[HIGH COURT OF AUSTRALIA.]

THE SOUTH AUSTRALIAN COMPANY . APPELLANTS;
DEFENDANTS,

AND

RICHARDSON . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *May* 25, 26, 27.

MELBOURNE, *June* 16.

Griffith C.J., Isaacs and Gavan Duffy JJ.

Negligence—Personal injuries—Dangerous condition of premises—Duty of invitor—Danger apparent—Evidence.

The defendants were the owners of land on which were a wharf and stores, the means of access to the wharf and stores being a road constructed over the same land. Two lines of railway also belonging to the defendants were laid down upon the road in such a position that it was necessary to cross them in going to and from the wharf. In some places the rails projected to a dangerous extent above the surrounding surface. R. in the ordinary course of his employment was driving from the wharf a lorry drawn by five horses and heavily loaded with goods, and in doing so had occasion to cross the lines of railway. While he was crossing one of the lines at a place where they converged at an acute angle to a set of points, the wheels of the lorry skidded upon a projecting rail, and R. was thrown off the lorry and killed. In an action by the representative of R. against the defendants to recover damages on the ground of negligence, the trial Judge, at the conclusion of the plaintiff's case, found that R. knew of the condition of the place, and entered judgment for the defendants.

Held, that there was evidence to warrant a finding that the place was not reasonably safe for the use which R. was invited by the defendants to make of it at the time when the accident occurred, and under the then existing circumstances of traffic, and a further finding that its condition was nevertheless such as to warrant a reasonable person in thinking that, notwithstanding some apparent danger, the road could be safely used if due care were taken, and that the evidence given for the plaintiff did not show conclusively that R. had, either by using the place at all or in the manner of his

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use, failed to take reasonable care to avoid the consequence of the defendants' breach of duty so far as he knew or ought to have known of it.

Held, therefore, that a new trial should be had.

Indermaur v. *Dames*, L.R. 1 C.P., 274; L.R. 2 C.P., 311, discussed and applied.

Decision of the Supreme Court of South Australia affirmed.

APPEAL from the Supreme Court of South Australia.

An action was brought in the Supreme Court by Ruebella Eva Dorothy Richardson against the South Australian Co. by which the plaintiff as administratrix of her husband, Henry Albert Richardson, deceased, claimed £1,500 damages for the death of her husband. By the statement of claim it was alleged that the defendants were the owners and occupiers of a certain wharf and of certain land whereon the wharf was situated; that the defendants carried on upon the land the business of wharfingers, and in the course of their business invited to the land the persons and their agents using the wharf in the course of the defendants' business; that the deceased on 8th September 1913, in the course of his employment and at the invitation of the defendants, entered upon the land driving a lorry drawn by five horses; that on that date the defendants were the proprietors of a railway situated on a roadway on the land, which roadway gave ingress and egress to the wharf, and that they so negligently and improperly constructed, managed and maintained the railway as to allow the rails to project above the surface of the land to the extent of two inches; and that while the deceased was lawfully and at the invitation of the defendants driving the lorry along the road it collided with one of the rails, and he was thrown to the ground and killed. By the defence it was alleged that the actual state and condition of the roadway and railway, including the projection of the rails above the surface, were apparent to all persons coming to the wharf and land, and in particular to the deceased before he drove or attempted or began to drive across the railway; that the deceased was aware of the state and condition of the railway, and being so aware took upon himself the risk, if any, arising from or in crossing or attempting to cross the railway in its then state or condition; and that the deceased was guilty of contributory negligence.

The action was heard by *Buchanan* J., who at the close of the plaintiff's case found as a fact that the deceased had knowledge or notice of the condition of the defendants' premises. He accordingly ordered judgment to be entered for the defendants. On a motion by the plaintiff the Full Court by majority ordered the judgment for the defendants to be set aside and a new trial had.

From that decision the defendants now appealed to the High Court.

Piper K.C. (with him *Skipper*), for the appellants, referred to *Dobson* v. *Horsley* (1); *Indermaur* v. *Dames* (2); *Torrance* v. *Ilford Urban District Council* (3); *Norman* v. *Great Western Railway Co.* (4); *Smith* v. *London and St. Katharine Docks Co.* (5).

Cleland K.C., *F. Villeneuve Smith* and *W. J. Denny*, for the respondent, were not called upon.

THE COURT dismissed the appeal, and stated that their reasons would be given on a later day.

The following judgments were read :—

June 16.

GRIFFITH C.J. This action was brought by the respondent to recover damages caused by negligence of the appellants resulting in the death of her husband.

