[HIGH COURT OF AUSTRALIA.]

BOND . . . . . APPELLANT;
PLAINTIFF,

AND

THE SOUTH AUSTRALIAN RAILWAYS COMMISSIONER . . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Oct.* 2, 3.

MELBOURNE, *Nov.* 7.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Negligence—Contributory negligence—Personal injuries—Dangerous condition of premises—Duty of invitor to invitee — Railway station — Unlighted platform — Knowledge of invitee of danger—Evidence.

The plaintiff went on business to the defendant's railway station, which he had before visited on several occasions. It was nearly dark, and the station lamps were not lit, as they should have been. Having completed his business, the plaintiff went along the platform towards the exit from the station, as a prudent man might in the circumstances properly do, and, without knowing it, got too near the edge and fell off the platform, whereby he was injured. In an action by the plaintiff to recover damages for the negligence of the defendant in omitting to light the station,

Held, that the plaintiff's prior knowledge of the station did not prevent him from recovering.

Indermaur v. *Dames*, (1866) L.R. 1 C.P., 274; (1867) L.R. 2 C.P., 311; *London, Tilbury and Southend Railway* v. *Paterson*, (1913) 29 T.L.R., 413; *Mersey Docks and Harbour Board* v. *Procter*, (1923) A.C., 253; *Cavalier* v. *Pope*, (1906) A.C., 428; *Norman* v. *Great Western Railway Co.*, (1915) 1 K.B., 584; *Brackley* v. *Midland Railway*, (1916) 85 L.J. K.B., 1596; *South Australian Co.* v. *Richardson*, (1915) 20 C.L.R., 181, discussed.

Decision of the Supreme Court of South Australia (*Poole* J.): *Bond v. South Australian Railways Commissioner*, (1923) S.A.S.R., 205, reversed.

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APPEAL from the Supreme Court of South Australia.

An action was brought in the Supreme Court by Barnabas Mayston Bond against the South Australian Railways Commissioner, in which the plaintiff by his statement of claim alleged that he had suffered damage from the negligence of the defendant in not lighting his railway station at Mallala at about 6.45 p.m. on 23rd June 1922, so that the platform of the station was rendered dangerous and unsafe to persons using the same; that about that time the plaintiff was lawfully upon the station at the invitation of the defendant for the purpose of transacting business with the defendant's servant thereon, and, in the course of transacting that business, walked along the platform to leave the station; and that owing to the station being insufficiently lighted and owing to the plaintiff's consequent ignorance of the situation of the edge of the platform, the plaintiff stepped over the edge, fell on to the permanent way and sustained personal injuries. The plaintiff claimed £1,200 damages. The action was heard by *Poole* J., who gave judgment for the defendant with costs: *Bond* v. *South Australian Railways Commissioner* (1).

From that decision the plaintiff appealed to the High Court.

The other material facts appear in the judgments hereunder.

Teesdale Smith (with him *T. E. Cleland*), for the appellant. The appellant was upon the railway station as of right, and the respondent owed him a higher duty than that which, according to *Indermaur* v. *Dames* (2), an invitor owes to an invitee (*Norman* v. *Great Western Railway Co.* (3); *South Australian Co.* v. *Richardson* (4)). That higher duty is to take reasonable care that the railway station is reasonably safe for a person using it in the ordinary manner with reasonable care (*Shepherd* v. *Midland Railway Co.* (5); *Osborne* v. *London and North-Western Railway Co.* (6); *London, Tilbury and Southend Railway* v. *Paterson* (7); *Simkin* v. *London and North-Western Railway Co.* (8)). The appellant's knowledge of the

(1) (1923) S.A.S.R., 205.
(2) (1866) L.R. 1 C.P., 274; (1867) L.R. 2 C.P., 311.
(3) (1915) 1 K.B., 584.
(4) (1915) 20 C.L.R., 181.
(5) (1872) 25 L.T., 879.
(6) (1888) 21 Q.B.D., 220.
(7) (1913) 29 T.L.R., 413.
(8) (1888) 21 Q.B.D., 453.

station is not an answer, for he did not voluntarily incur the risk (*Thomas* v. *Quartermaine* (1); *R.* v. *Broad* (2)). It has been found that the danger in walking along the unlighted platform was not so great that a prudent man would not have attempted it. [Counsel also referred to *Dickson* v. *Commissioner for Railways* (*Qd.*) (3).]

Hannan (with him *A. L. Pinch*), for the respondent. The duty of the respondent was to guard a person coming on business from any unusual danger of which the respondent knew or ought to have known. He could discharge that duty either by lighting the station or by giving notice of it. The appellant is not entitled to recover, because he did not use reasonable care in respect of the danger. He voluntarily accepted the risk, and he had full knowledge of the danger, and therefore cannot rely on the principle of *Indermaur* v. *Dames* (4).

[STARKE J. referred to *Smith* v. *Baker & Sons* (5).]

A reasonably prudent man would not have attempted to go along the unlighted platform, but would have asked the station-master to light the lamps. [Counsel referred to *Fairman* v. *Perpetual Investment Building Society* (6); *Mersey Docks and Harbour Board* v. *Procter* (7); *South Australian Co.* v. *Richardson* (8).] Upon the evidence the appellant was guilty of contributory negligence. If it was negligence on the part of the respondent not to have the platform lighted, the appellant could by the exercise of reasonable care have avoided the accident. [Counsel referred to *Huggett* v. *Miers* (9).]

Cur. adv. vult.

Nov. 7.

The following written judgments were delivered :—

KNOX C.J. AND STARKE J. The appellant, on the evening of 23rd June 1922, went to the Mallala railway station for the purpose of consigning a bottle of medicine for carriage by the respondent from that station to Kalumba, by a train due to arrive at Mallala about 6.54 p.m. and to depart about 7.9 p.m. He reached the station

(1) (1887) 18 Q.B.D., 685, at p. 696.
(2) (1915) A.C., 1110, at p. 1116.
(3) (1922) 30 C.L.R., 579.
(4) (1866) L.R. 1 C.P., 274; (1867) L.R. 2 C.P., 311.
(5) (1891) A.C., 325.
(6) (1923) A.C., 74, at p. 92.
(7) (1923) A.C., 253, at p. 276.
(8) (1915) 20 C.L.R., at p. 186.
(9) (1908) 2 K.B., 278, at p. 284.

