[HIGH COURT OF AUSTRALIA.]

TREEVE . . . . . APPELLANT;
PLAINTIFF,

AND

BLUE STAR LINE (AUSTRALIA) PROPRIETARY LIMITED . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Mar.* 28, 29; *April* 5.

Dixon C.J. McTiernan, Webb, Fullagar and Kitto JJ.

Negligence — Dangerous premises — Ship — Repairs — Workman — Invitee — Unusual danger — Personal injuries — Occupier — Knowledge of danger — Evidence — Parties.

The plaintiff was employed by a firm of ships-carpentering contractors which undertook to repair damage in a ship's hold as it lay at berth. While proceeding to go down into the hold by a booby hatch the plaintiff fell. His case was that he grasped at a piece of metal, which he described as a stanchion, for support and that the stanchion not having been pinned gave way. The plaintiff complained that this was the cause of his fall and of the personal injuries he sustained. He brought an action for damages not against the shipowners but against the defendant company and did so upon the basis that it was the occupier of the ship and he its invitee thereon. The ship was owned by an English company and the defendant was an Australian company bearing a similar name with the word (Australia) added. It acted in various Australian ports as stevedores, and as ship's agents, being remunerated by agency fees consisting of a percentage commission on the freight and earnings attributed to those ports. The ship's master had written from another port to an officer of the defendant company, the marine superintendent, describing the repairs to be done, and the marine superintendent had instructed the firm employing the defendant to do the work in the hold. Although the marine superintendent had inspected work done on the ship, the work was being carried out under the supervision of the ship's chief officer. The account for the work was made out to " the captain and owners "; the defendant company paid the charge and debited the amount in the general account for the ship sent to the owners, the English company. The evidence was definite that no such

stanchion existed as the plaintiff described but it was suggested that what he grasped might have been a bar stuck in a heap of pig iron.

Held: that on the evidence there was no room for holding that the defendant company was an occupier of or in control of the ship or any part of it as premises so as to fall under a duty of care of the safety of the plaintiff as an invitee.

Held, further, that as the verdict in the plaintiff's favour might be based on the suggestion as to the bar sticking in the pig iron the verdict could not stand and in any event there did not seem to be any satisfactory evidence of negligence.

Decision of the Supreme Court of New South Wales (Full Court): *Treeve* v. *Blue Star Line (Aust.) Pty. Ltd.* (1957) S.R. (N.S.W.) 264; 73 W.N. 664, affirmed.

APPEAL from the Supreme Court of New South Wales.

In an action brought by him in the Supreme Court of New South Wales, the plaintiff, William Henry Treeve, claimed from the defendant, Blue Star Line (Aust.) Pty. Ltd., damages for personal injuries alleged to have been received by him. It was claimed that Treeve, who was employed by one G. H. Miller as a carpenter to repair insulation in No. 1 hold of the M.V. *Empire Star*, the insulation having been damaged whilst the vessel was being unloaded at Melbourne, boarded the vessel as invitee of the defendant company which had the care, control and management of the vessel at the material time. It was further alleged that Treeve was required to make his way down an access hatch into the 'tween decks and when about to proceed down into the hold through a hatch in the lower 'tween decks fell into the hold and was injured. According to Treeve the fall was caused by a metal bar, referred to as a stanchion, which although apparently firmly fixed and which he held on to for support, was not so fixed, and, as he commenced to go down through the hatch he held on to the iron bar or stanchion but it " went backwards " and, being deprived of support, Treeve fell into the hold and was injured.

The jury returned a verdict for Treeve in the sum of £9,800 and judgment was entered accordingly.

An appeal against that verdict and judgment was allowed by the Full Court of the Supreme Court (*Street* C.J., *Herron* and *Manning* JJ.): *Treeve* v. *Blue Star Line (Aust.) Pty. Ltd.* (1).

From that decision Treeve appealed to the High Court.

Further relevant facts appear in the judgment hereunder.

(1) (1957) S.R. (N.S.W.) 264; 73 W.N. 664.

