INVITATION

Invitation may not seem a very appropriate term to describe that branch of the law of negligence which defines the duty owing by the occupier of premises to those resorting to them under certain conditions. These rules of law have the rare characteristic that they are almost entirely judge-made law, common law in the old-fashioned sense, uncontaminated by the direct intervention of legislative rules which now constitute the great bulk of present day law in England; a study of that law gives the best possible illustration of the merits and defects of judge-made law which can be examined in its limited area. I understand that the law of invitation has been chosen as a topic for consideration by the Law Revision Committee which has been recently established. I shall accordingly avoid as far as possible any introduction of suggestions for reform; my purpose is to be as far as possible positive and exegetical; possibly, however, I may make criticisms which may indicate defects capable of amendment. But that is by the way. The law of invitation is, as I have indicated, almost entirely to be found in case law and exhibits the characteristics of that method of law, its merits, and its drawbacks. In recent days there has been a tendency to tighten up the rigidity of the case law and to emphasise authority rather than elasticity in the law. Indeed some utterances in high legal quarters seem almost to support the idea of authoritarianism in law, the claims of the past rather than the needs of the present. But the object of law is to create and enforce a set of rules for the regulation of men's conduct in social life; without such rules life in society would be impossible. Such rules require constant revision from time to time if law is to catch up with life in the phrase of Holmes. There must be scope for growth and development to meet changing conditions and ideas, otherwise law will be sterilised. It will tend to become a matter of words and concepts. Distractions will multiply which are not based on relevant differences in fact. Judges will be largely occupied in collecting what appear to be analogous expressions of opinion of other judges; analysis and synthesis of words will supplant realistic appreciation of facts; logomachy will take the place of attempts to solve substantial disputes of right; certainty will be the aim, measured by consistency with earlier judicial statements, which will be slavishly followed even if plainly wrong, that is, incompatible with felt practical needs. Some difficulties of this sort are perhaps inevitable in any system like the English common law system. Law must involve some

general and governing rules, otherwise there would be no law, merely judicial discretion. Yet judicial discretion is also necessary; the difficulty is to give legal rules on the one hand and judicial discretion on the other hand, each its proper place. If that difficulty can be solved in any practical sense, it must be by distinguishing between fact and law, between the general and the particular. This distinction is paramount. It may be illustrated from the method adopted in many codes. In such codes you have the present mode of law, for example, a general rule such as that one is liable for want of due care in certain relations—perhaps the code would go on to lay down that due care is what is reasonable under the circumstances. The code will be supplemented by illustrations appended to the text and also in official editions by samples of summaries of decided cases; these will not be part of the positive law, which will be found in the body of the code, but will appear in footnotes and will serve as helps and guides to practitioners and perhaps to the judge for similar cases, without having coercive effect on either. This elasticity is particularly noticeable in a topic like negligence, in which detailed certainty is impossible. Here the law shows conclusive certainty in regard to general rules with elasticity as regards particular directions or orders. Law and discretion have thus each its appropriate place and must go hand in hand. I have made these perhaps too obvious observations because there has been an increasing tendency, perhaps in part owing to the disuse of the jury, to confuse questions of law and fact, and then to apply strict ideas of precedent to decisions which turn on questions of fact or of mixed facts and law. This is most unfortunate and is largely responsible for the present difficulties of the common law. It is a great evil, though the consequences may be mitigated by the circumstance that so much law in these days is statutory (which has sometimes its own drawbacks); and even where that is not the case, still in one way or the other the disadvantages of the casuistical system are opacated or mitigated. But the danger is that the multiplication of decisions, mostly treated as precedents though they are essentially decisions governed by fact, may tend to compel judges and practitioners to devote their energies to dialectical and verbal problems and to the study of words to the neglect of the primary duty of the Courts, which form a vital part of the system of government, to search for justice according to law, that is, the ideas of right and wrong which are fundamental in our civilisation. We cannot substitute "certainty" for justice as our aim, or substitute verbal quibbles or logical problems for a close and anxious regard to the practical needs of life. I have been most interested in a recent

decision culminating in the House of Lords which seems to illustrate many of the difficulties attaching to so much of our present system of law. Later I hope to comment a little further on these features.