The appellants are owners of a wharf and stores at Port Adelaide, where they carry on the business of wharfingers. The access to the wharf and stores was at the time in question over a piece of land, their property, upon which two lines of railway were laid down in such a position that it was necessary to cross them in going to and from the wharf. In some places the rails projected above the surrounding surface to a dangerous extent. The deceased was driving a heavily loaded lorry, drawn by five horses, carrying goods from the wharf, and in doing so had

(1) (1915) 1 K.B., 634.
(2) L.R. 1 C.P., 274; L.R. 2 C.P., 311.
(3) 25 T.L.R., 355.
(4) (1914) 2 K.B., 153, at p. 158; (1915) 1 K.B., 584.
(5) L.R. 3 C.P., 326, at p. 333.

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occasion to cross the lines of railway. While he was between the two lines at a place where they converged at an acute angle to a set of points, the wheels of the lorry skidded upon the projecting rails, and he was thrown out of the lorry and killed. The negligence alleged was in allowing the road at that place to be in an unsafe condition. The defendants denied negligence, and alleged that the actual state and condition of the place, including the projection of the rails above the surrounding surface, were plainly visible and apparent to all persons coming to the wharf, and in particular to the deceased before he attempted to cross the rails. They further alleged that the deceased, being aware of the condition of the place, attempted to drive across the rails, and took upon himself the risk, if any, arising from attempting to cross them. They also alleged that the damage was occasioned by the negligence of the deceased.

At the trial before *Buchanan* J. evidence was adduced for the plaintiff establishing the fact that at the place in question the rails were in fact about three inches above the surrounding surface, which had been worn away by traffic, and that the fatal accident occurred as already stated. There was also evidence to show that the deceased attempted to cross the rails at a right angle or nearly a right angle. This evidence was relied upon by the defendants as showing that he was aware of the dangerous condition of the place.

At the close of the plaintiff's evidence the defendants' counsel submitted that no case had been made calling for an answer. The learned Judge is reported to have said merely that he found as a fact that the deceased had knowledge or notice of the condition of the premises, and that he granted a nonsuit. In accordance with the practice of the Supreme Court of South Australia in such cases, judgment was entered for the defendants. Upon a motion for a new trial before *Way* C.J. and *Gordon*, *Murray* and *Buchanan* JJ., the Court being equally divided in opinion, the junior Judge withdrew his judgment, and the rule was made absolute for a new trial.

Before the Full Court the dangerous condition of the place in question does not seem to have been controverted. *Way* C.J. remarked in the course of his judgment that it was not disputed

that the projecting rails were dangerous, and that the defendants ought to have known of their condition. The argument seems to have been confined to the question of the deceased's knowledge of the condition of the place and the legal effect of that knowledge.

Before this Court the argument assumed a somewhat kaleidoscopic character. It was contended, so far as I could appreciate the contention for the appellants, that the place was not in fact dangerous, that, whether it was or not, its condition was apparent to all persons using it, and that under such circumstances persons using it could not found any claim upon its not being safer than it was in fact, whether dangerous or not. The appellants also contended that they did not owe any duty to anyone to have the premises in a reasonably safe condition.

As the case must go for a new trial, it is not desirable to express any opinion upon the facts, except so far as is necessary to show that there was evidence fit to be considered in support of the plaintiff's case. I will therefore confine myself to the questions of law which arise when one man invites another to enter his premises. The leading case on the subject is *Indermaur* v. *Dames* (1).

The rule of law which governs such a case is not a special and isolated rule, but a particular application of a general rule governing human beings who have intercourse with one another under such circumstances that one man reposes trust in another, who invites or accepts the trust. As applied to custody a familiar instance is what is commonly called bailment of goods. When one person accepts the custody of the goods of another he is bound to take care of them. The degree of the care to be taken may be qualified by express stipulation, but in the absence of express stipulation he must take reasonable care. At the time when forms of action were important, a breach of this duty might be treated either as a breach of an implied contract, implied from the acceptance of custody, or as an actionable wrong. In the latter alternative it was called an action for negligence, which only means failure to take due care. So, when one person invites another to come upon land under his dominion, or to use anything upon it, he invites the visitor to trust himself for the time

(1) L.R. 1 C.P., 274; L.R. 2 C.P., 311.

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being to his protection, and, if the circumstances are such that the personal safety of the visitor may be affected by the condition of the place or thing which he is invited to use, it is the duty of the inviter to take care of him so far as his safety depends upon that condition.

In this case also the degree of care required to be taken may be qualified by express or implied agreement, or by the circumstances of the invitation, which include the character of the place or thing which the visitor is invited to use, the nature of the use which he is invited to make of it, and the conditions and circumstances under which such use is invited to be made. The obligation arises wholly from the invitation, and is coextensive with it. It is immaterial, just as in the case of the bailment of goods for custody, whether the obligation is regarded as arising from implied contract or from the duty owed by one man to another which arises from the nature of human society. In the one view the test is the extent of the obligations of an implied contract; in the other, the extent of the obligation arising from the circumstances.

