger of this operation, and the plaintiff himself had told the person in charge of it that it was not safe. It was open to the jury to conclude that the plaintiff had gone on with his work under protest. Though the employment was a risky one, and though he had undertaken it with full knowledge of its risks, the jury found that he had not done so voluntarily. In addition, they had found negligence of the employer in supplying unfit and defective plant, and in failing to remedy the defect, and that finding, not having been impeached in the County Court where the action was tried, could not under the *County Courts Act* be made the subject of an appeal. Given this negligence, the House of Lords held that the jury's finding that the plaintiff did not voluntarily undertake the risk of injury was justified, and therefore they declined to apply the maxim. In that case it was for the jury alone to pronounce, on the whole of the evidence, that the risk had or had not been voluntarily undertaken. It was a pure question of fact, for plainly the evidence was not all one way. The case does not decide that where the evidence points only to one conclusion—where there is no evidence whatever that a plaintiff's action was other than voluntary—it is not open to a Court of Appeal to say that it was so and to decide accordingly. This is to my mind the clear meaning of *Bowen* L.J. in the judgment already quoted. " Where," he says, (2) " the danger is one

(1) (1891) A.C., 325.

(2) 18 Q.B.D., 685, at p. 697.

incident to a perfectly lawful use of his own premises, neither contrary to Statute nor common law, where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier at all. Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open but one, viz., that the risk has been voluntarily encountered, the defence seems to me complete." *Membery* v. *Great Western Railway Co.* (1) was an action for negligence at common law. A contractor had agreed with the defendant company to shunt their trucks on their line, the contractor to find the men and horses, and the company to provide boys to assist, if they had them; if they had not, the shunting was to be done without boys. To a man shunting trucks without assistance there was danger. The plaintiff had for years been shunting trucks for the contractor, sometimes with and sometimes without boys. On the night in question he asked the defendant's foreman for a boy, and was told, "When I have got one you shall have one." He went on with his work alone, and without any negligence on his part was injured by a truck running over him. The Court of Appeal held, first, that there was no evidence of breach of any duty on the part of the company, and secondly, that the injured man had with full knowledge of the danger of the employment voluntarily encountered its risks. On this aspect of the case, *Bowen* L.J. said (2): "If a man voluntarily incurred a risk he could not afterwards complain. The question whether his conduct was voluntary or not was an issue of fact, but it was not always for the jury. If the evidence was all one way it was for the Judge to withdraw the case from them. If there was conflicting evidence, as if, for instance, there was evidence of compulsion, as in *Yarmouth* v. *France* (3), the question must be left to the jury. The plaintiff here was not compelled. He never complained to his master. He therefore solely brought the accident upon himself." Both the Master of the Rolls (Lord *Esher*) and *Lindley* L.J. having

(1) 4 T.L.R., 504.

(2) 4 T.L.R., 504, at p. 505.

(3) 19 Q.B.D., 647.

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also held there was no evidence of compulsion, the verdict of the jury for the plaintiff was set aside and judgment was entered for the defendants. The case went to the House of Lords (1) and the plaintiff's appeal was dismissed. The House was unanimous that there was no evidence of any negligence or breach of duty on the part of the railway company towards the plaintiff. Lord *Halsbury* L.C. and Lord *Bramwell* held that the plaintiff was also prevented from succeeding because he had voluntarily done the work with full knowledge of the risk he ran. Lord *Halsbury* said (2): "The man obviously encountered a known risk which he had encountered for a period of seven years, and therefore he is not entitled to recover, upon the ground that he was voluntarily incurring the risk." Both the Lord Chancellor and Lord *Bramwell* held that the claim against the company failed on each ground. Lord *Herschell* decided against the plaintiff on the first ground, and thought it unnecessary for him to consider whether it was a case to which the maxim applied, but he added (3): "I do not mean for a moment to suggest that I entertain any doubt that in this case it would be applicable." In this case the defendant company had called no evidence at the trial. But there was no suggestion either in the Court of Appeal or afterwards in the House of Lords that there is anything to prevent a Court from deciding that there is in law no case to go to a jury where the facts point only to the conclusion that the injured person has voluntarily encountered the danger and the risk. Had there been any evidence that the plaintiff acted on compulsion, or that his action was in any way not entirely voluntary—such as there was in *Smith* v. *Baker & Sons* (4)—the verdict of the jury, so far as this defence was concerned, would not have been disturbed, though doubtless it would have been set aside on the ground that the plaintiff had failed to prove a duty, or a breach of a duty, on the part of the defendant company.