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about 6.30 p.m., but none of the respondent's servants were then there, though they arrived a very short time afterwards. The station was not lighted when the appellant arrived, and it was not the practice of the respondent to light it until some twenty or thirty minutes before the arrival of the train due about 6.54 p.m. The night was dark, but the appellant safely reached the railway offices, consigned his bottle of medicine, and paid for its consignment. Whilst he was in the railway offices, one of the respondent's servants proceeded to light the station, by means of kerosene lamps, and had lighted two of these lamps at the time of the accident to the appellant which is the subject matter of this action. One lamp was over the door of the ladies' waiting-room, and the other in a recess between the station offices. They were, however, quite insufficient for the purpose of lighting the station. He left the railway offices with his back to the lights, and the night had become much darker than it was when he arrived at the station. Through some mistake or want of direction, the appellant, instead of proceeding in a straight line along the platform and down the ramp to an outlet from the station, crossed the platform in a diagonal direction, and, giving way to another person coming along the edge of the platform, he fell or slid on to the rails below and fractured one of his legs in several places. Now, in these circumstances, the duty of the respondent towards the appellant was, at least, to "use reasonable care to prevent damage from unusual danger, which" the respondent "knows or ought to know." And "where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, . . . must be determined . . . as matter of fact" (*Indermaur* v. *Dames* (1)). The duty of the respondent was not simply to warn the appellant of a danger more or less hidden or concealed, but to take reasonable care to prevent damage when he knew or ought to have known that his premises presented "features of unusual danger" ("Duty of Invitors," by W. H. Griffith, *Law Quarterly Review*, vol. XXXII., p. 257), or, to use the words of Lord *Atkinson*, delivering the judgment of the House of Lords in *London, Tilbury and Southend Railway* v. *Paterson* (2), that an "abnormal

(1) (1866) L.R. 1 C.P., at p. 288; (1867) L.R. 2 C.P., 311.
(2) (1913) 29 T.L.R., at p. 414.

state of things" existed. The nature of the precautions must vary with the circumstances of each case. But the danger may be so great, as Mr. W. H. Griffith points out, "that the defendant ought in reason to light or guard the dangerous object, however well informed the plaintiff may be of its existence. This is all matter of fact for a jury." (See also *Pollock on Torts*, 11th ed., p. 515.)

The knowledge of the appellant and any notice or warning given to him of the danger is relevant for the purpose of determining whether the respondent took reasonable care and whether the appellant chose to accept the risk or was guilty of contributory negligence, but these questions must be determined, as *Willes* J. says in *Indermaur* v. *Dames* (1), as matter of fact (*Mersey Docks and Harbour Board* v. *Procter* (2); *London, Tilbury and Southend Railway* v. *Paterson* (3); *Latham* v. *R. Johnson & Nephew Ltd.* (4); *South Australian Co.* v. *Richardson* (5)).

The error in the judgment in the Court below resides in the view that the duty of the respondent towards the appellant was discharged if the appellant knew or was informed of the danger, whereas the true rule is as already stated. The learned trial Judge relied upon the dictum of Lord *Atkinson* in *Cavalier* v. *Pope* (6) that "one of the essential facts necessary to bring a case within" the principle of *Indermaur* v. *Dames* (7) "is that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered. If he knows of the danger and runs the risk he has no cause of action." He relied also upon the opinions given by the learned Judges in the Court of Appeal in *Norman* v. *Great Western Railway Co.* (8)—to which may be added the statement of the Lord Chancellor (Lord *Cave*) in *Mersey Docks and Harbour Board* v. *Procter* (9) that an invitee "was entitled, subject to using reasonable care on his part, to expect that the dock company should use reasonable care to protect him from any unusual danger known to the company and not known to or reasonably to be expected by him," and also the remarks of the

(1) (1866) L.R. 1 C.P., at p. 288.
(2) (1923) A.C., 253.
(3) (1913) 29 T.L.R., 413.
(4) (1913) 1 K.B., 398, at p. 412.
(5) (1915) 20 C.L.R., at pp. 185-186.
(6) (1906) A.C., 428, at p. 432.
(7) (1866) L.R. 1 C.P., 274; (1867) 2 C.P., 311.
(8) (1915) 1 K.B., 584.
(9) (1923) A.C., at pp. 259-260.

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learned Judges of the Court of Appeal in *Brackley* v. *Midland Railway* (1). But the Lord Chancellor and Lord *Atkinson*, and the learned Judges in the other cases referred to, founded their opinions upon the formula enunciated by *Willes* J. in *Indermaur* v. *Dames* (2), and were not, apparently, conscious of any departure from it. We may safely return, then, to the duty so carefully formulated by *Willes* J. and note that in his formula there is no statement that the duty is performed when the invitee knows or is warned of the circumstances of the danger. On the contrary, the rule states that it is the duty of an invitor towards an invitee to use reasonable care for the safety of the invitee, and where there is evidence of neglect the question whether such reasonable care has been taken by notice, &c., "must be determined . . . as matter of fact."

Now, in the Court below, the learned Judge who tried the action found that the railway platform, in its unlighted condition was, to the knowledge of the respondent or his officers, dangerous and unsafe for persons passing along it as the appellant did on the night of the accident. This finding has ample evidence to sustain it, and cannot be disturbed. It is clearly right. But if so, a duty at once arose on the part of the respondent towards the appellant to use reasonable care to prevent damage arising from this danger, which was unusual and abnormal. It is a question of fact whether reasonable care was taken in the circumstances of the case. The appellant knew that the station was unlighted, but it may be, notwithstanding this fact, that a prudent and reasonable man would have taken further steps to protect persons using the station with such knowledge, against harm from the existing danger. The learned Judge held, erroneously as a matter of law, that the respondent was relieved from liability because the appellant knew of the unlighted state of the station, but we gather that he found, as a matter of fact, that the respondent did not, in the circumstances, take reasonable care to prevent damage arising from the existing danger. Such a finding has evidence to sustain it, and ought, we think, to be supported.