The word Invitation is curiously chosen, but it points to the origin of the doctrine. The root idea seems to be that if one asks or invites another to enter on the premises of which the invitor is occupier, he should accept some liability to the invitee for the reasonable safety of the premises to which he is invited. The two parties are thus invitor and invitee, called rather grotesquely. The word 'premises' in this context is to be and has been widely construed, but all the same some flavour of real property law has lingered. It has included the floor of the upper storey of a sugar factory, as in the leading case of *Indermaur v. Dames*,[1] and almost every variety of places to which persons may resort and on which be injured on occasion. An obvious place is a shop to which customers go to buy or for similar purposes; a stand erected for people to view a performance; a ship and the various places on a ship, for example, a hatch in the deck, a platform for working on, as in *Horton's*[2] case to which I shall shortly refer; an exit way from a building; a common staircase in a building consisting of offices or flats; I need not exhaust the category. The decisions collected in the text books will give further instances. In all such cases it is the occupier or occupant who is liable.

I can now quote the famous words of Willes J. in *Indermaur v. Dames*.[3] The Judge there distinguishes servants or employees of the occupier who are treated as being in a special category in certain respects, and guests and other bare licensees. I may note in passing that employees or servants have a special right to protection both by statute and at common law: see for instance, as to common law rights, *Wilsons & Clyde Coal Company Ltd. v. English*.[4] Willes J. in *Indermaur's* case specially noted the case of a customer at a shop, whether he purchases or not. He proceeds to say that the class of invitees to which a customer belongs includes persons who go not as mere volunteers or licensees or guests or servants, or as persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier and upon his "invitation" express or implied. "And with respect to such a visitor at least, we consider it settled law, that he, using reasonable

1 (1866) L.R. 1 C.P. 274.
2 *London Graving Dock Co. Ltd. v. Horton*, [1951] A.C. 737.
3 See note 1, *supra*.
4 [1938] A.C. 57.

care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, 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 . . . as a question of fact."[5] These memorable words are the basic statement of the law of invitation.

This judgment like other judgments is coloured and conditioned, not only by the prevailing ideas and sentiments of the time, but by the facts of the case. There is, for instance, no reference to what is called the assumption of the risk (i.e., the legal risk) where that question arises, as it did not arise in *Indermaur's* case. Contributory negligence is referred to in the judgment as it was the subject of a special question to the jury, which disposed of it in favour of the plaintiff. The facts as to that aspect of *Indermaur's* case are briefly sketched by Lord Tucker in his judgment in the Court of Appeal in the *Horton*[6] case. Assumption of risk is obviously always a serious matter to be dealt with by separate issues of fact and law wherever it is relevant. It involves a tort by the defendant and a waiver of the tort by the plaintiff if he consents to assume the danger created by the tort. Its foundation is a breach of duty which the plaintiff may waive if he consents to it. But waiver of a cause of action is always a serious matter to be duly proved. Knowledge was considered by Willes J. simply from the point of view of the invitee's possibly negligent conduct as possibly contributing to the accident. The judgment then must be considered from the point of view of what it decided, like any other judgment. I have always admired the judgments of Willes J. I feel that criticisms of his judgment in *Indermaur* are not justified having regard to what was required to be and was decided. The invitor's duty, as the Court clearly decided, was one to exercise reasonable care for the safety of the invitee. The only point which might call for any second thoughts has been sufficiently dealt with by Singleton L.J. in *Horton's* case in the Court of Appeal.[7] He emphasises that the positive statement of the duty of reasonable care ends with the words "knows or ought to know." 'The reasonable care' is to 'prevent damage' from unusual danger; this *unusual* needs to be specified, particularly because there are dangerous employments in which danger is not unusual and danger money is often paid, that