These cases sufficiently elucidate the principles to be applied here. A perception of danger, without complete comprehension of the risk, is in a sense knowledge. But that mere knowledge is not sufficient, for it is consistent with it that the whole risk was

(1) 14 App. Cas., 179.
(2) 14 App. Cas., 179, at p. 186.
(3) 14 App. Cas., 179, at p. 192
(4) (1891) A.C., 325.

not voluntarily encountered. But where the danger or risk is so apparent that it must be assumed to have been appreciated, and has been undertaken without protest or sign of unwillingness, it has been undertaken knowingly and voluntarily. The case is, of course, stronger where the risk has been so undertaken habitually. In any such case, a person injured in the course of an operation which he thus undertakes cannot sue another in respect of an injury which is the result of his acceptance of the risk. And the case of *Thomas* v. *Quartermaine* (1) makes it clear that this disability exists "quite apart from the relation of master and servant." But where, coupled with evidence of knowledge and of voluntary action, there is some evidence on which a jury could reasonably, even if mistakenly, base the conclusion that, though danger was apparent, its extent was not fully known to the plaintiff, or if known not fully comprehended, or that his conduct in incurring it was not in truth entirely voluntary, the question is for the jury and must be left to them to decide. Where, however, there is no evidence on which any such conclusion can rest, there is no case for the jury.

What are the facts then to which the principles stated ought to be applied ?

The operation in the course of which the accident happened was one with which the respondent was familiar. He had been on the *Werfa* as second mate over two years. During the whole period of his employment the *Werfa* had been engaged in the South coast colliery trade, in the course of which she loaded with coals at the South Bellambi jetty, the scene of the injury, at least once and generally twice a week. On each of these occasions the operation of shifting the vessel aft to bring the fore part of the main hatch under a coal-shoot took place, in accordance with the description already given by the Chief Justice. The respondent himself put the hook into the strop. He says: "It had always been done in that way while I was on the ship, and the whole operation was the same. I occupied the same position on the poop near the Sampson post, alongside. I was in view of the captain, and was in most cases on previous occasions. The captain never gave me instructions to do it in any other way, nor

(1) 18 Q.B.D., 685, at p. 699.

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did the chief officer. That was the system of working. . . . . "I have done the same work all the time that I have been going to the jetty. . . . I have been working with that hook all the time that I have been there. . . . . I always work in that position at Bellambi. Sometimes I am on that job twice a week. I suppose I would be on it fifty times a year, perhaps more." The respondent had never made any complaint of the hook or gear, though he had asked for the one alteration which had been made, and which is not said to have conduced to the accident in any way; nor does he appear to have objected to taking part in the operation either on the score of danger or otherwise. He must have known that there was at times a very heavy strain—"a tremendous jerking strain"—on the hook. It was the respondent's habit to keep his eyes on the gear and report to the chief officer if anything was wrong, but he had made no report to the chief officer (presumably as to the block and hook).

Now the respondent was no inexperienced person. He had held a first mate's foreign going certificate from June 1897. He had held a second mate's certificate for nine or ten years. He had been acting as a mate for fifteen years. Taking these facts together with his experience of the same operation, with the same gear, on the same ship for over two years, throughout which he had taken the same part in the operation, and the fact that he found the system at work when he undertook his service with the appellants in the *Werfa*, can any question be raised as to the extent of his knowledge and comprehension of the operation and any danger inherent in it, or as to his having encountered these dangers of his own free will and without a trace of compulsion? I think not. The dangers of the operation were such as are spoken of by Lord *Watson* in *Smith* v. *Baker & Sons* (1) as "necessarily inherent" in the work. There is always a risk of a strong apparatus giving way under a sudden strain. There is always, too, a risk of accident owing to defects which the employer, or he whom the employer places in charge, does not know and which he has no means of knowing: defects which develop suddenly, or flaws which continuous trial

(1) (1891) A.C., 325.

fails to discover. Further the master is liable for all unnecessary danger in the system of work, but not if the servant knows or can estimate it as well as the master. The plaintiff's case then discloses clearly that the injury of which he complains resulted from his voluntary acceptance of a risk the nature and extent of which he knew and understood.

I doubt whether it is necessary to add anything as to the seventh finding of the jury, that namely as to the 7th count, on which the respondent's counsel chiefly relied before us. The jury, as already pointed out, negatived contributory negligence on the part of the respondent in respect of the only act relied on by the defence to show it, that is his standing on the starboard side of the Sampson post while the block was being drawn towards him. They found however on the 7th count that "personal injury was caused to the plaintiff by reason of the negligence of a person in the service of the defendants who had superintendence entrusted to him, whilst in the exercise of such superintendence." There is no part of the evidence that I can discover which is referable to that finding, unless it be the fact that the captain failed to caution the respondent against standing where he did: a caution which the captain, contradicting the respondent, says that he gave. Mr. *Reid* rightly says that we must take the jury to have believed the respondent as against the captain in this, virtually the only point of real conflict between them, and that the 7th finding relates to this absence of any caution. Taking it to be so, first there appears to be a fundamental fact which in denying contributory negligence the jury must have found not to have existed, and yet the existence of which was involved in their affirmance of the negligence charged in the 7th count. That fact is that the side of the post on which the respondent stood was the dangerous, or more dangerous side. If he was not guilty of contributory negligence, the starboard side was not the point of the greater danger. But if the 7th finding is justified, the respondent was more endangered by standing there, and for that reason and that only the captain was negligent in failing to warn him. These things cannot both be true. But to my mind the finding on the 7th count becomes immaterial if the respondent, although not guilty