With regard to the extent of the obligation, that is, the degree of care required of the inviter, I am of opinion that a person who provides a road or other means of access to, or egress from, his premises, and invites persons having business with him to make use of the means of access so provided, is bound as against them to take reasonable care that the means of access are reasonably safe for such use as they are invited to make of them in their apparent condition. The visitor, on his part, is bound to take reasonable care in the use which he makes of the means of access which he is invited to use. Since the obligation arises from the invitation, and is coextensive with it, it follows that, if the invitation itself is qualified by warning of danger, or knowledge of danger by the visitor, or otherwise, the obligation is qualified correspondingly. If, for instance, there is in a road which a person is invited to use any obvious defect, or defect known to him, of such a nature as to require special care in using it, the invitation is a qualified invitation to use the road with such special care as is required under such circumstances. If the obvious or known danger is such that a reasonable man would

not use the road at all, or not at that time, or under those circumstances, then the mere use would be evidence of want of reasonable care, if not of recklessness, in the person using it. In such a case there would, indeed, be no real invitation. But, in the absence of such obvious or known danger as last mentioned, the invitation stands, with its consequent obligation. What degree of care on the part of persons using such a defective or dangerous road is reasonable in any particular case is a question of fact depending upon all the circumstances, which include their actual knowledge of the defect and the opportunity which they have of knowing it. The mutual obligations of the respective parties are analogous, on the one hand, to that of a person who makes a representation as to an existing state of facts upon which he invites another person to act, and, on the other hand, to that of the person who acts upon the representation. In such a case the extent of the obligation depends upon the representation.

In the present case there was abundant evidence to warrant a finding that the road was not reasonably safe for the use which the deceased was invited to make of it at that time, and under the circumstances of traffic then existing, and a further finding that its condition was nevertheless such as to warrant a reasonable person in thinking that, notwithstanding some apparent danger, the road could be safely used if due care were taken.

Although Mr. *Piper* refused to put his case upon the ground of contributory negligence, it is plain that the real basis of his argument was that the efficient cause of the accident was not the defendants' breach of duty, but, at least in part, the recklessness or carelessness of the deceased. This is commonly and conveniently spoken of as the defence of contributory negligence.

In my opinion, the only material questions in the case are: (1) whether the defendants invited the deceased to make use of the road for the purposes for which, and under the circumstances in which, he used it; (2) whether the road was reasonably safe for such use; and (3) if not, whether the deceased, either by using the road at all or in the manner of his use, failed to take reasonable care to avoid the consequences of the defendants' breach of duty so far as he knew or ought to have known of it.

It is impossible to say that upon the evidence already given

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in the case the first question must be answered in the negative, or either of the others in the affirmative.

The appeal should, therefore, be dismissed.

My brother *Gavan Duffy* desires me to say that he does not wish to add anything to what was said by the Court in Adelaide.

Isaacs J.

ISAACS J. In this case there arise for consideration three important questions of law, namely, (1) the true import of the rule in *Indermaur* v. *Dames* (1); (2) the proper proof of the invitor's negligence; and (3) the true bearing of the doctrine of *volenti non fit injuria* to such a case.

There is also the effect of the evidence with relation to the finding of the learned primary Judge, the importance of which goes no further than the present appeal.

Richardson was an "invitee" in the legal sense, because he was upon the appellants' premises on their business invitation. There was no contract between him and them—he being a carter in the employment of master carriers, between whom and the appellants the contractual relations, if any, existed. The plaintiff's case is rested solely upon the ground of invitation, and no obligation founded upon contractual nexus or absolute right can be relied upon. But it is not denied, and it is clear upon the evidence, that Richardson was an "invitee" in the sense required by the law to raise the appellants' duty imposed by the common law; that is to say, he was invited into the premises by the occupier for the purpose of business or material interest, and within the rule formulated in *Indermaur* v. *Dames* (1).

It is now nearly fifty years since that case was decided. Its propositions were carefully stated by one of the most learned and exact Judges that have sat on the English Bench, the primary judgment was affirmed, and in its main essentials quoted literally in the Exchequer Chamber, and since that time it has constantly been affirmed and acted on. Nevertheless, to-day we find its real purport and meaning contested; English cases are cited which, it is said, support varying views; and, finally, the Supreme Court of South Australia are in equal division as to its effect.

(1) L.R. 1 C.P., 274; L.R. 2 C.P., 311.

