[HIGH COURT OF AUSTRALIA.]

LEVERIDGE . . . . . APPELLANT;
PLAINTIFF,

AND

SKUTHORPE AND OTHERS . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 14, 15, 16, 29.

Barton, Isaacs and Rich JJ.

Negligence—Liability—Dangerous premises—Persons having control of premises—Voluntary association—Members—Committee—Hidden danger—Invitee—Licensee.

The defendants, who were members of the committee of a voluntary association, of which also they were members, had the management and control of a hall which they let for hire from 7 p.m. until 12 p.m. of a certain day for a concert. The plaintiff, a young girl, was invited by a lady, who at the request of the hirers of the hall was assisting in preparing for the concert, to attend at the hall on the afternoon before the concert to help in decorating wands which were to be used at the concert. The plaintiff accordingly went to the hall on that afternoon, and, while waiting for the lady to arrive, opened a door at the back of the hall and went through it on to a landing from which steps descended to the ground and which had a railing round it. The plaintiff leaned against one of the rails, which, being insecurely fastened, slipped out of position, and she fell to the ground and was severely injured. In an action by the plaintiff against the defendants the jury found a verdict for the plaintiff, and in reply to specific questions put to them found (*inter alia*) that the plaintiff, when she was on the landing, was waiting to help in the decoration; that the landing was a place to which it would be reasonable to suppose that persons so waiting would be likely to go in a reasonable belief that they were entitled to go there; that the unsafe condition of the rail was known to two of the defendants personally; and that the want of such knowledge on the part of the other defendants, except one of them, was due to the absence of reasonable care on their part.

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Held, that the plaintiff was, with regard to the defendants, in the same position as an invitee, and, therefore, that on the findings of the jury, which there was evidence to support, she was entitled to hold her verdict against all the defendants other than him whose want of knowledge of the dangerous condition of the rail was not found by the jury to be due to absence of reasonable care on his part.

Decision of the Supreme Court of New South Wales: *Leveridge* v. *Skuthorpe*, 18 S.R. (N.S.W.), 504, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Eva Leveridge, by her next friend Horace Leveridge, against Sydney Richard Skuthorpe and ten other persons, in which it was alleged by the declaration that the plaintiff was a child of the age of fourteen years; that the defendants were in possession and control of, and occupied, certain premises known as the Coonamble School of Arts; that the defendants negligently conducted themselves in and about the care, management, maintenance and repair of the said premises, and negligently allowed a certain floor and posts and rail on an elevated landing on the said premises to become and be in a state of disrepair and insecure, and a concealed and unusual danger to persons using the said premises, of which said disrepair, insecurity and danger the defendants ought to have known, and by themselves, their servants and agents well knew, and the plaintiff was ignorant; and that by reason of the facts aforesaid, while the plaintiff was lawfully using the said premises by the licence, permission and invitation of the defendants and on and with a view to business which concerned them, the said floor and posts and rail gave way, whereby the plaintiff was thrown to the ground and injured. The plaintiff claimed £5,000 damages. To this declaration the defendants pleaded not guilty; that they were not in possession or control of, and did not occupy, the premises, and that the plaintiff was not using the premises by the licence, permission and invitation of the defendants, or on or with a view to business which concerned them. Upon these pleas the plaintiff joined issue.

The action was tried before *Ferguson* J. and a jury, and at the conclusion of the evidence the jury found a verdict for the plaintiff for £2,000, and also answered certain questions put to them by the

learned Judge. The material facts and the questions put to the jury and answers given by them are set out in the judgments hereunder.

The defendants moved before the Full Court that the verdict should be set aside, and that a verdict for the defendant or a nonsuit or a new trial should be directed. The Full Court ordered that the verdict should be set aside; that a verdict should be entered for one of the defendants, John Stewart Hartley Murray, and that a new trial should be had between the plaintiff and the other defendants: *Leveridge* v. *Skuthorpe* (1).

From that decision the plaintiff now appealed to the High Court, as of right in respect of the defendant Murray, and by leave in respect of the other defendants. The appeal as against Murray was not pressed.

Knox K.C. (with him *Abrahams*), for the appellant. The appellant was in the position of an invitee in relation to the respondents. Where the giving of permission to enter upon premises is connected with the business interests of the occupier, or where the transaction giving rise to the permission is a matter of business on the part of the occupier, or where the permission is given by a contract entered into by the occupier in the course of his business, then the person permitted to enter is an invitee (*Indermaur* v. *Dames* (2); *Smith* v. *London and St. Katharine Docks Co.* (3); *Miller* v. *Hancock* (4); *Gorman* v. *Wills* (5)).

[ISAACS J. referred to *Ivay* v. *Hedges* (6); *White* v. *France* (7).

[RICH J. referred to *Latham* v. *R. Johnson & Nephew Ltd.* (8).]