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of contributory negligence, voluntarily and with full knowledge risked the danger by conducting the operation as he did. That defence is quite apart from the principle of contributory negligence. *Bowen* L.J. says in *Thomas* v. *Quartermaine* (1), "the doctrine of *volenti non fit injuria* stands outside the defence of contributory negligence and is in no way limited by it. In individual instances the two ideas sometimes seem to cover the same ground, but carelessness is not the same thing as intelligent choice, and the Latin maxim often applies when there has been no carelessness at all. . . . These two defences . . . are quite different, and both, in my opinion, are left open to an employer, if sued under the *Employers' Liability Act*." As the defence of *volenti non fit injuria* applies in the present case, consistent as it is with the absence of contributory negligence, because a risk may be knowingly and willingly encountered by one who nevertheless takes due care in the operation undertaken, the question whether the captain warned the respondent or not and the finding upon it are alike immaterial. "Nor is it the duty of the master to admonish his servant to be careful, when the servant well knows his danger and the importance of using care to avoid it." So said the Supreme Court of Massachusetts in *Ciriack* v. *Merchants' Woollen Co.* (2), and nothing can be sounder sense. Mr. *Broomfield* put it pithily when he asked what duty there was on the appellants or their ship-captain to warn the respondent, seeing that he knew as much as they did after his two years' experience of "that very job."

On the whole case, then, I am of opinion that the appeal must succeed. But now that the defendant company have established their defence at law, I hope that they will take the position and the misfortune of this officer into full and humane consideration, remembering that their immunity is due to the absence of a Workmen's Compensation Act in this State.

ISAACS J. The appellants have rested their case upon the contention that there was no evidence upon which the jury could reasonably find a verdict for the plaintiff upon any count.

The respondent's ultimate position was that there was evidence

(1) 18 Q.B.D., 685, at pp. 697-8. (2) 151 Mass., 152, at p. 155.

upon three of the counts, namely, the first, the eighth and the ninth, sufficient to sustain the findings in his favour.

The first count is a common law claim for the negligence of the defendants in not taking care to provide in the first instance safe machinery, ropes, tackle and gear, and afterwards to examine them. The only material portion of the apparatus is the hook of the block.

The eighth count is a claim under the *Employers' Liability Act* for the negligence of the first officer in not examining the apparatus, that is in substance the hook.

The ninth count is a statutory claim in respect of the negligence of a person having superintendence, whilst in the exercise of superintendence. The respondent's contention as to the ninth count was that the captain negligently required or permitted the respondent to stand in a dangerous place.

There is no allegation of misdirection, surprise or bad faith, and the only question upon the argument as presented by the appellants is whether there was evidence to sustain these findings of the jury, which were in respondent's favour. If there can be found such evidence then I apprehend the appeal must be dismissed. The test of how far the Court ought to interfere with the verdict of a jury, where the question is whether a verdict is against evidence or the weight of evidence, has been stated in many cases. In *Metropolitan Railway Co.* v. *Wright* Lord *Herschell* L.C. said (1):—"The verdict ought not to be disturbed unless it was one which a jury, viewing the whole of the evidence reasonably, could not properly find." The word "properly" was to a certain extent ambiguous, and so Lord *Halsbury* after referring to the indefiniteness of that word said (2):—"I think the test of reasonableness, in considering the verdict of a jury, is right enough, in order to understand whether the jury have really done their duty. If their finding is absolutely unreasonable, a Court may consider that that shows that they have not really performed the judicial duty cast upon them; but the principle must be that the judgment upon the facts is to be the judgment of the jury and not the judgment of any other tribunal." This has been followed in several subsequent cases in the Privy Council

(1) 11 App. Cas., 152, at p. 154. (2) 11 App. Cas., 152, at p. 156.

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and is unquestionably law. I am aware it is not precisely on the point of the entire absence of all evidence which is a still harder position for the appellants to sustain; but as the argument and the evidence have run so close to this branch of the question, and as it appeared to me overlapped it, it affords an excellent reminder of the Court's function in the present case.

The respondent's cause of action is negligence causing damage. During the course of the arguments many views were presented of the evidence and as to how far it was open to the jury to arrive at their conclusion, and as to the extent to which the law requires the plaintiff in such an action as the present to substantiate his claim by affirmative testimony. It will be convenient to recall the words of Lord Chancellor *Herschell* in *Membrey* v. *Great Western Railway Co.* (1) as to the burden which every plaintiff has to bear when his case rests upon the allegation of defendant's negligence, that learned Lord said:—"Whenever there is a charge of negligence it is of the utmost importance, in order to avoid confusion and the danger of mistake, to remember that negligence implies the allegation of a breach of duty—a duty to take care—and to inquire at once what duty, if any, there was on the part of the persons charged with negligence to take care, and if there was any such duty, what was the extent of it, *at the time* and *under the circumstances* which existed on the occasion when negligence is alleged to have been committed."

The present case is one of employer and employé, and therefore the first step is to ascertain what is the employer's duty. Each case ultimately turns upon its own circumstances, but there are some principles which the decisions have firmly established respecting the relations of master and servant, and when these are applied to the facts of the case, I apprehend there is not much difficulty in solving the question before us.

The central proposition, to which all others are subsidiary, is that stated by Lord *Herschell* in *Smith* v. *Baker & Sons* (2), in these words:—"The contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper con-

(1) 14 App. Cas., 179, at p. 190.