But it was also contended that the appellant chose to run the risk or take the chance of an accident. Here again, the learned Judge

(1) (1916) 85 L.J. K.B., 1596. (2) (1866) L.R. 1 C.P., at p. 288.

in the Court below found that the appellant did not assume the risk. The question is one of fact, and the finding cannot, in the circumstances of the case, be disturbed.

Further, it was said that the appellant was guilty of contributory negligence, that he had not taken ordinary or reasonable care for his own safety. But this defence was also negatived in point of fact in the Court below, and the finding ought not, in the circumstances of the case, to be disturbed.

Accordingly, the judgment of the Court below ought to be reversed, and judgment entered for the appellant for £1,100, the amount of damages assessed below, with costs of action and the costs of this appeal.

ISAACS J. This appeal, in my opinion, necessarily compels a very close analysis of the doctrine formulated as settled law in *Indermaur* v. *Dames* (1), and particularly with reference to the effect of an invitee's knowledge of the danger he incurs.

The appellant sued the respondent for negligently omitting to light the platform of the railway station at Mallala, whereby the appellant sustained injury. The learned trial Judge, *Poole* J., gave judgment for the respondent on the ground that the appellant had "knowledge of the existence of the danger," founding his decision on the well-known passage in Lord *Atkinson's* judgment in *Cavalier* v. *Pope* (2). In order properly to understand the position, and especially to see precisely the real meaning of the decision of *Poole* J., both on the facts and the law, it is very necessary, in the first place, to state some of the circumstances.

Mallala is an intermediate or wayside station. The accident took place on the evening of 23rd June 1922, the middle of winter. The usual time for opening the office for business was then 6.25 p.m. The appellant arrived at or about 6.30 to send a packet by train. It was then so dark that, there being no lamps lit, he had to light a match to look at his watch. The station-master arrived at 6.41, the incoming train being due at 6.54 and timed to leave on its forward journey at 7.9. The appellant transacted his business with

(1) (1866) L.R. 1 C.P., 274; (1867) L.R. 2 C.P., 311.
(2) (1906) A.C., at p. 432.

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the station-master, and left the office at 6.41. *Poole* J. says :—" He " (that is, the appellant) " went there in the ordinary business hours at such a time that he could, had the defendant's servants been following the ordinary practice, have transacted his business and left as he expected to do, before the night closed in. When that business was in fact transacted it was, owing to the late arrival of the defendant's servants, dark : the station was no longer reasonably safe." The learned Judge does not definitely find that at that time no lamps were lit, but he says that at most two were alight, No. 1 and No. 2. Of these No. 1 would principally light the space immediately in front, that is, towards the rails, and give very little if any assistance going north along the platform, the way out for the appellant. More particularly so for him as his back would be towards the lamps. The other lamp, No. 2, was in a recess, and gave no assistance to the appellant at all. Four other lamps existed intended to light the path along the platform in the direction the appellant had to take in leaving the station, but none of these were lit. It was getting darker, but, as the appellant says, " it was not so dark that I could not see where I was going. I was in fact able to see where I was going." He walked along the platform northwards. It meant a distance of about 63 yards to reach what is called the northern ramp, by which the platform is approached on entering the station on that side. That distance, however, is not deposed to by any witness, but is found by the learned Judge by scaling the plan produced. And—what, in my opinion, is most material—the width of the platform was described by the station-master as from 12 to 14 feet in width from edge to lamp standards. The lamp standards are within 4 inches of the further edge of the platform. I emphasize the fact that the station-master, who sees the platform every day, can say nothing more precise as to the width of the platform than that it is " from 12 to 14 feet." A passenger, Miss Huxtable, entering the station and walking in the opposite direction to that taken by the appellant, and having the great advantage of the lights ahead, approached the appellant. He, to make way, deviated from the centre of the platform, to which at all events he intended to keep and thought up to then he had kept, and then, by misadventure and evident mistake as to position and

direction, reached the edge of the platform where it was about 3 feet 2 inches above the level of the permanent way. His foot slid down as he says—probably he was feeling his way—and he presently found himself on the level below, with his left leg broken in several places.

In determining the various issues necessary to arrive at the final result, the learned trial Judge postponed the question of initial negligence of the respondent until the last. He first found as a fact that the platform in its unlighted condition was dangerous and unsafe for persons passing to the northern ramp. But before pronouncing as to the negligence of the respondent he proceeded to consider the questions of contributory negligence and what is sometimes called " assumption of risk."

1. *Contributory Negligence.*—As to contributory negligence he was of opinion that the danger was not so obvious that a prudent man in the appellant's circumstances would not have used the platform at the time he did as a mode of egress at all, and he thought there was nothing the appellant did which fell short of the proper standard of care. He also found that Miss Huxtable's position in approaching the appellant in the darkness not unnaturally misled him, he made way for her and fell over. His Honor held the appellant was not guilty of contributory negligence. That finding, in my opinion, cannot be disturbed, so far as it relates to " contributory negligence." But " contributory negligence " presupposes some negligence in the defendant to which the plaintiff's conduct is said to be contributory (see *Symons* v. *Stacey* (1)). The finding that the danger was " not so obvious that a prudent man would not in the plaintiff's circumstances have used the platform at the time he did as a mode of egress at all " gives rise to a consideration quite outside " contributory negligence," which applies to the care taken by the plaintiff *in the course* of his use of the platform and not to his initial determination to use it at all for egress. This becomes plain when we reflect that, if a prudent man in his position would not think lights necessary, at that time, provided reasonable care were taken by him, it would be inconsistent to impute the opposite opinion to the defendant relative to the same circumstances. It

(1) (1922) 30 C.L.R., 169, at p. 178.