It is not necessary that the respondents should be interested in the appellant being in the hall. The appellant was an invitee in this case, because the contract of letting and hiring of the hall covered by usage the right to be in the hall on the afternoon when the accident happened for the purpose of preparing it for the concert in the evening. There was an implied term in the contract to that effect. Apart from the evidence of usage, there was permission

(1) 18 S.R. (N.S.W.), 504.
(2) L.R. 1 C.P., 274; L.R. 2 C.P., 311.
(3) L.R. 3 C.P., 326.
(4) (1893) 2 Q.B., 177.
(5) 4 C.L.R., 764.
(6) 9 Q.B.D., 80.
(7) 2 C.P.D., 308.
(8) (1913) 1 K.B., 398, at p. 410.

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to use the hall in the afternoon, and that permission, being directly connected with the purpose for which the hall was let, is sufficient to constitute those persons then using it invitees. The benefit of the invitation is not confined to the person directly contracting with the occupier, but extends to persons connected in some way with the person so contracting. If the appellant was an invitee, she is entitled to recover not only against those defendants who knew of the hidden danger, but also against those whose ignorance of the danger was due to their negligence. The jury might properly find on the evidence that the landing where the accident happened was a place to which the appellant might be reasonably expected to go under the reasonable belief that she was entitled to go there. If the appellant was not an invitee but a mere licensee, the respondents are still liable; for the knowledge of the caretaker, Bull, should be imputed to the defendants. (See *Coughlin* v. *Gillison* (1); *Cooke* v. *Midland Great Western Railway of Ireland* (2); *Baldwin* v. *Casella* (3).) The action is properly brought against the respondents, who are liable either as members of the Committee who exercised dominion over the hall by letting it, or as members of the School of Arts who were occupiers of the hall.

Shand K.C. and *Watt*, for the respondents. Assuming that there was evidence that Bull knew of the insecure state of the rail, the jury should have been asked to say whether he was in such a position with regard to the management of the hall that his knowledge should be imputed to the respondents. The Court cannot take judicial notice of what were his duties, and there is no evidence of any delegation of authority to him. Nor is there any evidence from which the delegation of authority to him can be implied. (See *Applebee* v. *Percy* (4); *Lovegrove* v. *London, Brighton and South Coast Railway Co.* (5).) The respondents were not liable as members of the Committee, because they were only agents as to letting the hall, and there was no act of commission on their part but only an omission. There is no implication that the hall was let on their behalf. As members of the School of Arts, a voluntary association,

(1) (1899) 1 Q.B., 145, at p. 148.
(2) (1909) A.C., 229, at p. 238.
(3) L.R. 7 Ex., 325.
(4) L.R. 9 C.P., 647.
(5) 16 C.B. (N.S.), 669, at p. 688.

the respondents were not liable, because the fact of membership did not confer on any member a right to occupy any part of the premises. The Committee let the hall not by virtue of any right of property but by virtue of a delegation from the trustees in whom the premises were vested. The only case where in circumstances like these the members of a committee of a voluntary association have been held liable is *Brown* v. *Lewis* (1). The individual respondents cannot be held responsible for the knowledge of Bull, because he was the servant of all of the members and cannot be said to have been the servant of any one of them. All of the members of the association should therefore have been sued. No plea of abatement was necessary (*Cabell* v. *Vaughan* (2)). The usage that persons who hired a hall for an evening entertainment had a right to go into the hall during the previous afternoon to prepare it for the entertainment is so uncertain that it cannot be annexed to the contract as an implied term. There is no suggestion that anyone who had anything to do with this hall had ever heard of the usage. Here he contract was to let the hall from 7 o'clock until 12 o'clock at night, rehearsals being paid for separately. The only inference that can be drawn is that those who were at the hall in the afternoon, preparing it for the concert, were there without the dissent of anyone who might dissent. That would make the appellant at most a mere licensee. Even if those who were in the hall for the purpose of decorating it were invitees, that invitation cannot extend to the appellant, who was not to decorate the hall but merely to decorate wands, which might have been done elsewhere, and she was a trespasser. The highest the permission can be put is that it is a permission to the hirers to bring to the hall persons who were reasonably necessary for the purpose of preparing the hall; and that permission cannot be implied as a matter of contract. The only implication of an invitation must be one that can arise from the contract. The obligation of the defendants must arise out of and be coextensive with the invitation arising from the contract. The only terms that can be implied from the contract must be terms which are necessary for performance of the contract. The time of the hiring is fixed by the contract, and no contract can be implied for

(1) 12 T.L.R., 455. (2) 1 Wms. Saund., 291, at pp. 291f, 291m.