(1) *The Rule in Indermaur* v. *Dames*, decided in 1866, is the recognized repository of the law on this subject. Whatever diversity of language occurs in later judgments, the authority and accuracy of the rule stated remain unquestioned. There is only one earlier case to which reference need be made, namely, *White* v. *Phillips* (1). There, wharf owners had in connection with their wharf a structure, called a campshed, so built as to be dangerous to barges unloading at the wharf. It caused injury to the barge of the plaintiffs, who did not know of its existence. *Erle* C.J. said (2):—"A duty was . . . cast on the defendants, either to give notice of the danger arising from the campshed being there in that state, or to have had it repaired and properly constructed." *Williams* J. said (3):—"The plaintiffs were not aware of that danger, but the defendants were. Were not the defendants bound to give notice of such danger to all those who came to use the wharf in the ordinary course of business? I think they were; and that they were responsible for any neglect to give such notice." *Byles* J. agreed, and said (3):—"It is the case of a campshed improperly constructed, with an abrupt termination, and no notice given of its existence." That case, though not cited in *Indermaur* v. *Dames* (4), was of course in the mind of the Court—two of the Judges taking part in both cases.

The rule formulated in the latter case was quoted without addition by Lord *Sumner* (then *Hamilton* L.J.), in *Latham* v. *R. Johnson & Nephew Ltd.*, thus (5):—"'With respect to such a visitor at least'—*i.e.*, a person on lawful business in the course of fulfilling a contract in which both the plaintiff and the defendant have an interest—'we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, when there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was such contributory

(1) 33 L.J.C.P., 33.
(2) 33 L.J.C.P., 33, at p. 36.
(3) 33 L.J.C.P., 33, at p. 37.
(4) L.R. 1 C.P., 274; L.R. 2 C.P., 311.
(5) (1913) 1 K.B., 398, at p. 412.

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negligence in the sufferer, must be determined by a jury as a matter of fact.'" Now, it is all important to adhere to the carefully-worded formulation of the rule. The formula says not a word about putting the premises into repair or keeping them safe. It is the *person*, the visitor, who is to be kept safe, so far as reasonable care can do it. The duty of the invitor is to "use reasonable care to prevent damage from unusual danger which he knows or ought to know"; that is what the invitee is "entitled to expect." The invitor, however, may choose his own way of doing it; he may, if he pleases, endeavour to prevent damage by making the place as safe for the invitee as such a place with its incidental risks usually is—the invitee himself being bound then to look after his own safety by exercising reasonable care on his part. But the occupier is not bound, apart from legal enactment or contract, to tie himself down to this mode of guarding the safety of the invitee. He is not bound to alter his premises, which are his private property and under his sole dominion; his duty, though arising in relation to his premises, is not in respect of his premises as the subject matter of his duty. The subject matter of his duty is his visitor. And so the occupier may leave his premises dangerous, provided he reasonably protects the invitee. If, however, the occupier omits to make the place reasonably safe, having regard to its character, so that there is in fact unusual danger which he knows, or ought to know, then his reasonable care of his visitor must take another form. *Willes* J. says (1):—"Where there is evidence of neglect, the question whether . . . reasonable care has been taken, by notice, lighting, guarding, or otherwise, . . . must be determined by a jury as a matter of fact." The learned Judge does not say where there is "neglect," but where there is "evidence of neglect," which covers the whole field, then the question of whether reasonable care has been taken to prevent damage by any means whatever —in other words, whether there has in fact been "neglect"—is to be decided by the jury. In the Exchequer Chamber, in a passage, one phrase of which not affecting the present point requires later consideration, *Kelly* C.B. says (2):—"If a person occupying such premises"—*i.e.*, a sugar refinery, that usually

(1) L.R. 1 C.P., 274, at p. 288.

(2) L.R. 2 C.P., 311, at p. 313.

has holes in the floor without fence or safeguard—"enters into a contract, in the fulfilment of which workmen must come on the premises who probably do not know what is usual in such places, and are unacquainted with the danger they are likely to incur, is he not bound either to put up some fence or safeguard about the hole, or, if he does not, to give such workmen a reasonable notice that they must take care and avoid the danger? I think the law does impose such an obligation on him." The learned Lord Chief Baron thus spoke of this alternative course as one obligation. It is so in fact, because there is merely a variation in method in discharging the one obligation of using reasonable care to prevent personal injury.