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is not even as if there were some extraordinary coercive situation impelling the plaintiff, such as the life or death of a person dependent on his presence, and known to the defendant, as to which further considerations might present themselves. But it appears to me that, if it can be said there was nothing unreasonable in the appellant, a prudent man, thinking the platform without lights between 6 p.m. and 7 p.m. was not too dangerous provided he used reasonable care in passing, it is difficult to say the respondent is liable because he did not act on the opposite view. The truth, in my opinion, is that the question of the respondent's duty, and therefore of the respondent's initial negligence, must be resolved with reference to the events *anterior* to the possibility of the appellant's " contributory negligence."

2. *Volenti non fit Injuria.*—The learned Judge proceeded next to consider the defence of *volenti non fit injuria*, and determined that in favour of the appellant. On the facts *Smith* v. *Baker & Sons* (1) renders it impossible to reverse this finding. I shall, however, state later why I think this is an immaterial issue.

3. *Damages.*—Then his Honor dealt with damages, contingently, and assessed them at £1,100.

4. *Respondent's initial Duty of Care.*—Having thus cleared the way of all other obstacles, the learned Judge approached the question of the respondent's duty. He thought some observations of mine in *South Australian Co.* v. *Richardson* (2) pointed to a standard of responsibility in such a case as the present higher than that of *Indermaur* v. *Dames* (3). Those observations I shall refer to later. For the present I merely say he rightly disregarded them in the determination of this case. I believe that in all these cases it would be well to begin with a repetition of the words of Lord *Herschell* in *Membery* v. *Great Western Railway Co.* (4). The learned Lord there says : " I think that whenever there is a charge of negligence it is of the utmost importance, in order to avoid confusion and the danger of mistake, to remember that negligence implies the allegation of a breach of duty—a duty to take care—and to inquire at

(1) (1891) A.C., 325.
(2) (1915) 20 C.L.R., at 193.
(3) (1866) L.R. 1 C.P., 274 ; (1867) L.R. 2 C.P., 311.
(4) (1889) 14 App. Cas., 179, at p. 190.

once *what duty*, if any, there was on the part of the persons charged with negligence to take care, and if there was any such duty, *what was the extent of it at the time and under the circumstances which existed* on the occasion when negligence is alleged to have been committed." His Honor accepted, as I understand, the interpretation of the principle of *Indermaur* v. *Dames* (1), which I had given in *Richardson's Case* (2), and he quoted the passage from Lord *Atkinson's* judgment in *Cavalier* v. *Pope* (3) that I had there set out. That passage is of central importance, because it states what, I respectfully say, is an essential element in the duty to take care, and, therefore, in the breach of it which the law terms "negligence." Lord *Atkinson* says: "One of the essential facts necessary to *bring a case within that principle*" (that is, of *Indermaur* v. *Dames* (1)) "is that the injured person must not have had knowledge or notice of the *existence of the danger* through which he has suffered." I stated at some length in *Richardson's Case*, at pp. 189-192 and 199, my understanding of the extent of the duty of an invitor towards an invitee. I refer to those pages, but will shortly state the effect, more particularly as (in addition to the text-writers referred to later) the prior cases of *Manchester, Sheffield and Lincolnshire Railway Co.* v. *Woodcock* (4) in 1871, *London, Tilbury and Southend Railway* v. *Paterson* (5) in the House of Lords in 1913 (which were not cited in *Richardson's Case* (2)), and the subsequent cases of *Brackley* v. *Midland Railway* (6) in the Court of Appeal and *Mersey Docks and Harbour Board* v. *Procter* (7), confirm my view.

In *Richardson's Case* (8), after referring to Lord *Sumner's* quotation in *Latham's Case* (9) of the formula in *Indermaur* v. *Dames* (1), I said:—"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." And I refer to my further observations immediately following on pp. 190 and 191. On p. 192 I said:—"So that keeping in

(1) (1866) L.R. 1 C.P., 274; (1867) L.R. 2 C.P., 311.
(2) (1915) 20 C.L.R., 181.
(3) (1906) A.C., at p. 432.
(4) (1871) 25 L.T., 335.
(5) (1913) 29 T.L.R., 413.
(6) (1916) 85 L.J. K.B., 1596.
(7) (1923) A.C., at pp. 259-260.
(8) (1915) 20 C.L.R., at p. 190.
(9) (1913) 1 K.B., at p. 412.

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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 *Paterson's Case* (1) Lord *Atkinson*, after stating the facts, says :—" The question is what duty towards her, if any, springs out of these circumstances. In my opinion they imposed upon the company a duty towards her, at the very least, to take *all reasonable precautions to protect her effectively from the dangers besetting* all movement and action reasonably incidental to the doing of each of the things above mentioned. *The precise nature of these directions may vary according to circumstances.*" There is a very distinct statement in *Brackley's Case* (2), in the judgment of *Bankes* L.J., in these words : " The duty which arises out of the relationship of an invitor and an invitee is a duty in respect of any danger which was known to the defendants, or ought to have been known to the defendants, *and of which the plaintiff had either no knowledge or notice.*" (Obviously this is a misprint for " neither knowledge nor notice.") The effect of the invitee's knowledge is stated to the same effect by *Swinfen Eady* L.J. (3), where the learned Lord Justice says " this was a risk of which the plaintiff was aware," as part of his answer to the question " what duty was it that they owed ? " Lord (then Lord Justice) *Phillimore* (4) expressly agrees with *Swinfen Eady* L.J. in thinking there was no breach of duty. That is precisely in accord with the judgment of *Blackburn* J. in 1871, in *Manchester, Sheffield and Lincolnshire Railway Co.* v. *Woodcock* (5), that the duty is to " use reasonable care to prevent damage from unusual danger." But that learned Judge, after quoting the classical passage from *Indermaur* v. *Dames* (6) and after referring to certain dangers, said that if the company had notified the plaintiff verbally or by placard of the danger, if " they had given him such *distinct notice, warning him*

(1) (1913) 29 T.L.R., at p. 414.
(2) (1916) 85 L.J. K.B., at p. 1608.
(3) (1916) 85 L.J. K.B., at p. 1606.
(4) (1916) 85 L.J. K.B., at p. 1607.
(5) (1871) 25 L.T., 335.
(6) (1866) L.R. 1 C.P., at p. 288.

of all that, then in the meaning of the above passage in the judgment delivered by *Willes* J., which I take to be quite good law, *they would have taken reasonable care* by giving notice that such a state of things existed, and that if persons came on to the premises they were to *guard themselves* against it." Then he held that, as the person *knew* the place, that was the same as if the company had *notified* him, and so there was reasonable care and *no duty* to do more, though the place was dangerous.