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any other time. The usage of which evidence was given cannot help, because it is not shown that this particular contract is one to which the usage applied. Even if the appellant was an invitee, there was no common interest in which she and the respondents were engaged. The respondents had no interest in the decorating of the hall (*Wilson, Sons & Co.* v. *Barry Railway* (1)). The only common interest was the occupation of the hall by the hirers during the time for which it was hired. The purpose for which the hirers were in the hall is immaterial. Even if the appellant was an invitee when she was in the hall, she was a trespasser when she went on to the landing. (See *Walker* v. *Midland Railway Co.* (2); *Jenkins* v. *Great Western Railway* (3).)

[RICH J. referred to *Maclenan* v. *Segar* (4).]

There were no facts which would justify a finding that the landing was a reasonable place for the appellant to be upon. The finding that the rail was never fastened by a bolt is contrary to all the evidence on the point, and that finding vitiates all of the findings.

Knox K.C., in reply. The custom as to the use of a hall in the afternoon, where it is hired for the evening, is not too vague, for a contract in the terms of the custom alleged would give the hirer an enforceable right. The fact that a benefit given by a contract is very slight or can very easily be destroyed does not prevent it from being a term of the contract for breach of which damages may be awarded. Even if the finding by the jury that there never was a bolt in the rail is not supported by the evidence, their verdict is consistent with their having thought that it did not matter whether it was or was not. When an occupier of premises enters into a contract and as incidental to it gives permission to certain persons to come on those premises, those persons are invitees. It was never suggested at the trial that Bull's position as caretaker was not such that his employers were not affected by his knowledge. The evidence is consistent with the appellant having been asked to decorate the hall, and not only the wands. The defendants were properly sued. The trustees of the hall could not be sued, because they had no control over it.

(1) 86 L.J. K.B., 432.
(2) 2 T.L.R., 450.
(3) (1912) 1 K.B., 525.
(4) (1917) 2 K.B., 325.

If the defendants cannot be sued as members of the Committee, they can be sued as members of the association, because they occupied the hall.

Cur. adv. vult.

April 29.

The following judgments were read :—

BARTON, J. The plaintiff, who at the time of her injuries was about fourteen years of age, brings this action through her next friend against the defendants, who at the time were the Committee of the Coonamble School of Arts. The action was for negligence in the care, management, maintenance and repair of the premises in allowing a certain floor and post and rail on an elevated landing on the premises to become and be in a state of disrepair and insecure, and a concealed and unusual danger to persons using the premises. It was averred that the defendants ought to have known, and by themselves, their servants and agents well knew, of the disrepair, insecurity and danger, and that the plaintiff was ignorant thereof, so that while the plaintiff was lawfully using the premises by the licence and invitation of the defendants and on and with a view to business which concerned the defendants, the floor and posts and rail gave way, and the defendant was thrown down and injured. The defendants pleaded (1) not guilty; (2) that at the material time they were not in possession or control or occupation of the premises; (3) that the plaintiff was not then lawfully using the premises by the licence, permission or invitation of the defendants, or on or with a view to business which concerned them. The plaintiff replied joining issue. A verdict was given against all the defendants with damages £2,000, and the jury answered certain questions, to which I will refer presently. On appeal to the Supreme Court, the Full Court set aside the verdict, entered a verdict for the defendant Murray and as to the other defendants ordered a new trial.

In pursuance of special leave the plaintiff appeals to this Court on four grounds, of which the substance now material is contained in the first and fourth; that substance being that the Supreme Court wrongly held that on the evidence the appellant was not an invitee, and therefore that the new trial order as to the defendants other than Murray was made in error.

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The appellant has, no doubt rightly, abandoned the appeal as against Murray. As to the remaining defendants she maintains that the verdict must stand. No question has been raised as to the damages.

In view of the evidence at the trial it is not now contested that the defendants possessed, occupied and controlled the premises. Those premises included a hall, in which entertainments were held from time to time, various offices, such as dressing-rooms, and a library. Some little while before the 14th of August 1917 the hall was engaged by the Coonamble Town Band for a concert to be held on that date. The hall was usually let by the secretary, who acted under the Committee in letting it, paying the money into the bank to the credit of the School of Arts account, on which the Committee acted through two of their officers. The hall was so let on the occasion in question for the time from 7 to 12 p.m., and there can be no doubt that the contract was between the Band and the Committee. There were several rehearsals, the last of which was held on the afternoon of the 13th of August. The hall was decorated for the concert on the afternoon of the 14th, prior to the performance to be held on that evening. The evidence of one Brownlow, a director of concert and other entertainments in the service of Paling & Co. Ltd , was that he had a good deal to do with the arrangement of concerts and entertainments in the country, engaging country halls for such purposes. He deposed that it was customary, after engaging the hall for a particular date, to go to the hall in the afternoon for the purpose of decorating, and without telling the owners of the intention to do so, it being the custom to go in and do the decorating during the day without express intimation to the owners. He said: "You inquire whether it is engaged first. If it is disengaged you do not tell him you will be in to decorate, you just simply go in and do your work. . . . If it is not open you apply to the caretaker to open for you." There has been argument whether this was good evidence of a legal custom. I think that is beside the question. It is sufficient if there was a practice of the kind, and no attempt was made to question Brownlow's evidence; nor was it attempted to be shown that no such practice existed, at any rate at Coonamble.