(2) (1891) A.C., 325, at p. 362.

dition, and so to carry on his operations as not to subject those employed by him to unnecessary risk."

Those words completely cover the present case.

The first count raises both the questions stated in the first and second parts of Lord *Herschell's* rule, viz., whether the defendants took reasonable care (1) to provide proper appliances, and (2) to maintain them in a proper condition.

The alleged negligence consisted in not providing a stouter hook, and also in not properly testing it shortly before the accident.

With regard to the original strength of the hook, there is no evidence whatever as to what strength of hook it would have been prudent to provide, no evidence as to what thickness of metal, or what description of article, other than the one actually in use, would in the opinion of skilled or practised men be sufficient or necessary to withstand the strain likely to be put upon it. So far as the plaintiff's case was concerned, this information was left blank. The plaintiff himself said he could give no reason for the hook carrying away. He could assign no reason except the strain, and he had seen a bigger strain than that on it. The two expert witnesses, Captain Hay and Captain Bird, the latter stating it was part of his general duty to understand strains, say nothing whatever in condemnation of the size or structure of the hook, they do not hint at any original mistake for lack of stoutness.

They did condemn the hook system, as not being so well calculated to resist sudden jerks as the shackel-block system, but that view was rejected by the jury and may now be disregarded.

The defendants adduced clear and distinct testimony, not merely as to the correctness of the hook system (which the jury adopted), but also that a stronger block, that is a block having a stronger hook, was not to be advised. See Captain Denny's evidence, at folios 126 and 128. Tucker says, "A block the size of that in Court is strong enough for the job."

Captain McGeorge says he has used just the same size block for larger vessels in the same trade, and that the block in Court, which, though not being the identical hook that existed at the time of the accident, was one which everyone accepted as identical

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in size and strength, was about as big as he had seen for the purpose.

The jury, said learned counsel for the respondent, saw the vessel, and could judge for themselves whether the hook was big enough. I am unable to agree with that. There might be such a flagrant disparity between the size of a hook and the work it was expected to do as to offend against the commonest experience of life; but so far from that being the case here, the hook that broke lasted for several years, and bore, as the plaintiff said, a heavier strain without breaking.

The breaking strain of wrought iron of the particular thickness of the hook is not stated, the weight of the strain, steady or jerking, it was called upon to bear is not suggested, nor could it well be. That is of course unavoidable, but it is a fact. There then seems no guide but the experience of practised men in the trade, and that is all on the side of the defendants. The defendants appear incontestably to have provided a hook which according to all past experience, so far as any hook not too heavy or too clumsy, and which is capable of being fairly handled and of doing the work required of it, would stand the various pulling or jerking strains to which it is likely to be subjected.

Then as to examining the hook. The break was a clean one. There is nothing to indicate that ocular examination, or tapping or any other reasonable mode of testing it would have disclosed a flaw. No known method of testing a hook for this purpose is even faintly suggested.

According to the evidence, it appears that hooks will fly as this one did in the most sudden way when a jerking strain comes, and when it probably displaces the rope so as to put the weight momentarily upon a cross section of the iron instead of allowing the hook to bear it longitudinally. That might have been an excellent reason for adopting the shackle-block system preferred by Captains Hay and Bird, but the jury thought otherwise, and if a hook is adopted as a suitable form of appliance, the risk of sudden snapping in the way it occurred seems to me an inseparable risk. It is a great risk, a danger that may occur at any moment; but apparently no test can be applied to a hook not too

heavy or cumbersome for the purpose that would be likely to avert the consequence.

In these circumstances then are the defendants liable upon the first count? I am clearly of opinion they are not.

Where machinery is used there is no warranty that it is so complete that no injury shall be incurred by the workman; and to make the employer liable for injury incurred, it must be shown there was negligence on his part. For this purpose it was necessary to show not only that the machinery was insufficient, but also that the deficiency did not arise from any inherent secret defect, and was known or might by the exercise of due skill and attention have been known to the employer: see *per* Lord *Campbell* in *Weems* v. *Mathieson* (1). The two cases of *Murphy* v. *Phillips* (2), and *Hanrahan* v. *Ardnamult Steamship Co.* (3), exemplify the conditions of liability and non-liability; the latter case being remarkably like the present with respect to the first count.

Learned counsel for the respondent built his argument largely upon the obviously dangerous character of the operation, arising from the terrific force of the sea. That circumstance does certainly operate as a factor in determining the degree of care which an employer is bound to take in any given circumstances, but it by no means casts an unlimited obligation upon him.

It might even work the other way. An employer is bound to avoid involving an employé in any risk not incident to the employment, unless the employé has specially agreed to accept it. Risks incident to the employment are risks which exist notwithstanding all reasonable care on the part of the employé in conducting his operations, and therefore are risks without which such operations must either physically cease or become commercially impossible, or onerous beyond all fair proportion to their purpose.

In the case of what is regarded as a dangerous occupation an employer is, in my opinion, in the absence of special stipulation or special facts limiting his responsibility, bound at common law to use such appliances and take such precautions as would from

(1) 4 Macq. H.L. Cas., 215, at pp. 221, 222.