The most recent illustration of *Indermaur* v. *Dames* (1) is *Mersey Docks and Harbour Board* v. *Procter* (2), where the application of the principle in relation to an invitee produced a judgment for the defendant. Viscount *Cave* L.C. said (3) : —" In the present case it is not disputed that the deceased man came within the class described by *Willes* J. He came upon the dock property and passed to and from the vessel where he was engaged upon business which concerned both the dock company and himself ; and he was entitled, subject to using reasonable care on his part, to expect that the dock company should use reasonable care to protect him from any unusual danger known to the company and *not known to or reasonably to be expected by him.* If so, the questions of fact which arise or may arise are three—namely, (1) Were the appellants guilty of negligence or want of reasonable care for the safety of the deceased ? (2) If so, was their negligence or want of care the cause of his death ? and (3) Was there any contributory negligence or want of reasonable care on his part for his own safety ? " I particularly wish to emphasize the words " not known to or reasonably to be expected by him," and also the absence of any separate issue as to assumption of risk or, as it usually is put, as to *volenti non fit injuria.* A few lines further on the Lord Chancellor says the duty was " only to use reasonable care for his safety while he was upon their land and acting in compliance with their invitation."

The fundamental truth is that the duty of an " invitor " is not a duty of undeviating character to take care to make the place safe for all " invitees " without distinction, but it is a duty of care for the personal safety of invitees, and is *relative to each separate invitee* and

(1) (1866) L.R. 1 C.P., 274 ; (1867) L.R. 2 C.P., 311.
(2) (1923) A.C., 253.
(3) (1923) A.C., at pp. 259-260.

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what may be reasonably anticipated with respect to him. And therefore, where the invitee is, either by notice or knowledge cognizant of the danger he incurs, he cannot assert even an initial duty in the invitor to guard him against it. In order to make perfectly clear what I understand the law to be, I shall combine the effect of what I have said in this way: Although an invitor may in certain circumstances be prima facie under a duty to take reasonable care to guard the safety of his invitee, yet, if the further circumstance appears that the invitee already knows or ought to know *the* danger he incurs, then the invitor's initial duty appearing prima facie to arise is shown, when the whole circumstances are regarded, not to arise at all. The "reasonable care" necessary in such a case to guard the invitee may be so diminished by the extent of his knowledge as to have reached vanishing point.

These considerations were part of what *Willes* J. regarded as "settled law." First, because, as was pointed out in *Richardson's Case* (1), the case of *White* v. *Phillips* (2) had been determined three years before by four Judges of whom two took part in *Indermaur* v. *Dames* (3). In *White* v. *Phillips* (4) *Williams* J. said: "*The plaintiffs were not aware of that danger*, but the defendants were." But again, it is implicit in the very statement of the law by *Willes* J. When he says "we consider it settled law that he" (that is, the invitee), "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," the learned Judge bases his position as to duty on proper *expectation of the invitee.* What can an invitee who *knows* absolutely no actual condition of the place reasonably *expect* to be in the way of care by the invitor? Admittedly, a clear warning or notice would be sufficient in any case. Can he, with his perfect knowledge, expect that notice or warning? If not, he cannot expect anything, and he must know it is *caveat visitor.* Suppose a man who built and for years operated a place of business and is therefore intimately acquainted with every detail of the place, including the exact situation and

(1) (1915) 20 C.L.R., at p. 189.
(2) (1863) 33 L.J. C.P., 33.
(3) (1866) L.R. 1 C.P., 274; (1867) L.R. 2 C.P., 311.
(4) (1863) 33 L.J. C.P., at p. 37.

perils of a hole as a permanent part of the structure, though quite unusual in such buildings; suppose he sells to another, and next day or next week comes there as a visitor on mutual business: what is the duty of reasonable care owing to him by the new proprietor? What, in the words of *Willes* J., can the former owner expect? Is the new proprietor bound to warn or notify the visitor of what he knows at least as well as his successor? I cannot read so unreasonable a duty into the formula of *Willes* J. The words of limitation as to knowledge that I had quoted are, in my opinion, *verba subaudita* in the judgment of *Willes* J. And indeed they are, as I read the judgment, really expressed by *Kelly* C.B. in the Exchequer Chamber (1), speaking for himself and four other Judges. I therefore entirely agree with the view taken by *Poole* J. as to the respondent's initial duty up to that point. Where, with respect, I feel bound to part company with the learned Judge in this branch of the case is in the interpretation and application of the statement of the essential element of knowledge or notice as stated by Lord *Atkinson* and Viscount *Cave*. *Poole* J. says:—"Did then the plaintiff have knowledge of the existence of the danger? I think he did. True, he did not know on that night precisely how close to the edge of the platform he was when he took the step which carried him over the edge. But he knew or ought to have known the width of the platform and the sudden drop to the rails at its edge. He must have known that it was dark, and he must have known that there was danger of his falling off the platform." For these reasons his Honor concludes the "plaintiff knew of the danger and so has failed to establish an essential fact, his ignorance of the danger." And finally his Honour distinguishes *Paterson's Case* (2) on the ground that there was no evidence that the plaintiff was previously acquainted with the platform.