But I am not sure that it was necessary to prove as a fact the

existence of the practice. It would be scarcely possible to give an effective entertainment in a place of the kind without allowing the entertainers to make some preparation for the evening's performance by adapting the hall to the kind of entertainment to be given. If there is to be a theatrical entertainment, the scenery and properties must be arranged beforehand. If there is to be a ball, the floor must be prepared. If there is to be a banquet in the evening, the tables must be laid and adorned. And in all these cases the doing of all that is necessary and proper, such as relieving the bareness of the place by decoration, must really be understood as incident to the letting. The employment of proper assistance for the purpose, whether on terms of payment or not, is equally incident. Without some such understanding some entertainments would be impossible, others repellent, and scarcely any attractive. And those who rent a hall for an entertainment do not rely solely on the words and acts of the performers for the success of the entertainment. They cannot do so, as those who let the halls well know. Now, as the hall was to be decorated on the afternoon of the 14th, the secretary of the Band made an arrangement with Mrs. Hodgkinson, a local lady, who had been conducting some of the rehearsals for the concert. One of the numbers on the programme was "Wattle Day in Australia," a chorus. That number was left in the lady's hands entirely. Among the decorations for the evening was the adornment of the wands to be used by the chorus. On the afternoon of the 13th Mrs. Hodgkinson set about obtaining assistance for the decorations, and as to the wands she invoked the assistance of some girls. One of them was the appellant, who promised to come next day and help to decorate. So, on the afternoon of the 14th, when the hall appears not to have been engaged for any other purpose, the plaintiff and other invited girls went to help. Some men were there getting the hall ready for the concert. The girls went there on the permission of their schoolmistress, obtained by Mrs. Hodgkinson. When she went to the hall she found that Mrs. Hodgkinson was not there, but was told she would be back in a few minutes. The appellant and the other girls waited for her, first on the stage and presently on the landing at the back of the hall, emerging by opening an unlocked door. There she leaned against

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the railing, it gave way, and she fell, six feet, to the ground, sustaining grave injury.

The landing was a small platform, on to which she could step from the back door of the hall. It was apparently protected by a rail reaching from the back wall to a post, thence by a rail leading to another post at the top of the steps, and thence by a rail leading down the steps to the ground. After the fall, the rail was seen hanging down from the wall end. Afterwards it was apparently placed upright against the wall. The rail, at the end at which it was dislodged, had been attached to the post with the help of an iron in the shape of an inverted L, an angle bracket, so placed that in the horizontal part of the bracket was a hole—not a screw hole—through which a bolt had at times pierced the rail and attached it to the iron, while the upright part of the iron was fastened to the post by three screws. The rail was evidently in its usual place before the appellant leaned on it, but the bolt must have been missing. From the circumstances of the accident as well as the oral evidence it is too clear for question that such was the case. There was conflict as to whether the rail could be secure without the bolt, but the jury held that it was unsafe, believing the evidence for the appellant, supported as it was by the circumstances. Indeed, when the caretaker went to look for the bolt after the accident, no bolt could be found, though on other occasions, after the rail had been removed to admit goods, he had found the bolt replaced through the rail. Now the rail was so placed as not to give any indication of its insecurity. To the appellant it must have been a quite unexpected danger.

The contention for the appellant is that she was an invitee, and that the defendants ought to have known of and to have rectified the danger which the appellant could not have expected to exist. The respondents, that is, all the defendants save Murray, contend that the plaintiff was a trespasser, or that at most she was a mere licensee, and that therefore no defendant who had not actual knowledge of the danger could be liable. They had indeed a preliminary contention, which was that the Committee were not liable apart from the other members of the School of Arts. That contention may be disposed of by the fact that, if the appellant has made out her case in other respects, the respondents are liable in this action of negligence as joint tortfeasors, with or without their fellow members.

I turn now to the questions which the learned Judge put to the jury, and their answers thereto. They are as follows :—

(1) Did the plaintiff go to the hall at the invitation of Mrs. Hodgkinson ?—A. : Yes.

(2) When she was on the landing, was she waiting for Mrs. Hodgkinson to help in the decoration ?—A. : Yes.

(3) Was the landing a place where it would be reasonable to suppose that persons so waiting would be likely to go in a reasonable belief that they were entitled to go there ?—A. : Yes.

(4) Was the rail originally fastened by a bolt ?—A. : No.

(5) Did the accident arise from the unsafe condition of the rail ?—A. : Yes.