(2) 35 L.T. N.S., 477.

(3) 22 L.R., Ir. 55.

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any source of information suggest themselves to an ordinarily reasonable and prudent employer in his situation as being both with regard to character and working condition of the appliances used, and with regard to all other circumstances of his operations, necessary to avoid involving his workmen in any risk.

This connotes that he is not bound to guard them from any risks they have agreed expressly or impliedly to accept, or to select appliances because they are the safest possibly obtainable, or to adopt means which either guarantee the security of his workmen in all circumstances, or render his operations physically impracticable or ineffective, or commercially impossible or disproportionately onerous. But with those qualifications, unless he exercises the care indicated he fails to exercise the due skill and attention he has impliedly undertaken, and he therefore does negligently subject his employés to unnecessary danger, or in other words to danger in a region of conduct where they have not agreed to encounter it. For the groundwork of the mutual rights and liabilities in this regard it is sufficient to refer to the judgments of Lord *Coleridge* C.J. in *Rourke* v. *White Moss Colliery Co.* (1); *Mellish* L.J. in *Woodley* v. *Metropolitan District Railway Co.* (2), now the accepted law; *Bowen* L.J. in *Thomas* v. *Quartermaine* (3); Lord *Watson* and Lord *Herschell* in *Smith* v. *Baker & Sons* (4); *Romer* L.J. in *Williams* v. *Birmingham Battery and Metal Co.* (5); and the whole Court of Appeal in *Young* v. *Hoffman Manufacturing Co.* (6).

It was suggested on behalf of the appellants that the law regarding an employer's duty with regard to machinery and appliances is as stated in *Titus* v. *Bradford &c. Railway Co.* (7), quoted in *Beven on Negligence*, 3rd ed., at p. 614. But with the greatest deference to the Court that determined that case, which has indeed been followed as lately as 1908 in the same State: *Wilson* v. *Atlantic Crushed Coke Co.* (8), I do not find myself able to agree with the rule there laid down that "the unbending test of negligence in methods, machinery and appliances is the

(1) 1 C.P.D., 556, at p. 559.
(2) 2 Ex. D., 384, at p. 391.
(3) 18 Q.B D., 685, at p. 698.
(4) (1891) A.C., 325, at pp. 350, 355, 360, 362, 363.
(5) (1899) 2 Q.B., 338, at p. 345.
(6) (1907) 2 K.B., 646.
(7) 136 Pa. St., 618, at p. 626.
(8) 219 Pa. St., 245, at p. 247.

ordinary use of the business." It is too broadly stated. The judgments in both those cases, the principle of which in most instances might reach a just conclusion, seem to me, however, to lose sight of the clear distinction between the *primâ facie* obligation of the employer apart from any special agreement of the employé, and the employé's voluntary acceptance of non-incidental risks. They also confuse the measure of reasonable care with the evidence of that care. I agree with the view taken by Mr. *Beven*, at pp. 613, 614. He cites from *Thompson on Negligence*, p. 3989, the deduction that the test of fitness is "not that others use like tools and machinery, but to consider whether they are reasonably safe and suitable for the work to be done and such as a reasonably careful man would use under like circumstances." "This," observes Mr. *Beven*, "seems preferable to the view that general use is the test; for a general conspiracy of employers might possibly exist in certain trades to use a particular kind of machinery, when a safer method, procurable at a reasonable price, was generally known. If the one method were associated with danger and the other with safety, universality of use, though an important element in fixing the standard of duty, would certainly not be conclusive; while again machinery, though not in general use, reasonably safe in the using would satisfy the law's requirement." This appears to me sound sense and good law, and in accordance with English decisions and with the view taken by the Supreme Court of the United States in *Mather* v. *Rillston* (1).

Judged by the standards I have stated, the defendants have not, in my opinion, neglected their duty with respect to the matter alleged by the first count.

The eighth count necessarily fails for the same reason as the first. The ninth count, however, presents features of a different character, and depends upon Lord *Herschell's* third branch of the duty of an employer, viz., so to carry on his operations as not to subject those employed by him to unnecessary risks. With the utmost deference to the views expressed by my learned brothers, the point of this part of the case is not whether there was any duty on the defendants to warn the plaintiff against dangers which they had not occasioned, but whether there is any evidence

(1) 156 U.S., 391.

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to show they had adopted a method of working which unnecessarily created danger, and to which therefore they unnecessarily exposed him.

The plaintiff, who was second mate of the *Werfa*, had been on her a little over two years. He says in direct examination (f. 54): "I put the hook on. It had always been done that way while I was on the ship and the whole operation was the same. I occupied the same position, on the poop near the Sampson post, alongside. I was in view of the captain and was in most cases on previous occasions. The captain never gave me instructions to do it in any other way or did the chief officer. *That was the system of working.*"

He also says in cross-examination (f. 68): "I always work in that position. *I think the first mate would have more liberties than I have.*" At f. 69 he says: "I had my back to the captain. . . . I looked at the captain sometimes for *orders.*" At f. 76, in re-examination in answer to the question, "Did the captain ever warn you that there was danger where you were standing?" he answered "No"; and to the further question, "Did he ever tell you that the hook was dangerous while being used for the purpose that it was being used for"? he replied "No."