Paterson's Case is of considerable importance. The plaintiff there had been to the railway station before. Lord *Atkinson* says (3): "The plaintiff stated she had never been at the station but once before." She therefore had not merely the knowledge that even ordinary members of the public may be anticipated to have as to the characteristics of railway stations—that is, as to platforms with

(1) (1867) L.R. 2 C.P., at p. 313. (2) (1913) 29 T.L.R., 413.
(3) (1913) 29 T.L.R., at p. 414.

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straight descents to the permanent way and so on; but she had such special knowledge of that particular station, which had an island platform, as a prior visit might be supposed to give to an ordinary passenger. She also must be taken to know there was—on the night of the accident—considerable danger in moving along the platform and attempting to enter the train as she did. And still the House of Lords, affirming the decision of the Court of Appeal, held the defendant liable notwithstanding the fact that all usual lighting precautions were taken. It is necessary then to search for the test. First, it is clear that the mere knowledge that a platform—even an island platform about 21 feet wide— existed, that there was by reason of obscurity an inability to see the edge of the platform in spite of the usual lamps being lit, and consequently a knowledge to a certain extent that movement was perilous, is not necessarily sufficient to exclude the duty of care for the invitee's safety.

The test, I apprehend, is found in each case by turning first to Lord *Herschell's* words in *Membery's case* (1) and inquiring, as to the duty, "what was the extent of it *at the time and under the circumstances which existed on the occasion* when negligence is alleged to have been committed"; then following the course adopted in *Paterson's Case* (2), *to regard the circumstances existing at the moment of invitation.* In the present case these were that darkness had begun and was increasing. The respondent in that growing obscurity had by his servants invited the appellant to transact business, had engaged in that business, and as a part of that invitation had a duty of care for his invitee's personal safety in departing. The way was admittedly dangerous. The danger would be sufficiently indicated in daylight or, we may assume, when the lamps were lit at night; but it was only partially disclosed in the then present obscurity, which was increasing, and in the absence of lighted lamps Nos. 5 and 6. There was therefore not only "*a danger*" of falling over the edge of the platform, but there was "*unusual danger.*" The unusual danger was the additional danger caused by the unusual obscurity. It was against that additional danger the respondent had a duty to guard the appellant unless he had himself the requisite knowledge of it. The reasonable

(1) (1889) 14 App. Cas., at p. 190. (2) (1913) 29 T.L.R., 413.

anticipation of the respondent must have been that a person however carefully picking his way might deviate both from imperfect recollection and perception of his position and direction, and from making way for other persons coming or going along the platform. The appellant, it is true, had frequently been along the platform; but, having regard to ordinary human powers of observation and judging of the matter upon a balance of probabilities (see per Lord *Loreburn* in *Richard Evans & Co.* v. *Astley* (1)), he could not be supposed to carry in his mind any very exact knowledge of the width of the platform or the position of its edge, whereas this exact knowledge the respondent had or must be taken to have had. The knowledge that the appellant possessed cannot be understood to have been so full and complete as to be equivalent to the "distinct notice" referred to by *Blackburn* J. in *Woodcock's Case* (2), or to overcome the prima facie effect of the circumstances other than the appellant's knowledge of them. To have that effect the notice or "knowledge" which takes its place must be such as to enable the invitee to estimate with reasonable approximation the full extent of the danger he is invited to incur, so as to decide whether he will embark on it at all. To adapt the words of Lord *Atkinson* in *Paterson's Case* (3), "here the plaintiff was deliberately invited by the defendant in order that he might earn the plaintiff's freight, to place himself in a perilous position." Having thus placed the appellant in a perilous position, and to some extent in an embarrassing position—for, though by no means a prisoner, he was certainly between the inconvenience of waiting and of going on—what is the eventual result as to liability? Contributory negligence in the course of going on is negatived, and properly so. Assumption of risk is also negatived. I must, however, observe as to that branch, that I think it is foreign to the case. Lord Chancellor *Cave's* judgment in *Procter's Case* (4) omits it, as I have already said. If the appellant knew the danger sufficiently to satisfy the one element of the doctrine of *volenti non fit injuria*, that fact would of itself be sufficient to exclude the respondent's initial duty. Therefore, the further questions necessary to establish that the appellant was *volens* as distinguished from *sciens* would be

(1) (1911) A.C., 674, at p. 678.
(2) (1871) 25 L.T., 335.
(3) (1913) 29 T.L.R., at p. 415.
(4) (1923) A.C., 253.

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irrelevant. But if the extent of knowledge possessed by the appellant as found by *Poole* J. is sufficient to exclude altogether the duty of reasonable care for his safety, it would lead to very serious consequences. There would be no necessity, where a passenger was familiar with a station in daylight, to light a single lamp however dark a night it might be, even for him to enter or leave the train. It could with equal force be said that he knew the danger. But, unless that obviously impossible conclusion is to be accepted, the principle must be that the knowledge attributed to the invitee must be sufficient to render unnecessary the distinct notice that would otherwise be required to guard the invitee's safety. A notice merely intimating that there was a platform—perhaps 12 and perhaps 14 feet wide (and 2 feet might make all the difference between life and death)—and that there was a distance of somewhere about 62 yards to travel to safety, without further indicating just where the edge of the platform was, would not, in my opinion, be necessarily sufficient in law or in fact in the circumstances to absolve the respondent. In my opinion as a judge of fact—unhampered by any considerations of credibility or demeanour, and therefore free, and also bound, to form my own conclusions—the knowledge the appellant should be taken to have possessed was not in the circumstances sufficient to absolve the respondent from his prima facie duty of lighting the lamps Nos. 5 and 6, and that duty existed and was neglected.

The exculpatory issue of contributory negligence being determined in the appellant's favour, judgment should be entered for him for the amount of damages ascertained.