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C. R. Evatt Q.C. (with him *P. G. Evatt*), for the appellant. A limited interest in the vessel or the part of the vessel—the hold and the access hatch leading to it—is adequate to bring the Australian company within the *Indermaur* v. *Dames* (1) principle (*Hartwell* v. *Grayson Rollo & Clover Docks Ltd.* (2)). It was clearly open to the jury on the evidence to find that the respondent company was an invitor, and was legally entitled to invite Miller and the appellant on to the ship. Having so invited them it was an occupier of that portion of the ship to which they were invited, it being necessary to have control over the premises or work being done in the hold. The appellant rightly sued the respondent company. The jury was fairly charged in accordance with the various principles in *Indermaur* v. *Dames* (1). The invitation to Miller and the appellant was authoritative, the superintendent having the right to give it and by giving it he bound his employer the respondent company. The invitor was also the occupier of that portion of the ship where the accident occurred. The judgment of the court below anent the respondent company's knowledge of the metal bar disregarded the decision in *Swinton* v. *China Mutual Steam Navigation Co. Ltd.* (3). That the company should have known is shown by the evidence of the superintendent. The real gist of this case is the relationship between Miller and the respondent; it was clearly a contractual relationship. The insulation work to which the appellant was proceeding was a particular job in which the superintendent and his employer had a particular interest. A case in which the facts were in some respects not unlike this case so far as the documents are concerned, is *De Gioia* v. *Darling Island Stevedoring & Lighterage Co. Ltd.* (4). The judge at *nisi prius* erred as to the accounts. The position in this case is somewhat analogous to the position in *Gorman* v. *Wills* (5). There was a breach of the duty that the superintendent, and, therefore, the respondent, owed to the appellant. The gist of *Indermaur* v. *Dames* (1) is not occupation but is invitation coupled with the right to invite. There was evidence of an unusual danger of which the superintendent and the respondent knew or should have known (*Gorman* v. *Wills* (6)). In *Leveridge* v. *Skuthorpe* (7) people in whom permanent control was vested were made liable—as distinguished from the people who had gone on to the ground for

(1) (1866) L.R. 1 C.P. 274.
(2) (1947) K.B. 901, at pp. 912, 913.
(3) (1951) 83 C.L.R. 553.
(4) (1941) 42 S.R. (N.S.W.) 1; 59 W.N. 22.
(5) (1906) 4 C.L.R. 764, at pp. 770-775.
(6) (1906) 4 C.L.R., at pp. 777-780.
(7) (1919) 26 C.L.R. 135, at pp. 136, 137, 149, 150.

the particular occasion: see also *Lipman* v. *Clendinnen* (1). It is most important to ascertain the relationship between the appellant and the respondent. The relationship determines the extent of the duty. It is contractual relationship (*Watson* v. *George* (2) and the cases there cited (3)). It being a contractual relationship then the obligation of the respondent was to make the hatch, or scuttle, as reasonably fit and proper for the purpose, as the exercise of ordinary care and skill could make it: *Francis* v. *Cockrell* (4); *Maclenan* v. *Segar* (5). The respondent is estopped from setting up that it was not the principal in the arrangement with Miller and his employees. Controlling the work means controlling this work in this part of the ship, therefore it has got the limited occupation of that part of the ship. That was all the control that was evidenced in *Hartwell* v. *Grayson Rollo & Clover Docks Ltd.* (6). Something less than complete, or sole, control, is adequate to cast upon the person having that degree of control, less than sole or exclusive control, the right to guard against danger—the obligation to guard against danger (*John* v. *Bacon* (7)). The words "possession" and "control" are used in a synonymous sense in the authorities.

J. W. Smyth Q.C. (with him *E. Lusher*), for the respondent. As put to this Court this case bears little, if any, resemblance to the case as fought at *nisi prius*. As put to that court the whole case turned upon whether or not the respondent to this appeal was the invitor, and the appellant an invitee. At the closing of evidence a verdict for the defendant-respondent was requested based on *Thomson* v. *Cremin* (8) that the alleged protrusion was one of the fittings on the ship and the respondent would not be under any responsibility. Alternatively, the evidence being that there was no such stanchion at the particular place then there must be a verdict for the respondent, and further, that there was not any evidence to go to the jury that the respondent had possession and control of the ship or any part of it. It was not until the second day of the argument on the motion for verdict that any suggestion was made that the protrusion was a crowbar, or a piece of metal stuck into ingots. The plaintiff having failed on other grounds the matter was not proceeded with. The idea of a crowbar was never part of the case of either of the parties. There never was

(1) (1932) 46 C.L.R. 550, at p. 559.
(2) (1953) 89 C.L.R. 409.
(3) (1953) 89 C.L.R., at pp. 413-415, 420, 421, 424, 425.
(4) (1870) L.R. 5 Q.B. 184; 501.
(5) (1917) 2 K.B. 325.
(6) (1947) K.B., at p. 915.
(7) (1870) L.R. 5 C.P. 437, at pp. 440, 441, 442.
(8) (1953) 2 All E.R. 1185.