(6) Was the unsafe condition of the rail known to the defendants or any of them personally ?—A. : Yes, to Geary and Button.

(8) Was it known to Bull, the caretaker ?—A. : Yes.

A question was added after verdict, taking the place of a prior question, which perhaps was not pressed to an answer. It is this : Was the want of knowledge of the defendants other than Geary and Button due to absence of reasonable care on their part ?—A. : Yes, except Murray.

Now, the fourth question was obviously immaterial, because the question really was whether the rail was securely fastened at the time of the accident, a question which was expressly answered in No. 5. If the appellant was an invitee, as I think she was, No. 6 was immaterial, if the defendants ought to have known. Similarly, if there was an unexpected danger of which the defendants ought to have known, the appellant's case was not made more complete by the knowledge of the caretaker, as affirmed in No. 8, because it was not necessary to claim that his knowledge was imputable to the defendants. If I take the correct view as to the position of the appellant when upon the premises, her case would be complete upon findings 1, 2, 3, 5, and possibly the answer given after verdict, since to say that the defendants ought to have known means that they failed to take reasonable care to know the condition of this part of their premises.

The appellant was, of course, either a trespasser, a licensee, or an invitee of the defendants. *Pring* J. has referred to the definition

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of the liability of the occupier in each of these cases laid down by *Buckley* L.J. (now Lord *Wrenbury*) in *Norman* v. *Great Western Railway Co.* (1). I need not repeat it. That the appellant was not merely a trespasser is so clear that it would be a waste of time to discuss the question. She was there either by the permission or on the invitation of the occupiers, the respondents. If a licensee, she was bound to take the premises as they were, with the qualification that if the occupiers or any of them actually knew of a danger on the premises unknown to her, and did not warn her, liability on the part of the defendant or defendants arose from the duty not to leave a trap open for her. On the evidence the jury have found that two of the defendants are in this position, namely, Messrs. Geary and Button. For throughout the case there is no trace of a warning given to the appellant against the danger unknown to her. But if the appellant was there on invitation, express or implied, then it was the duty of the invitors to endeavour to prevent the appellant from suffering damage from an unusual danger, if they knew or ought to have known it.

Now, was the appellant there upon bare permission? I take it that the Town Band were entitled to go upon the premises, if the place was not engaged that afternoon, to make their proper preparations for the performance which was to take place the same evening. True, all the rehearsals had been held. But there remained the work of decorating the hall, and such properties as would reasonably be required for use that evening, among them the wands to be used in the "Wattle Day" chorus. Nobody would expect from the bandsmen such proficiency in the art of decoration that they could do it themselves without aid. That is why the Band secretary invoked the assistance of Mrs. Hodgkinson, who had sole charge of the item, and she in turn was right in invoking the assistance of the girls, including the appellant, who, indeed, had been at rehearsal among the performers. I have no doubt that the shield of the invitation covered not only Mrs. Hodgkinson, but the girls whom she brought in to assist her in her work. And that was obviously the view of the jury, to whom, in his summing-up, *Ferguson* J. fully explained the positions of trespasser, licensee, and invitee, intimating

(1) (1915) 1 K.B., 584, at p. 591.

that "a person is said to be on the premises by the invitation of another if he is lawfully there on some business in which they are both concerned." Of course, it may be said that the appellant, however lawfully present in the hall, had no business to be on the landing. But the landing was commonly used by persons leaving the building. One of the appellant's witnesses said :—"I often go to the School of Arts. I attend the pictures there. When there are picture shows on at the School of Arts a lot of people go out that back landing after the picture show is over. It is used as an exit door. There are a number of people sit on the stage, and they go out that way. I have gone out that way myself repeatedly." Indeed, it could not justly be said, apart from his evidence, that the landing was not, as the jury affirmed it to be, a place where it would be reasonable to suppose that persons waiting, as the appellant was for Mrs. Hodgkinson, would be likely to go, in a reasonable belief that they were entitled to go there. And I think that the invitation to the appellant, albeit an implied one, covered a right not only to make her exit by way of the landing, but also a right to use it, as a commonly used part of the premises, while waiting for a person equally entitled to go to the hall, with whom she had an appointment on the business in hand. The reasoning of *Willes* J. in *Indermaur* v. *Dames* (1), affirmed in the Exchequer Chamber (2), though confined in its expression to the case of a paid workman employed under a contractor, in my judgment extends in its implications to a case such as the present. *Indermaur* v. *Dames* is the leading case on the subject. The present appellant had an interest alike with the respondents in the subject matter of the contract, and although their interest was not identical, it was a common interest in the sense of the authorities ; and she was there on lawful business and not upon bare permission. She was therefore entitled to expect that the occupiers should on their part use reasonable care to prevent damage from unusual danger, which they either knew or ought to have known.