I wish to say a very few words as to the higher duty to which I referred in *Richardson's Case* (1). *Poole* J. gave excellent reasons for not holding himself bound by my observation. Further, having looked at the relevant South Australian Railway Acts, I see no "higher duty" attributable to the respondent in this case, which must be determined on the principle of *Indermaur* v. *Dames* (2). But, with the deepest respect to the distinguished Judges who determined *Norman's Case* (3), the opinion there expressed on the subject of "higher duty" not being coercive on this Court, that question cannot

(1) (1915) 20 C.L.R., at p. 193.
(2) (1866) L.R. 1 C.P., 274; (1867) L.R. 2 C.P., 331.
(3) (1915) 1 K.B., 584.

be considered closed for us; and so, if it should ever arise, it would, in my opinion, deserve careful consideration. (See *Pollock on Torts*, 12th ed., p. 521, n. (*f*), and the article of Mr. Griffith there referred to; *Clerk and Lindsell on Torts*, 7th ed., at p. 517; *Salmond on Torts*, 5th ed., at pp. 405-406, and *Smith's Leading Cases*, 12th ed., vol. I., p. 875.)

HIGGINS J. We have not been referred by counsel to any provisions in the South Australian Railways Act that differentiate, or might differentiate, the liability of the Railways Commissioner from the liability of a railway company in Great Britain. The facts have all been found by the learned Judge at the trial in favour of the plaintiff. Shortly stated, the plaintiff had come up the northern ramp of the railway station to despatch a parcel by a train; he came about 6.25 p.m., when it was dark; the lamps were unlit; and, after doing his business, he left to return by the same ramp, intending to keep to the middle of the platform; but he fell from the platform to the permanent way, and broke his leg. At the moment of the fall, one or perhaps two of the lamps, out of eight lamps, had been lit by the porter; the station-master and the porter had come late to their duty. Under the railway regulations, "station-masters must see that the station lamps are kept alight during the time the station is open after dark for public business." The fall was due to the fact that there was not sufficient light in the station. There is no doubt that the plaintiff knew of the drop from the platform to the rails; but, owing to the want of light, he did not know that he was going near to the rails instead of keeping, as he intended, to the middle of the platform.

The learned Judge dismissed the action, under the constraint of certain dicta contained in decided cases, to the effect that the plaintiff is not entitled to recover damages if he fail to establish, as an essential fact, his ignorance of the danger. If the established law coerces us to such a conclusion in the facts of the present case—where the accident was due to insufficient light, not to an unknown hole or drop—we must, of course, submit; but the conclusion must shock people who approach the subject using only their common sense—people whose minds are unsophisticated by the elaborate refinements of the law courts.

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What is the duty of a railway company with regard to persons visiting its railway stations on business? According to the Court of Appeal in England, there are three grades of liability for negligence: the lowest in the case of a trespasser, then next is the case of a licensee, the highest in the case of an "invitee"—as, for instance, in the case of a customer invited into a shop (*Latham* v. *R. Johnson & Nephew Ltd.* (1)); and there is no fourth or higher grade in the case of a person who has an absolute right to go on the premises (*Norman* v. *Great Western Railway Co.* (2)). This view is contrary to the view taken by my brother *Isaacs*, *obiter*, in *South Australian Co.* v. *Richardson* (3), and it has been vigorously combated by a learned writer, Mr. W. H. Griffith (*Law Quarterly Review*, vol. XXXII., p. 255), and in *Clerk and Lindsell on Torts*, 7th ed., pp. 516-517. But it is not necessary in this case to decide which of these views is right, if, even in the case of mere "invitees," the invitor is liable. Two at least of the members of the Court of Appeal who decided *Norman's Case* expressly agreed with the duty of the invitors as stated by *Bray* J. in the King's Bench Division; and the third member did not dissent.

The duty is stated by *Bray* J. (4) as "a duty to take reasonable care that their premises were reasonably safe for persons using them in the ordinary and customary manner and with reasonable care." Applying this test, the Railways Commissioner is clearly liable for the negligence as to lighting. There is no room under such a formula for the doctrine that the plaintiff must, under all circumstances, be ignorant of the danger if he is to recover damages; and, according to the Court of Appeal, the formula involves no larger duty than in *Indermaur* v. *Dames* (5)—the classic case as to the duty of invitor and invitee.

In *Indermaur* v. *Dames* (6) *Willes* J. said: "And, with respect to such a visitor at least, 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;

(1) (1913) 1 K.B., 398.
(2) (1915) 1 K.B., 584.
(3) (1915) 20 C.L.R., at p. 193.
(4) (1914) 2 K.B., 153, at p. 163.
(5) (1866) L.R. 1 C.P., 274; (1867) L.R. 2 C.P., 311.
(6) (1866) L.R. 1 C.P., at p. 288.

and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by *notice, lighting, guarding, or otherwise*, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact." As usual in judgments of that learned Judge, the words used are carefully weighed and chosen. Perhaps the word "unusual" does not unambiguously convey his meaning; for if it means that the danger must not be usually, or always, there, the fact that the permanent way is always about three feet below the platform would seem to exclude a railway company from all duty to supply light or other adequate protection in the darkness. But such exclusion is not consistent with (amongst other cases) the case to which my learned brothers have referred—*London, Tilbury and Southend Railway* v. *Paterson* (1). That was a case where the accident was due to insufficient lighting on a railway platform. The plaintiff fell off and was injured. The House of Lords, as well as the Court of Appeal, sustained the verdict of the jury for the plaintiff, although the plaintiff knew that she was on a railway platform with its usual incidents. At all events, we should be content with the view taken by the Court of Appeal in *Norman's Case* (2) that the statement of the duty by *Bray* J. (already quoted) does not go further than the doctrine laid down in *Indermaur* v. *Dames* (3).

But if we accept the formula approved in *Norman's Case* (2), what becomes of the dictum of Lord *Atkinson* in *Cavalier* v. *Pope* (4)? "One of the essential facts necessary to bring a case within that principle" (*sc.*, of *Indermaur* v. *Dames* (3)) "is that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered." The dictum is, of course, unexceptionable if, as in *Cavalier* v. *Pope*, the accident occurred from danger of a certain class. If, as in that case, the accident occurred to the plaintiff by the disrepair of flooring in a house in which she lived, a disrepair of which she was fully aware, it would be foolish to hold that the defendant must give her warning or notice of this disrepair.