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such a stanchion there. That being so there must be a verdict for the defendant-respondent whether the jury accept the plaintiff's version or the defendant's version. If the jury find there was a stanchion there must be a verdict for the defendant because it was part of the ship's equipment. If there was nothing there the plaintiff's case would collapse because there could not then be any negligence. There was no evidence that the respondent knew or ought to have known. Being there only for a limited purpose the respondent was not bound to inspect and was entitled to assume that all the ship's fittings were all right, unless there be something to indicate the contrary. Assuming that the English company was liable for a defective part of the ship's structure—a defective stanchion—that does not make the shipping agent liable. Merely because the superintendent visited various parts of the vessel and wharf to satisfy himself that the work was being done in a proper and workmanlike manner does not show that he was in possession or control of the building or the ship within the meaning of *Indermaur* v. *Dames* (1). It is quite unreal to suggest that the document could ever be construed to give possession and control of the ship or any part of it. The position of the respondent is exactly covered by the remarks of Lord *Wright* in *Thomson* v. *Cremin* (2) even assuming it was in the position of a stevedore or a repairer; a person having a limited occupation—there is no such evidence. There is no distinction between a stevedore and such a person in these circumstances. Even if the respondent had entered into a contract so as to be contractually liable to pay Miller, that would not create any obligation as between the respondent and the appellant because the respondent entered into this contract on behalf of the shipping company: see *De Gioia* v. *Darling Island Stevedoring & Lighterage Co. Ltd.* (3).

C. R. Evatt Q.C., in reply. *Thomson* v. *Cremin* (4) is only an authority on its own precise facts. It does not cut down *Indermaur* v. *Dames* (1).

Cur. adv. vult.

April 5. THE COURT delivered the following written judgment:—

This appeal comes from an order of the Supreme Court of New South Wales setting aside a verdict found for the plaintiff upon the trial of an action for damages for personal injuries and entering a verdict for the defendant.

(1) (1866) L.R. 1 C.P. 274.
(2) (1953) 2 All E.R., at p. 1192.
(3) (1941) 42 S.R. (N.S.W.) 1; 59 W.N. 22.
(4) (1953) 2 All E.R. 1185.

The plaintiff, who is the appellant, was a carpenter employed by a firm of ships-carpentering contractors carrying on business under the name of G. H. Miller. On 11th September 1950 the ship "*Empire Star*" berthed at No. 11 Berth, Woolloomooloo Dock. The firm had undertaken to repair certain damage in the ship's hold said to have been done in the course of discharging cargo in Melbourne. In particular, in No. 1 lower hold there were repairs to be done to insulation connected with the refrigeration system. The plaintiff was among those whom Miller's sent aboard to this work. In going down to the hold by a booby hatch near to No. 1 hatch the plaintiff fell and suffered the injuries in respect of which he sued in the action. His case was that there was a stanchion beside the booby hatch which, after testing, he grasped as an assistance in stepping from the deck to the steel ladder for the purpose of descending, and that, owing to its being unpinned, it unexpectedly gave way, thus causing him to slip and fall. At the trial the existence of such a stanchion was disputed. The possibility was put to the jury by the learned judge who presided that a bar may have been standing up from ingots of zinc which were piled near the hatch and that it was such a thing the plaintiff took for a stanchion. The defendant objected to the direction on this matter on the ground that it was not the case which the plaintiff had made or the defendant had met. Which view the jury took in finding for the plaintiff cannot of course be known. The plaintiff's declaration alleged that the defendant had the care control and management of the vessel and that the plaintiff was upon the vessel at the invitation of the defendant for the purpose of performing certain repairs thereon and that there was a metal bar apparently fixed and as the defendant well knew or ought to have known so fitted into a slot that upon being pulled it would move and that it constituted an unusual danger to the plaintiff. Then followed allegations of negligence in failing to take care to protect the plaintiff from the unusual danger, next of the plaintiff's ignorance of the danger and finally of his injury and damage.

It will be seen that the plaintiff's case rested on the duty of an occupier to an invitee. Unfortunately the defendant did not sue the shipowner. There is in London a company called the Blue Star Line Ltd. which, no doubt by the master, had possession and control of the ship as she came into the Port of Sydney. But that company the plaintiff did not sue. Instead he made an Australian company the sole defendant, by name Blue Star Line (Australia) Pty. Ltd. In answer to a request from this defendant for particulars of the respects in, and the basis upon, which it was alleged that

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the defendant had the care control and management of the vessel "*Empire Star*", the plaintiff replied that, whilst it was not material, it was understood that the defendant company were the Sydney agents of Blue Star Line Ltd. In fact the defendant company act as ships' agents and stevedores. As ships' agents they are remunerated by agency fees consisting of a percentage commission on the freights or earnings attributed to the port.