The principle of *Indermaur* v. *Dames* has been, I will not say extended, but illustrated in many subsequent cases, more than two or three of which it would be superfluous to cite. One of them is

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

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Holmes v. *North Eastern Railway Co.* (1), and another is *Wright* v. *London and Nor'h Western Railway Co.* (2). In the last mentioned case Lord *Coleridge* C.J. observes that the case of *Holmes* v. *North Eastern Railway Co.* is one of the greatest authority because in the Exchequer Chamber seven Judges affirmed the decision for the reasons given by the Judges in the Court of Exchequer. The latest case on the subject is *Hayward* v. *Drury Lane Theatre Ltd.* (3), decided by the Court of Appeal. The plaintiff, a principal dancer, attended rehearsals of a revue to be produced at the defendants' theatre; she had no contract with the defendants to attend these rehearsals and was not paid for her attendances, but attended voluntarily in the hope and expectation of obtaining an employment for the run of the revue when it was ready. She took up a position on a staircase by the direction of the producer. The staircase was unsafe. It collapsed; she fell and sustained serious injury, and sued for damages. The jury found that she was not in the employment of the defendants, and that the accident was caused by the negligence of one of their servants. Judgment, which was given for the plaintiff at the trial, was upheld. *Scrutton* L.J. delivered a very lucid judgment. He held that the plaintiff had the ordinary protection of an invitee and could recover in the action. She was either a licensee with an interest or an invitee, and in the former case she had the same rights as an invitee. For that he cited *Holmes's Case* (4) and *Wright's Case* (2). He said that a trap, in his view, "is none the less a trap that it begins by an act of negligence and continues so by an act of negligence if its continuing condition is a danger which the licensee cannot avoid by reasonable care" (5). So here, if the appellant was not an invitee, as I think she was, she was clearly a licensee with an interest, and entitled to the same rights, although her interest was in the execution of a contract to which she was not actually a party, and she attended to perform services for which she was not to be paid.

The evidence I have quoted as to the use of the landing as part of an exit is sufficient to show as a matter of fact that the respondents

(1) L.R. 4 Ex., 254; L.R. 6 Ex., 123.
(2) 1 Q.B.D., 252.
(3) (1917) 2 K.B., 899.
(4) L.R. 6 Ex., 123.
(5) (1917) 2 K.B., at p. 915.

had a duty to people using it in that way, namely, a duty to take care that persons using it on their tacit invitation and not knowing of its dangerous condition were warned of that condition or otherwise protected against the danger. If they did not know of that danger, they certainly ought to have known. They employed a caretaker, Bull, who said that his hours were from 10.30 to 1 or 1.30 p.m. and from 7 p.m. to 11 p.m. He was not on duty, therefore, at the time the accident happened, namely, 3.30 or 4 in the afternoon. That was no protection to the respondents. If he observed the dangerous condition of the rail in the morning, he ought to have told them, but it does not avail them that he did not do so. It was their duty to know, and a duty which they owed to anyone who was in the position of the appellant. They must have known that persons who had hired the hall for performances were in the habit of using the place in the afternoon for the purpose of decorating it, and that they must have used it also in preparation for their performances. All such persons ran the risk of being injured by a danger unknown to them, whether in the concert room itself or in the places ordinarily allowed to be used by those who hired it, and if the respondents did not keep the place in a safe condition or inform them of the danger, they are liable, because it was their business to know it and at least to give some protection to those who rightfully used it unless they took the better course of making it safe.

I think that every material finding of the jury was amply supported by the evidence; no exception is taken to the direction save on a question now immaterial, and the general verdict for the appellant is, in my view, unimpeachable.

The appeal must therefore be allowed except against the respondent Murray.

Isaacs and Rich JJ. The respondents are sued by the appellant to recover damages for injuries sustained by her as the result of their negligence in respect of her safety at the Coonamble School of Arts building. The action is therefore one of tort.

The first question is the position of the defendants towards the building. They are not the legal owners, but liability in such a case as the present depends not upon ownership but on possession

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and control. They are the Committee of the Institution, called the School of Arts, a voluntary association of unincorporated members. The constitution of the association consists of articles or regulations adopted in October 1898, and these are in evidence.

It is sufficient to state that the articles provide for the annual election of a Committee to manage the property and affairs of the Institution as it is called, including the power to appoint officers of the Institution, and to let the building now under consideration. The members therefore assume control of the buildings, and the Committee are for these purposes the agents of the general body of members. A secretary of the Institution duly appointed by a former Committee and still retained was empowered by the Committee to let the hall, and she did let the hall for the concert in connection with which the present case has arisen. It must be taken on the evidence that the letting was on behalf of the general body of members. The defendants, however, were members, and the letting was consequently by them and any other members with whom they were associated. The action was brought against them personally, and could be sustained whether their participation as principals was as committeemen or as members. There is no plea in abatement, and no question of non-joinder is raised. In the result the defendants are to be regarded as having for the purposes of the concert the possession and control of the building.