Now this evidence is ample to support a finding that the defendants or the captain had established *a system* of working which was already in operation when the respondent joined the vessel, and that he either had been at some time instructed to occupy the position he did, or from the conduct of his superiors was according to the rules and practice of the ship required or expected to occupy it or was reasonably led so to believe; that the direction of affairs was in the hands of the captain, and subject to him, under the command of the first mate; that the respondent was in the position of feeling himself bound at the peril of being guilty of a breach of discipline to conform and was conforming to orders, instructions, rules or the established system in standing where he did, and did not do so by way of voluntary choice. There is no doubt the respondent thought the proper place for him to occupy was on the starboard side of the post. He says (f. 70): "I would be of no assistance on the other side of

the post. One man must stand on the mast or starboard side of the post. I could not take the slack of the hawser in if I stood on the other side of the Sampson post. I have never been told by the captain not to stand where I have been standing." His own opinion, therefore, for what it was worth, was that the work could not be done if he went the other side of the post. He had found that system in operation, he followed it, he had never, so far as appears, been told of any permission or right to stand on the other side, and at all events the jury did not believe he had, no accident had occurred during his two years of service, and so he had no reason for believing he was exposing himself to unnecessary risk. Certainly there is ample evidence of these facts, and as the jury has found that he was not guilty of contributory negligence in standing at the starboard side of the Sampson post they must be taken to have adopted that view. If ignorant of the unnecessary character of the risk he actually ran, if, in short, he was led to believe it was incidental to his duty, he cannot be considered as having voluntarily incurred it.

The defendants' own case was that it was not even common knowledge that to stand where the plaintiff stood was dangerous: see f. 77, where the objection to the question regarding the want of warning by the captain includes the contention by defendants' counsel that even the captain may not have known it was dangerous. No one says it was common knowledge, and the jury may have thought that it was not. At all events the degree of risk certainly is an important element, and the jury have considered it lay more in the knowledge of the captain than in that of the respondent.

No separate issue of fact was sent to the jury as to whether the plaintiff assumed the risk, whatever it might be, of standing where he did, or, in other words, whether he subjected himself to the maxim *volenti non fit injuria*. That is an entirely different question from contributory negligence; and although in some of the older cases, such as *Woodley* v. *Metropolitan District Railway Co.* (1), these two defences were not sufficiently separated, the distinction since *Thomas* v. *Quartermaine* (2) and *Smith* v. *Baker & Sons* (3) is clear cut and cannot in future fail to be

(1) 2 Ex. D., 384. (2) 18 Q.B.D., 685. (3) (1891) A.C., 325.

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observed. In the latter case Lord *Watson* (1), speaking of *volenti non fit injuria*, says :—"In its application to questions between the employer and the employed, the maxim as now used generally imports that the workman had either expressly or by implication agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform, and from which he had suffered injury. The question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that, if injury should befall him, the risk was to be his and not his master's."

But no such distinct issue, at least in a separate form, was ever submitted to the jury. The specific questions left to the jury were previously, as we were informed during the argument, shown to learned counsel for both parties, and no further question was requested by either party. It appears, also, from the transcript (f. 164) that when the learned Judge left those questions to the jury, the parties agreed that he should direct a verdict one way or the other, with leave to the other side to move, all questions of law being reserved on both sides. It may therefore be taken that the Court and the parties treated this phase of the question in one of two ways. They either included it in the 7th question, namely, the captain's negligence, because, in the circumstances, unless the plaintiff had expressly or impliedly agreed to accept the risks in the way Lord *Watson* stated, the facts left it open to the jury to say whether the captain was negligent; or else that, whatever separate issues of fact were open on the pleadings, the parties in view of the evidence elected, so far as they related to any finding upon which it would have been open to the jury to find, to confine themselves irrespective of that phase to the specific issues raised by the questions put. By this course of conduct they are bound: see *Chandler & Co.* v. *Collector of Customs* (2) and cases there cited; and see also *Tobin* v. *Murison* (3). If however the learned Judge was bound, in view of the evidence, to direct the jury in favour of either party on any point whatever, I apprehend the Full Court could, and this Court can now similarly act under the reservations of questions of law. But at this point,

(1) (1891) A.C., 325, at p. 355.
(2) 4 C.L.R., 1719, at p. 1741.
(3) 5 Moo. P.C.C., 110, at p. 127.

as it is one of law, I would quote the observations of Lord *Herschell*, in *Smith* v. *Baker & Sons* (1): "It is to be observed that the jury found that the plaintiff did not voluntarily undertake a risky employment with knowledge of its risks, and the judgment of the County Court, founded on the verdict of the jury, could only be disturbed if it were conclusively established upon the undisputed facts that the plaintiff did agree to undertake the risks arising from the alleged breach of duty. I must say, for my part, that in any case in which it was alleged that such a special contract as that suggested had been entered into I should require to have it clearly shown that the employed had brought home to his mind the nature of the risk he was undertaking and that the accident to him arose from a danger both foreseen and appreciated."