It appears that the vessel, after discharging in Sydney, had gone down to Hobart whence she returned to Sydney to load, and perhaps to discharge some steel. From Hobart the master had written to the marine superintendent in Sydney telling him of the repairs to be undertaken in Sydney. The marine superintendent was in fact an officer of the defendant company. He instructed the firm of G. H. Miller to do the work and on the arrival of the ship from Hobart that firm sent the plaintiff, among others, down to the ship to begin the work. On the same day the accident occurred. The manager of G. H. Miller was in charge of the work and under him the firm's foreman, but, according to his evidence, the marine superintendent "had a look at the job two or three times because there were insulation repairs involved, but the majority of the work was done under the supervision of the chief officer". The account for the work though made out to "the captain and owners" of the ship, was sent to the defendant company, which paid the charge by its own cheque, debiting the amount subsequently to the London company in the receipts and disbursements account for the ship on that voyage. It is difficult to see in this evidence any possible room for holding that the defendant company was an occupier of, or in control of, the ship or of any part of it as premises so as to fall under a duty of care for the safety of the plaintiff as an invitee.

The theory upon which it was left to the jury to find that the defendant company had a sufficient possession occupation or control was that the marine superintendant of the defendant company had invited the firm of G. H. Miller to go to the ship to do the work, and that, of course, included its workmen, that the defendant company contracted as principals with that firm and in so doing acted at the request of the shipowners, and that this all meant that the defendant company must have a limited occupation of those parts of the ship where the work was to be done. There was added, in argument, the consideration that because of the remuneration of the defendant company by a percentage of the ship's earnings there was an interest, presumably pecuniary. Reliance was placed upon the decision of the Court of Appeal in *Hartwell* v. *Grayson Rollo & Clover Docks Ltd.* (1) as supporting a contention

(1) (1947) K.B. 901.

that on these facts a conclusion might be drawn that the defendant company occupied or controlled the relevant part of the ship. But that case lends no support to such a contention. The facts were entirely different. The events took place in August 1942. The ship was out of commission and in a dry dock for conversion to a troop ship. The Ministry of War Transport had contracted with the defendant held liable to the plaintiff to do work which appeared to extend to nearly every part of the ship, and the plaintiff was employed by one of that defendant's sub-contractors in the very work. The decision is put briefly but very clearly by *Bucknill* L.J. : " The vital question, in my opinion, is : who were the occupiers of the No. 2 lower 'tween deck at the material time ? I have not been able to find a definition of the word ' occupier ' as used by *Willes* J. in the case of *Indermaur* v. *Dames* (1), but it seems to me that in order to be an occupier one must have possession of the premises and control over them. In my view, the first defendants had both, they had possession and control. They had been put there over the heads of the shipowners by the Ministry of War Transport, who had ordered them to effect very extensive alterations throughout the vessel and, in particular, in the lower No. 2 hold and in the No. 2 lower 'tween deck " (2). His Lordship remarks : " It seems to me to be clear that someone must have been the occupier of the lower 'tween deck. The learned judge has found that it was not the shipowners, and I think that on the evidence he was right. . . . I think that all the evidence indicates that it was the first defendants " (3).

The state of facts in the present appeal is simple in the extreme. The defendant company must be treated as an entirely distinct person from the shipowner. It is nothing but a ships' agent and a stevedore. At the time of the accident it had not even begun work in the latter capacity. All it had done was to employ a contractor to do work aboard the ship and agree to pay him. It had acted at the request of the master who remained in complete command of his ship as it lay at the wharf fully manned. Except that the defendant company's marine superintendent afterwards came aboard to inspect the work, the transaction involved no contact with the ship as premises. It would be artificial enough to impute occupation or control of any part of the ship to G. H. Miller, who undertook the work ; for clearly full possession occupation and control remained in the shipowners by their master and his officers and crew. But not the faintest ground exists for imputing

(1) (1866) L.R. 1 C.P. 274 ; (1867) L.R. 2 C.P. 311.

(2) (1947) K.B., at p. 915.
(3) (1947) K.B., at p. 916.

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possession or control to the ship's agents. Unfortunate as it may be that the plaintiff has persisted in his suit against the wrong defendants, it was in that light that he went on. It is, however, clear that, had they been the right defendants, he could not have retained his present verdict. For it was quite possible that it was founded on the view that he grasped a bar that had been left standing upright in the pile of zinc ingots. Such a thing ought not, we think, to have been left to the jury. Moreover it is not easy in any view to discover in the facts satisfactory evidence of negligence.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *Aidan J. Devereux.*
Solicitors for the respondent, *Nicholl & Hicks.*

J. B.