The view above expressed is clear from the leading case itself. But it is also strongly confirmed. In *Thomas* v. *Quartermaine* (1) *Bowen* L.J. says:—"In the case of premises that contain an element of danger, a duty arises as soon as there is a probability that people will go upon them: but it is a duty only towards such people as actually do go. It is not a duty in the air, but a duty towards particular people. *The occupier is bound to use all reasonable care to prevent such persons from being hurt.* It is obvious that this duty must vary according to the character of the danger, and the circumstances under which the premises are to be visited. It differs in the case of hidden dangers, and the case of dangers that are palpable and visible: it may vary according to the age and comprehension of the visitor: in the case of bare licensees, and of those who come on the premises on the occupier's business and at his invitation. The only obligation on the occupier is to take such precautions as are reasonable in each instance to prevent mischief, and this is but the adaptation to a special case of the general doctrine *Sic utere tuo ut alienum non lædas.*"

In *Latham's Case* (2) already cited, Lord *Sumner* says:—"The duty which one person owes to another to take reasonable care not to cause him hurt by act or omission is relative both to the person injured and the person charged with neglect and the circumstances attending the injury." Again (3), he says: "Danger is relative."

(1) 18 Q.B.D., 685, at p. 695. (2) (1913) 1 K.B., 398, at p. 410.
(3) (1913) 1 K.B., 398, at p. 419.

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So that keeping in mind the cardinal consideration, namely, avoidance of hurt to the individual, there is no reason for holding, and on the contrary there is strong reason for not holding, that the duty of an invitor is expressed in the obligation to keep the premises reasonably safe, and leaving other circumstances to be considered as exculpatory only. Such a formulation leads to misconception, and, in the practical working out of the rule, very probable injustice, both as to burden of proof and otherwise.

In the view of the reference to recent cases, it is desirable to observe—even though at first sight it appears a vain repetition—that the duty arises solely from the invitation, coupled of course with its acceptance. The invitee is not compelled to accept the invitation, any more than he can insist on visiting the premises without the invitation. It follows that if the invitor, while inviting him, informs him of a specific danger, the invitee accepts at his own risk so far as that danger is concerned. He has no right to demand that the danger shall be removed. His remedy is to stay away, and if he does stay away from fear of the danger, he has no ground of complaint against the invitor. In the absence of such special information, he is entitled to regard the usual tacit business invitation as one to visit the premises in the condition in which premises of that nature usually are, if reasonably kept as such, at the time he visits them.

The very recent case of *Norman* v. *Great Western Railway Co.* (1) has been referred to in some of the judgments of the Supreme Court, and was cited to us; and the question arose during the argument whether it did not determine that the real duty of the invitor is to make his premises "reasonably safe," and that, if he does not do so, he is thereby guilty of negligence—notice to or knowledge by the invitee being in that case exculpatory only. It cannot be denied that there are expressions in that case which lend themselves to such a view. More particularly is that so from the circumstance that the Court of Appeal held that the duty of the railway company was not "higher" or "larger" than the duty of an "invitor" as stated in *Indermaur* v. *Dames* (2).

If the decision in *Norman's Case* were in conflict with

(1) (1915) 1 K.B., 584. (2) L.R. 1 C.P., 274; L.R. 2 C.P., 311.

Indermaur v. *Dames* (1) it is clear that it was not intentionally so; and *Indermaur* v. *Dames* is so deeply rooted that it would be our duty to follow it until, if ever, it be shaken by the Privy Council or the House of Lords.

In *Norman's Case* (2) the plaintiff was on the defendants' premises as the Court of Appeal held, not by the defendants' invitation at all, but as of right, and independently of any invitation. Yet they held the duty of the defendants was not "higher" or "larger" than that of an invitor. If the case decides only that as a matter of law the railway company were not bound to fence such a place as that where the accident occurred, or that there was no evidence that the want of a fence caused the injury, it has of course no bearing here.

Again, if it is to be taken as deciding that the railway company were bound to keep the railway premises reasonably safe for persons using them in the ordinary and customary manner, that is, as such, and with reasonable care, it is quite consistent with the views already expressed in this judgment.

But so far as it holds that the duty of the railway company so stated is identical with that of the invitor in *Indermaur* v. *Dames* (1), it is, I say it with deep respect, not well founded. It has been already shown that invitation and acceptance are voluntary on both sides. But where the visitor has an absolute right to go upon the premises independent of invitation in the strict sense, his rights cannot be measured by any supposed invitation. He has a right to come upon a place free from unusual danger. Notice not to come, or notice of a danger that ought not to be there, cannot absolve the occupier. He has, in such a case as *Norman's* (2), undertaken the duty of having a railway to which the law gives a right of public access, and he has accepted the obligation of conducting it so as to be open to the public at their will, and of maintaining it for that purpose in a reasonably safe manner, and he therefore has not the alternative of deterring the public from entering it any more than he has the alternative of excluding the public altogether. His duty is single. Argument was in that case rested by learned counsel, and the argument was apparently adopted by the Court as correctly rested, upon

(1) L.R. 1 C.P., 274; L.R. 2 C.P., 311. (2) (1915) 1 K.B., 584.