Then, speaking of *Sword* v. *Cameron* (2), he says (3):—"It will be noticed that in that case the defective system which created a risk, and from which the pursuer suffered, was known to him, and that he continued his work notwithstanding this knowledge; yet it never appears to have occurred, either to the Scotch Court or to Lord *Cranworth*, that this absolved the employer from liability."

Now, that is the important point of law: Knowledge of risk is not synonymous with voluntary acceptance of it. Without disregarding it in substance, I do not see how in any aspect this appeal can be allowed on the 9th count.

So far as the question of the respondent's obligation to stand where he was is part of the *primâ facie* case of negligence, it may therefore well be assumed in the absence of proof to the contrary that he was obeying orders, and his testimony affirmatively supports that, and gives ample ground for the jury's finding to the 7th question.

The onus of establishing this defence as a separate ground and displacing the *primâ facie* presumption is on the defendants, and they have offered no evidence except the very equivocal statements of Captain Denny (fols. 116 and 117)—"In getting in the hawser aft, the men should stand on the port side of the Sampson

(1) (1891) A.C., 325, at p. 363. (2) 1 Sc. Sess. Cas., 2nd Series, 493.
(3) (1891) A.C., 325, at p. 364.

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post," and further on, "He should have been standing on the port side of the Sampson post, and then he could not have got hurt," and the confirmatory statement of Captain McGeorge at fol. 147. But there is the distinct statement of the respondent as to the established *system* already referred to; the admission of Tucker (at fol. 130), "We always observed the same duties. I go forward, the second officer aft, and the captain on the bridge," showing that there really was a regular settled system, by which each man at once went to his defined and allotted post, uncontroverted by Captain Denny except in the equivocal passage mentioned and the caution not to stand in front, but to stand on one side, without stating which; a passage to which I shall again refer. It therefore cannot be said the defendants were entitled to a direction on this point.

There being this evidence of a *system* or practice, actually in operation for a number of years, other observations of some of the learned Lords in *Smith* v. *Baker & Sons* (1) become very material. I refer to Lord *Watson's* speech at p. 353, and Lord *Herschell's* at pp. 363 and 364. Quoting from Lord *Cranworth* in *Sword* v. *Cameron* (2), Lord *Herschell* approves of the statement that the existence of a *system* is some evidence of a sanction and even a direction by an employer to conduct the operations in the manner practised. It is consequently beyond controversy there was evidence upon which the jury, if they had been specifically asked, might have found that the respondent was in substance, if not explicitly, directed to stand where he was, and if so, the appeal is hopeless.

That the captain was in charge is unquestionable. The plaintiff's evidence I have already read.

Captain Bird (at fol. 106) says: "Taking the master in charge, and the second mate aft with the tackle, the master would be in charge of all persons, if, as I understand, the second mate was handling the tackle with the other men." This answer, be it observed, was in cross-examination; and it pointedly shows how this matter was understood by the defendants to be in issue at the trial.

The defendants' evidence establishes, on this count, a much

(1) (1891) A.C., 325. (2) 1 Sc. Sess. Cas., 2nd Series, 493.

stronger case for the plaintiff than his own. The plaintiff's view was that the captain had in the circumstances exposed him to unnecessary risk. His own opinion was that, although he would naturally feel compelled to stand in the place where he invariably stood and did not apprehend he was incurring avoidable risk, he could not properly have performed his task on the other side.

He was mistaken in both respects. So much is proved by Captain Denny, and the defendants cannot complain if their own captain's testimony, carefully prepared and strongly substantiated, proves the plaintiff's case more completely than he did in his own evidence.

The plaintiff's statement of his opinion to my mind only brings into relief, and so the jury apparently thought, the omission of the captain to let him know where he could stand with safety and yet do his work. This erroneous impression caused by the defendants themselves lasted even to the trial, and ought not to prejudice the plaintiff, when the defendants proved even better than he did that he was right in his assertion of their negligence.

Captain Denny knew well the danger, and he says he knew that the plaintiff could have effectually performed his work on the other side and out of danger. He swears however (fol. 112) "I cautioned the plaintiff not to stand in front of the block but always to stand well on one side." That was utterly impossible to do, so long as the plaintiff was on the starboard side of the hawser—as the photograph demonstrates, and as the defendant's counsel in his summing up (fol. 160) indicates. The captain continues (fol. 116):—"All are under me. I supervise everything being done fore and aft while she is being moored. In getting in the hawser aft the men should stand on the port side of the Sampson post. All could have done what they had to do if so standing." At fol. 128:—"There is always a certain amount of danger."

This is a distinct opinion by the defendants' own chief witness, the captain of the vessel for seven years, besides a previous service upon her as chief officer for two years and a master mariner for ten years, that there was danger, and he knew it, because "there is always a certain amount of danger," and that the plaintiff could have done all that was necessary if he had

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stood on the port side where there was room to avoid a hook that flew. This opinion the jury were at liberty to accept, were asked by the defendants themselves to accept, and have accepted. Then why was the respondent permitted to work in that dangerous position for two years, unless that was the recognized system? The system might in fine weather and a smooth sea have been comparatively free from extra peril as to the position of the respondent, but with a heavy sea a special deviation from the system was humanely necessary, a deviation which the respondent had no authority to make unless so directed.