The next question concerns the position of the plaintiff. The hall was let to a man named Schneider on behalf of an indeterminate body called the Town Band Committee, and for the purposes of a patriotic concert. The hours during which the building was engaged for the purpose were from 7 to 12 on the evening of 14th August 1917. It is, of course, universal knowledge that the promoters of a concert, particularly when they are so indefinite in personnel, may require the assistance of others to carry out the project. As in *Indermaur* v. *Dames* (1), there is no *dilectus personarum*. The principle of *Dennett* v. *Grover* (2) applies. In that case, decided in 1739, it was held that if A license B to enter his house to sell goods, B may take assistants if necessary for the purpose of selling the goods. "Necessary" there does not mean within the narrowest limits of

(1) L.R. 1 C.P., at p. 285. (2) Willes, 195.

physical necessity, but within such limits as a reasonable man would observe. This principle is at the root of many of the cases. If the appellant comes within those limits, she would stand in the same position for present purposes as the actual hirers of the hall, and is so far identified with them.

It is shown that one of the items of the concert was a wattle dance by children, in which wands decorated with wattle were to be used. The concert committee, or those acting for them, entrusted a Mrs. Hodgkinson, wife of one of the defendants, with the task of organizing the dance, and also with various other duties towards the preparation of the concert. Mrs. Hodgkinson, through the schoolmistress, obtained the consent of the appellant to take part in the dance, and instructed her to come to the hall to assist in the decorations, presumably of the wands. The plaintiff, on the occasion when she was injured, went to the building for the purpose of carrying out the instructions given. She was with other children, and, though there is some conflict of evidence, the jury found in her favour that she remained for the purpose for which she originally went. Her status therefore entitled her to the same protection as the actual hirers of the hall.

The next question is what was that status ? Was she an invitee, or a licensee, or a trespasser ? It is admitted that the hirers themselves could not, in view of the circumstances appearing, be regarded as trespassers, and therefore what has already been said eliminates also as regards the appellant the character of trespasser. It remains to be considered whether she was invitee or licensee.

It has been very strenuously contended that there was no binding term of agreement between the Institution and the concert committee to permit entry except between 7 and 12. Assume, but certainly without so deciding, that that is correct ; assume further, as argued, that the fixed hours of occupation in return for the fixed remuneration preclude the addition of a further time by implication as a term of the contract—the contention being that, as concerts commence usually at 8 o'clock, the previous hour is the agreed margin for preparation : nevertheless, those assumptions do not determine the matter. It may be that the Institution, if it had chosen, could have refused to allow the decoration to proceed until

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7 o'clock, whether the hall were in the meantime engaged or not; and that such refusal would not have been a cause of action.

But the status of "invitee" does not depend on the existence of a contract. That is demonstrated by reference to the decided cases. Let us assume Brownlow's evidence does no more than prove a *practice*—a voluntary practice it may be—so generally observed throughout New South Wales as probably to have been known to the Coonamble School of Arts authorities and to the concert committee, a probability greatly increased by the absence of evidence to the contrary notwithstanding some of the defendants were witnesses. The practice as deposed to could well be taken by the jury, and it appears to have been so taken, as a practice which was generally followed when a hall was engaged for an entertainment with fixed hours, at least with the commencing hour fixed. If the practice was that any person hiring the hall under those circumstances would be regarded as having, by reason of his hiring and for the purpose of better effectuating its main object, a conditional permission—conditional on the hall being disengaged, and perhaps even revocable,—yet if the condition happened and the permission were not revoked, but continued and was acted upon, that would be quite sufficient to create the position of invitee. The admission to the hall for the purpose of preparing for the concert would spring from the transaction of hiring, would be inseparable from it, and would not be granted (see *Gautret* v. *Egerton* (1)) to everyone, whether dealing with the Institution or not. It would be therefore so closely connected with the main object of the transaction as to make the expectation of the permission an element in inducing the hirer to take the hall or to pay a higher price for it; for we know that probabilities of advantage enhance value. In other words, the admission in such circumstances could fairly be viewed by the jury not as philanthropy but as a matter of business, not as a pure gift but as a possible business accretion to a minimum certain consideration. *Willes* J., in *Indermaur* v. *Dames* (2), constantly speaks of "bare licensees" and it is quite clear that, on page 288, the words "mere volunteers or licensees" mean mere licensees as well as mere volunteers.

(1) L.R. 2 C.P., 371, at p. 375.