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some observations of Lord *Sumner* in *Latham's Case* (1), that the law has long recognized three categories of obligation—namely, to trespassers, to licensees and to invitees. And it was argued no fourth case was suggested. But when the passage is examined, its true import is plain. Lord *Sumner*, in speaking of three categories of obligation, expressly excluded the case where the injured party was there as of right. So far as Lord *Sumner's* words go, they are adverse to the argument. These observations are only material here in order to clear away the suggestion that the rule in *Indermaur* v. *Dames* (2) confines the duty of the invitor to making the place reasonably safe, and leaving him no alternative course to pursue. He has the alternative course open to him, by giving proper notice of the unusual danger, and, if he does, he cannot be held guilty of negligence with regard to safeguarding his visitor from damage.

If actual notice of unusual danger is sufficient, it necessarily follows that the invitee's knowledge, however acquired, of that danger is equally sufficient to prevent him from complaining. The plaintiff's action for breach of this duty therefore includes as an essential that he, or the person he represents, was unacquainted with the danger. That allegation was part of the declaration in *Indermaur* v. *Dames*; and see *Gautret* v. *Egerton* (3). Lord *Atkinson*, in *Cavalier* v. *Pope* (4), in speaking of cases like *Indermaur* v. *Dames* observed that "one of the essential facts necessary to bring a case within that principle is that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered."

"Unusual danger" is another essential which has received prominence in this case. The term has received an interpretation, by way of dictum only it is true, by two of the learned Lords Justices in *Norman's Case* (5). It has also been practically interpreted and applied in the present case by reference to the similar condition of other wharves and streets in Port Adelaide. Again, with much deference, the interpretation given to the term in *Norman's Case* appears at variance with the

(1) (1913) 1 K.B., 398, at p. 410.
(2) L.R. 1 C.P., 274; L.R. 2 C.P., 311.
(3) L.R. 2 C.P., 371.
(4) (1906) A.C., 428, at p. 432.
(5) (1915) 1 K.B., 584.

meaning intended in *Indermaur's Case* (1). In the last mentioned case *Willes* J. used the term "unusual danger" on page 288 of L.R. 1 C.P. in the same sense as he had used it on page 286 referring to *MacCarthy* v. *Young* (2) and *Farrant* v. *Barnes* (3), and again on page 287, where he gives as an instance a trap door left open unfenced and unlighted. On page 286 he draws the distinction between ordinary risks and extraordinary risks. Consequently, when using the term "unusual danger" on page 288, it seems plain that the Court referred to danger that was not usual in well-constructed and well-managed places of that nature, having regard to the business transacted and the class of persons attracted there—in other words, danger that was not really and properly incidental to such premises. The word "unusual" has relation to the premises, not to the visitor. If, as thought by *Phillimore* L.J. and *Pickford* L.J., it meant danger unusual for the particular person, it would follow that on his first visit to such a place all danger would be unusual. If, as there suggested, it means "unexpected" in fact, the obligation of the occupier would depend on an utterly unknown and undiscoverable factor. The last fifteen lines of page 288 of *Indermaur's Case* (4) seem directed to the question, and to resolve the matter beyond reasonable doubt.

It is very probable that the view taken of "unusual danger" in *Norman's Case* (5) was started by a phrase in the passage from the judgment of *Kelly* C.B. which is quoted by *Phillimore* L.J. (6). The learned Chief Baron alludes to workmen "who probably do not know what is usual in such places"; this is in addition to their being unacquainted with the actual danger. That phrase appears to have crept into the report of the case in the Law Reports. It does not appear in the contemporary reports in 36 L.J. C.P., 181; 15 W.R., 434 (the latter a manifestly condensed report); or 16 L.T. (N.S.), 293 (the last mentioned apparently a precise report). The Chief Baron clearly does not mean to qualify anything said by *Willes* J., because he proceeds immediately afterwards to quote the vital passage of the judgment

(1) L.R. 1 C.P., 274; L.R. 2 C.P., 311.
(2) 6 H. & N., 329.
(3) 11 C.B. (N.S.), 553.
(4) L.R. 1 C.P., 274.
(5) (1915) 1 K.B., 584.
(6) (1915) 1 K.B., 584, at p. 595.