The opinion that the plaintiff could have worked effectually on the other side is supported by the significant experience of William Ernest Prudence, the plaintiff's successor, in whose case the hook carried away also. But he was on the port side, and no one was hurt. The whole three men in this instance were on the port side. See fols. 140 and 142. So in McGregor's evidence, fols. 147 and 148. Now it is true that these opinions were given with a view of showing contributory negligence. But though the testimony of all these witnesses indubitably establishes *their* knowledge of the unnecessary nature of the risk in a man standing where the plaintiff stood, no one ventures to say *he* knew, or that it was common knowledge. The hook was on board when he arrived originally—the defendants knew better than he how far it could be depended on. Then if his was so dangerous a position and the work could be effectually and sufficiently done, even if not so perfectly done, on the other side, what possible reason could exist for the plaintiff standing there except his honest belief that he was required so to do by the captain in accordance with the established system, that the hook was not very likely to break, and that in any case there existed no method of lessening the risk.

It is well known that discipline on board ship, especially during an operation under the actual personal superintendence of the captain, leaves at any time but little scope for individual choice on the part of the crew, and it is remarkable that, with the admitted knowledge of the danger on the part of the captain, he gave the plaintiff no hint during two years to move to the other side. He swears he did not tell him not to stand in front, but on

one side, but that, though an admission of the necessity to do so, is disbelieved by the jury. Now was it his duty with that "fairly good surge" and the jerking strain caused by the back water (fol. 55) to tell the plaintiff that he was at least at liberty to move to the other side, and so depart from the established system which the plaintiff swears to, which no one really denies, and which the respondent apparently believed, and with good reason, bound him, in the absence of explicit directions to the contrary, to take up the position, not of danger merely, but of the greatest danger? In my opinion there is ample evidence, including the captain's tacit admission already referred to, for the jury to find that there was a breach of the last part of Lord *Herschell's* rule, because the captain while superintending exposed the plaintiff to unnecessary risk, that is a risk not intrinsic to his employment. The captain's evidence (fols. 116 and 117) shows that the direct result of his negligence was the damage sustained. This is corroborated by McGeorge (fol. 148). There is thus the required connection between the *injuria* and the *damnum*.

The plaintiff's case is therefore in my opinion complete on the ninth count. It is no question of expert testimony—it is, first, a question of credence as to the sworn facts, and then a plain matter of commonsense open to a jury as men of the world upon which to form their opinion upon the issues raised and fought as to the extent of the captain's duty, as well as the degree of care incumbent on the plaintiff in the proved circumstances.

I should add, though perhaps unnecessarily, that the finding of the jury that the plaintiff was not guilty of contributory negligence was not challenged in argument, and while that stands it cannot be said consistently with that finding that he knew of the danger. But even if it were challenged, as I have pointed out, there is no reason to disturb it.

Now if that be the result of the evidence, what reason can there be for not giving the usual effect to it? It was stoutly urged by Mr. *Broomfield* that the case of the captain's negligence was not relied on. But *Sir George Reid* was equally clear that it was. Looking at the pleadings, at the direct announcement of learned counsel for the plaintiff in opening his case (see fol. 38), at the evidence at fol. 48, and the other evidence I have quoted,

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at the objection taken at fol. 77, and reading the learned Judge's notes of the summing up by defendants' counsel, particularly fol. 160, I feel no personal doubt it was one of the issues actually fought and decided. I asked Mr. *Broomfield* if he could suggest any other meaning to the 7th finding, and he could not, except that he thought possibly it might refer to the first mate's non-examination of the hook. But that is covered by the 6th finding and arises under another count, the 8th.

To allow the appeal as to the 9th count would, as I think, be to substitute the opinion of the Court for that of the jury, and I am therefore of opinion on the whole that the appeal should be dismissed.

Even if the appellants were permitted at this stage to raise the question of *volenti non fit injuria*, the question should be sent for re-trial on that point, because this Court has no authority to determine it, there being, at the best for the defendants, evidence both ways. In such circumstances, as Lord *Brougham* said, speaking for the Privy Council in *Tobin* v. *Murison* (1): "Negligence is a question of fact, not of law, and should have been disposed of by the jury."

I should not omit to notice an argument raised on behalf of the appellants that the vessel was not moored or at anchor receiving or discharging cargo, coal, ballast, or dunnage (sec. 4 of the Act) because the operation, the cause from which the accident occurred, was that of bringing another part of the hatch under the shoot so as to put cargo in. But in my opinion the evidence shows one continuous and connected operation and substantial compliance with the requirements of the section. The observations of the Lord Chancellor in *London and India Docks Co.* v. *Thames Steam Tug and Lighterage Co.* (2) are very pertinent.

Appeal allowed. Order appealed from discharged. Rule absolute with costs to enter judgment for defendants. Respondent to pay the costs of the appeal.

Solicitors, for the appellants, *J. Stuart Thom Bros. & Co.*

Solicitors, for the respondent, *G. S. Beeby & Moffatt.*

C.A.W.

(1) 5 Moo. P.C.C., 110, at p. 126. (2) (1909) A.C., 15, at p. 18.