(1) (1913) 29 T.L.R., 413.
(2) (1915) 1 K.B., 584.
(3) (1866) L.R. 1 C.P., 274; (1867) L.R. 2 C.P., 311.
(4) (1906) A.C., at p. 432.

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All those general propositions have to be considered in relation to the kind of accident and negligence to which the mind of the Judge was, for the time being, directed; and it is necessary, in every case involving the question of negligence, to go back to first principles, to find the duty of the invitor from formulae such as that accepted by *Bray* J. and by the Court of Appeal in *Norman's Case* (1). Did the defendant here take reasonable care that the railway premises were reasonably safe for persons using them in the ordinary and customary manner and with reasonable care? The learned Judge at the trial has found that the defendant, through his servants, did not take such reasonable care, but that the plaintiff used the premises in the ordinary and customary manner and with reasonable care. This is a question of fact; there was no jury; but I can see no shadow of doubt as to the correctness of the finding.

The plaintiff in the case of *Indermaur* v. *Dames* (2) was a tradesman brought in to test the action of a gas regulator. He was there on lawful business, and not upon bare permission. The jury had found that, without negligence on his part, he had fallen down a deep shaft—necessary, useful and proper in the defendant's business as a sugar refiner. In such a case it is the duty of the invitor either to make the premises safe or to warn the invitee; but this warning could be obviously unnecessary in cases where the invitee knows of the hole already, and how near he is to it. In *Cavalier* v. *Pope* (3) Lord *Atkinson* said, in effect, "You need not warn a man who knows the facts already."

But even if one should take the view that the words of Lord *Atkinson* are universally applicable, it may be pointed out that there is an ambiguity in the expression "the danger" in the phrase "knowledge of the existence of the danger." Admittedly, Dr. Bond knew the fact that there was a drop of three feet or so from the platform to the rails; but he did not know how near he was to the drop; he did not know that he was not keeping to the centre of the platform as he intended; and, in stepping out on the brink, he did not know of the danger he was in—he did not know that he was on the brink. He did not know it because the defendant failed

(1) (1915) 1 K.B., 584.
(2) (1866) L.R. 1 C.P., 274; (1867) L.R. 2 C.P., 311.
(3) (1906) A.C., 428.

to keep the platform sufficiently lit in the dark of the winter's night.

Counsel for the Commissioner have sought to impugn the learned Judge's finding that the plaintiff was not guilty of any contributory negligence; but the finding was clearly right, in my opinion, and we should not interfere with it even if we had any doubt, as it rests greatly on the relative credibility of the plaintiff's and the defendant's witnesses, whom the primary Judge has seen and we have not seen. Nor is there any ground for applying the principle of *volenti non fit injuria*, even if we are to treat such a defence as if it were pleaded.

In my opinion, the appeal should be allowed, and judgment entered for the amount of damages assessed below. There has been no argument against the amount of the assessment.

RICH J. As I am differing from the ultimate conclusion arrived at by the learned primary Judge, I shall state my reasons for so doing very briefly.

At the outset it is "essential to ascertain that there was a legal duty, and a breach thereof, before a party is made liable by reason of negligence" (*Marfell* v. *South Wales Railway Co.* (1)). No express statutory obligation relevant to this case having been suggested, it has to be determined upon the common law principles which were recognized, collected and formulated in *Indermaur* v. *Dames* (2). That case has been frequently considered and recognized, but always regarded as unimpeachable. *Brackley* v. *Midland Railway* (3) is a very recent case which interprets the law as stated in *Indermaur* v. *Dames* (4) with reference to a case like the present, where the final result turns on the knowledge of the person who has suffered injury from the defective condition of the premises. That case adopts Lord *Atkinson's* statement as to knowledge in *Cavalier* v. *Pope* (5), and the decision is based on that statement. The present Lord Chancellor, in *Mersey Docks and Harbour Board* v. *Procter* (6), is clearly of the same opinion as Lord *Atkinson*. I see no reason for doubting the

(1) (1860) 8 C.B.(N.S.), 525, at p. 534.
(2) (1866) L.R. 1 C.P., 274; (1867) L.R. 2 C.P., 311.
(3) (1916) 85 L.J. K.B., 1596.
(4) (1866) L.R. 1 C.P., 274.
(5) (1906) A.C., at p. 432.
(6) (1923) A.C., at pp. 259-260.

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accuracy of those opinions; and all I think necessary to do in this case is to see how far the appellant's knowledge relieved the respondent of any duty to protect him.

I think it should be said here, as the Master of the Rolls said in *Glasscock* v. *London, Tilbury & Southend Railway Co.* (1), that the plaintiff went "frequently to the station, but it was quite possible for persons to use a station every day without knowing at what exact spot the platform came to an end." I think that the condition of the station and the want of light, such light momentarily lessening, and the uncertain position of the edge of the platform, created a state of affairs that imposed a duty on the respondent to protect the appellant by lighting up the platform. That duty was neglected, and, no contributory negligence being properly chargeable to the appellant, the respondent's liability is established.

Poole J. has expressly found that the maxim *Volenti non fit injuria* does not touch the appellant. If that is necessary, the appellant has the benefit of the finding. But I do not see that it is necessary.

No question arises as to the damages which are settled by the learned primary Judge. I therefore think judgment should be entered for the appellant for the sum so found.

Appeal allowed. Judgment appealed from reversed. Judgment to be entered for the appellant for £1,100 *with costs of action. Respondent to pay costs of appeal.*

Solicitors for the appellant, *Cleland, Holland & Teesdale Smith.*

Solicitor for the respondent, *A. J. Hannan,* Acting Crown Solicitor for South Australia.

B. L.

(1) (1902) 18 T.L.R., 295.