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of that learned Judge in which nothing is said about actual knowledge of what is usual danger. Principle seems to require, and the words of *Willes* J. seem to assume, that, by what he calls the shopkeeper's "tacit invitation" (1) and by the tacit acceptance of that invitation, both parties are presumed to know what is usual danger, the one to see that it is not exceeded without warning, and the other to see that he uses reasonable care to avoid it, as well as not being guilty of contributory negligence should it be in fact exceeded. The last three lines on page 288 of the judgment of *Willes* J. particularly show that the actual unsafe condition of other Port Adelaide premises, if they be unsafe, cannot be the true standard for the defendants' premises. Such a standard would lead to a competition of demerits; and, of course, knowledge that other persons had neglected their duty, if such were the case, would be no evidence of knowledge that the particular defendant had similarly neglected his.

(2) *Proof of Negligence.*—Very slight circumstances will suffice as *primâ facie* evidence of the absence of knowledge and notice where the sufferer is dead. Where he is not shown to have been cognizant of the danger, where no rashness or negligence is imputable to him, where his conduct generally is that of a man unaware of extraordinary risks, and no reason is advanced for his deliberately flying in the face of danger that is proved to be unusual, the presumption arising from the natural instinct of humanity to avoid injury to life or limb is, in such a case, generally sufficient, unless rebutted by other circumstances. Conduct is often an excellent guide to a man's mental condition.

If actual notice is relied on, that is, in addition, a matter within the knowledge of the invitor, and in the circumstances is peculiarly within his knowledge; though not supplying the utter want of evidence on the point, the negative presumption arising from such a state of facts as has been already mentioned is more easily satisfied. (See *Stephen's Digest of the Law of Evidence*, 6th ed., art. 96, quoted in *Halsbury's Laws of England*, vol. XIII., p. 436); and also the *General Accident &c. Assurance Corporation Ltd.* v. *Robertson* (2)).

It has not been overlooked that the statement of claim in the

(1) L.R. 1 C.P., 274, at p. 287. (2) 25 T.L.R., 685, at p. 686.

present case treats the duty of the defendants as confined to the one method of care—by making the road reasonably safe. No point, however, has been made of that defect in the pleading; and, as will be pointed out later, the case has proceeded as if the allegations of want of knowledge had been contained in the statement of claim. If necessary, a formal amendment might be made hereafter.

(3) *Volenti non fit Injuria.*—Reliance was placed by appellants on the case of *Torrance* v. *Ilford Urban District Council* (1). The argument was that Richardson knew that irregularities did occur to a greater or less extent in such places, and had an opportunity of examining this place; and that, in those circumstances, the case referred to showed that he voluntarily accepted the risk, and so absolved the defendants from negligence altogether. When carefully examined, the case is no authority whatever for such a position. It is an interesting and severe illustration of a well-known principle relating to damages, and not an instance of *volenti non fit injuria*, which simply means that where a man is willing that a given course of action shall be pursued against him, he cannot, in the absence of statutory protection, be heard to say that that course is a neglect of due care towards him—in other words, negligence.

Torrance's Case was this:—A waggoner found a highway covered to its full width and for a length of 130 feet with partially unrolled granite. The waggoner, who was driving two horses pulling a waggon with a load of three tons, one of the horses being fat, found himself in the situation that he could not turn back, and if he went forward could not avoid the rough granite. Its rough condition was obvious. The defendants were clearly negligent, and were found so. The driver had a perfect right to proceed forward, and as he had that right independently of invitation, the rule in *Indermaur* v. *Dames* (2) was inapplicable. He did go forward, and his fat horse, after pulling through, fell and died. The Court held that, having had an opportunity of seeing the risk of such a catastrophe, and having elected to take the risk, the owner of the horse could not recover for its loss. But why? Not because the driver had

(1) 73 J.P., 225; 25 T.L.R., 355. (2) L.R. 1 C.P., 274; L.R. 2 C.P., 311.

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absolved the defendants from their duty of care, and not because it was contributory negligence to go forward. Not being able to turn back, and not being bound to remain there for ever, the driver had a right to go forward. But when the facts and judgments, particularly the judgment of Lord *Alverstone* C.J. in the Divisional Court (1), are examined it will be seen that it was the manner in which the driver proceeded that was the real point of the decision. The vital question admitting negligence on the part of the defendant, and no contributory negligence, on the mere going forward, on the part of the driver, was whether the death of the horse was the natural and proximate consequence of the defendants' negligence. The facts showed that the defendants' man with the steam roller was there, and could, if he had been asked, have given the driver a pull. And the driver apparently made no effort to lighten his load. He simply chose to chance the obvious risk of straining his horses and waggon when he had equally obvious means of trying to avoid this risk, none of which he endeavoured to take. Lord *Alverstone* held that the damage was not the natural and necessary consequence of the defendants' negligence, because the driver had so elected, and this view was affirmed by the Court of Appeal. The case is no authority as to whether the plaintiff could have recovered had the driver tried other means, and failed.