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

The distinction between a "licensee" and a "mere licensee" was the ground of decision in *Holmes* v. *North Eastern Railway Co.* (1), a case described by Lord *Coleridge* C.J., in *Wright's Case* (2), as of the greatest authority. *Channell* B. said (3): "Now in one sense the plaintiff was a licensee, but he was not a *mere* licensee, and the word *mere* has a very qualifying operation." *Cleasby* B. says (4): "The question of a mere licence does not arise; for as soon as you introduce the element of business, which has its exigencies and its necessities, all idea of mere voluntariness vanishes." In *Wright* v. *London and North Western Railway Co.* (5) a volunteer was held not to be a mere volunteer, and therefore was entitled to the protection of an invitee.

In both those cases, it is true, the person injured was engaged in doing something connected with the performance of a contract with the defendants. But it cannot be doubted that the principle which distinguishes between a bare licensee and a licensee who is for the purposes of this branch of the law an invitee can be satisfied by something less than the performance of a contract. *Hayward* v. *Drury Lane Theatre Ltd.* (6) is the most recent example (see particularly at pp. 904, 908). The point on which *Cullen* C.J. and *Pring* J. decided against the appellant's contention that she was an invitee was that as Brownlow's evidence was too vague to make the permission a matter of contract, there was an absence of common interest inasmuch as the actual operation of decorating the hall was of no benefit to the defendants. But, with deep respect, that view gives far too narrow a meaning to the expression "common interest." The immediate purpose of the person entering another's premises with his permission may be entirely isolated from all their other relations: if so, it must be judged of by itself. But it may, on the other hand, be so connected with other circumstances as to form only a part of some relation existing between them: if so, its effect must be judged of in connection with the whole of the circumstances constituting the relation, and considering them in their entirety. Detached from the contractual obligations of the parties, the decoration may be; but detached from the subject matter of the contract—

(1) L.R. 4 Ex., 254; aff. L.R. 6 Ex., 123.
(2) 1 Q.B.D., at p. 255.
(3) L.R. 4 Ex., at p. 258.
(4) L.R. 4 Ex., at p. 259.
(5) 1 Q.B.D., 252.
(6) (1917) 2 K.B., 899.

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in other words, from the admitted business relations of the parties to the letting—it certainly was not. The question of whether there was common interest in the decoration of the hall cannot in fairness be determined by ignoring the transaction which led to it, and from which the defendants received a benefit, since that transaction itself, according to the evidence, contemplated the possibility of the situation that actually arose. It is impossible to hold, as a matter of law, that the permission was a *mere* permission, or the licence a *mere* licence.

The jury, having considered the situation as a whole—though, as instructed, they disregarded Brownlow's evidence as raising a contractual obligation—came to the conclusion that the defendants did by their representative, Bull, in fact permit the presence of the plaintiff for the purpose of decoration, and that her situation was such as to raise a just expectation of care which was not observed; and their finding, being based on sufficient evidence, cannot lawfully be disturbed. The place where the accident occurred was a landing outside the building, and leading by a few steps to the ground. It was contended that the plaintiff had not, because the concert committee had not, any right to be there at all. The construction of the hall as described in the evidence follows a very usual type in country districts—a large hall, having a front main entrance, a stage, small rooms behind the stage, and a back exit from the building with landing and steps. As shown in the evidence, the public attending picture shows sometimes used the back exit after the performance. But the obvious purpose of the two back rooms and the means of access to them was for the convenience of persons taking part in entertainments. The appellant was, in the circumstances, fully justified in using that part of the building. The caretaker, Bull, was on the spot, and made no objection. The place, the time, and the whole of the circumstances relevant to the propriety and reasonableness of the appellant's presence at the spot where she was hurt, were matters for the opinion of the jury, and their finding, in view of the evidence, cannot be reviewed.

It was contended that though the jury's finding of negligence could otherwise be supported, yet it was vitiated by a violent finding that there never was a bolt in the rail. The evidence in favour of

the bolt is very strong. But there is more than a scintilla of evidence the other way. It is, however, unnecessary to discuss that finding, because the other findings are independent. The learned trial Judge was careful to sever the question of negligence from the utter absence of the bolt.

It has become unnecessary to decide the question of imputed knowledge, so as to determine the respondents' liability, if the appellant were a bare licensee. If it were necessary, the observations of *Willes* J. in *Gautret* v. *Egerton* (1), and of Lord *Herschell* (2) and of Lord *Morris* (3) in *Owners of Apollo* v. *Port Talbot Co.*, would be important.

The appeal should be allowed as to all the respondents except Murray, against whom the appeal was rightly abandoned.

Appeal dismissed as against the respondent Murray and allowed as against the other respondents. Order appealed from discharged, and new trial refused with costs. Respondents other than Murray to pay costs of appeal.

Solicitor for the appellant, *F. S. Hegarty*, Coonamble, by *Mackenzie & Mackenzie.*

Solicitor for the respondents, *J. D. Y. Button*, Coonamble, by *L. G. B. Cadden.*

B. L.

(1) L.R. 2 C.P., at p. 375. (2) (1891) A.C., 499, at p. 515.
(3) (1891) A.C., at p. 519.