The principle on which damages are recoverable is that they must be the natural and reasonable consequence of the act or omission complained of. That is true restitution. If further or other loss is sustained through the plaintiff's own rashness or imprudence, that is not attributable to the defendant, and he is not responsible for it. *Jones* v. *Boyce* (2), *Clayards* v. *Dethick* (3) and *The City of Lincoln* (4) are authorities for this. If a man by his wrongful act places another in a position where he must sustain what the law regards as damage, the sufferer is entitled to act reasonably for his own benefit, and any loss he sustains in so doing is part of the ordinary course of things for which the wrongdoer is responsible. But he is also bound towards the wrongdoer not to act unreasonably either in increasing

(1) 99 L.T., 847.
(2) 1 Stark., 493.
(3) 12 Q.B., 439.
(4) 15 P.D., 15, at p. 18.

or in omitting to mitigate the loss. In *Grant* v. *Owners of S.S. Egyptian* (1) Lord *Shaw* says:—"The defendants are liable for the damage which is the natural and direct consequence of their wrongful act . . . the defendants are not liable for any further damage which could have been avoided or minimized by the exercise of reasonable care on the part of the plaintiffs." To the same effect is the *British Westinghouse Electric and Manufacturing Co.'s Case* (2). It is clear, therefore, that the case of *Torrance* v. *Ilford Urban District Council* (3) has nothing to do with the question of mere liability, and does not affect the question discussed in this appeal of *volenti non fit injuria* in the sense of absolving the appellants from any duty of care towards Richardson.

(4) *The Facts as to Knowledge.*—The learned trial Judge, *Buchanan* J., found as a fact that the deceased knew the danger. If that finding were in our opinion a proper one, it would, of course, end the case. Not only in the leading case, but in others, "knowledge" of the danger is accepted as placing the sufferer outside the limit of the invitor's duty of care. A man who knows does not require telling. *Gautret* v. *Egerton* (4) and *Cavalier* v. *Pope* (5) have been referred to; *Crafter* v. *Metropolitan Railway Co.* (6), decided before *Indermaur* v. *Dames* (7) in the Common Pleas, assumes the same thing.

First of all, the evidence as it stands at present—it may be entirely different on the next trial—shows no proper ground for finding affirmatively that Richardson did know the condition of the rails. He was not in the position of Boyce, inspecting on foot and looking at the rails for the very purpose of testing whether the road had been kept reasonably free from danger. Unless he knew or had notice of the defect—if defect there was—he was entitled to assume that the appellants had taken all reasonable care to make the road reasonably safe for him as long as he exercised such care as was reasonable in the usual condition of a rail road properly looked after. He was not put upon inquiry,

(1) (1910) A.C., 400, at p. 402.
(2) (1912) A.C., 673, at p. 689, *per* Lord *Haldane* L.C.
(3) 73 J.P., 225; 25 T.L.R., 355; 99 L.T., 847.
(4) L.R. 2 C.P., 371.
(5) (1906) A.C., 428.
(6) L.R. 1 C.P., 300, at p. 303.
(7) L.R. 1 C.P., 274; L.R. 2 C.P., 311.

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so to speak. And as his duties kept him busy with his waggon, his horses and his load, and the surrounding objects, the mere fact that Boyce could see the true condition of the rails while on foot is not enough, in view of all the other circumstances at present appearing, to satisfy my mind as a Judge of fact that Richardson did know the danger he was encountering. As Boyce's evidence is admittedly the strongest in appellants' favour, and as other evidence militates against whatever force it has, it is unnecessary to say more as to the affirmative finding of knowledge. That would not, however, end the matter. The burden, slight as it is, in this case of proving the absence of knowledge is on the plaintiff, and this point was not lost sight of in the Supreme Court. But the actual spot was not the usual place frequented by Richardson; and, having regard to all the relevant considerations, it appears to be the better and more satisfactory conclusion, on the evidence as it at present stands, that the deceased was not aware of the defect complained of. This conclusion can, of course, in no way affect the case upon the new trial, because additional or qualifying circumstances might materially alter the ultimate result. And in accordance with the ordinary practice in such cases, all detailed examination of the facts and probabilities are omitted.

The appeal should therefore be dismissed.

Appeal dismissed with costs. Order appealed from varied by directing that the appellants should pay the costs of the first trial and of the motion for a new trial.

Solicitors, for the appellants, *Bakewell, Stow & Piper.*
Solicitors, for the respondent, *Denny & Villeneuve Smith.*

B. L.