5 (1866) L.R. 1 C.P. 274, at 288.
6 See note 2, *supra*.
7 See [1950] 1 K.B. 421, at 427.

is to say "danger is usually or commonly met with or confronted, though it does not irrevocably or indeed usually result in damage." Clearly Willes J. in the second paragraph of this statement of the law did not contemplate that reasonable care by "notice, lighting, or otherwise" completely satisfied as a matter of law and in all eventualities all the demands of care which the law required. Singleton L.J. in the Court of Appeal said the sufficiency of notice, etc., must depend on questions of fact. If Willes J. had meant to say that notice or warning of any kind would be as a matter of law in any case sufficient to constitute the reasonable care which the law required he would certainly have said so in clear terms. Willes J. clearly meant to include in his category due care in the widest possible sense under all the circumstances of the case. Notice and warning might clearly be a *pis aller* in some cases, in others even sufficient; it depends on the facts. The sufficiency of the reasonable care would naturally, indeed like other such questions, depend on what is proper in the particular case. There is not, and cannot be, any absolute or invariable criterion of sufficiency extending as a matter of law to each and every case where due care was required. That would be a strange and anomalous idea.

Lord Hailsham in *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck*[8] quotes a compendious and accurate description of the duty of the invitor to the invitee. Towards such persons (i.e., invitees) the occupier has the duty of taking care that the premises are safe! Such a comprehensive statement might well form a section of a Code, leaving its application to the infinite variety of facts to be determined by experience as in other cases. Precise legal definition of all the possible exemplifications of a legal rule is impossible and mischievous certainly in a doctrine like negligence. The position may be different in some statutory provisions or some stipulations which depend on figures and times and precise definitions; as for instance, statutes of limitation, or branches of law or equity in which absolute and arbitrary standards are fixed. Willes J. in another place was content to define negligence as want of care according to the circumstances. It may involve a very complex and complicated set of considerations both as to the actual condition of the premises and sometimes as to notices, etc., or to both. The acid test is 'for safety' primarily of the person who is invited and comes on the premises. Thus, to take an illustration from the very frequent and important type of invitation presented by vessels resorting to harbours, docks, wharfs, etc., the want

[8] [1929] A.C. 358.

of reasonable care for the invitees might consist in not maintaining the width and depth of the channel, which is a matter of the physical conditions of the entrance, but also in failure adequately to warn users of the port of the danger which the Harbour Authority knows or ought to know. This latter duty is a part of the primary and general duty to exercise reasonable care for the safety of the invitee. I refer here to the case of the *Towerfield*,[9] in which as in other cases of the kind the relationship was treated as that between invitor and invitee. There may be many cases where the invitor cannot change or be expected to change completely the physical under-water structure of the harbour, the entrance passage or the mooring place, but can efficiently secure the safety of the invitee by means of beacons, buoys, leading marks or other recognised means of showing where the passage way is safe. There may be other cases in which notice or warning is all that can be reasonably required to fulfil the duty of the invitor to the ship; what is essential is to observe that there is such a duty in general to take reasonable care for the invitee's safety, leaving to particular experience the precise mode of performing it. The object of the warning of the danger is to enable the invitee to avoid the danger. The duty is not in contract, but at law, so that its breach is a tort.

Distinctions have been drawn between persons who are or are not entitled to claim the benefit. Willes J. can clearly be blamed for not having anticipated the complications and subtleties of this aspect which the courts have developed. Willes J. had in mind, as the persons entitled to the protection, "persons who do not go as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go on business which concerns the occupier, and upon his invitation, express or implied."[10] It is clear that the word 'servants' needs to be qualified because *Indermaur* was merely a servant of the gas-fitter. But the invitation was taken to extend to him as well as to his employer; each was an invitee. From these words there has developed the rule that between invitor and invitee there must be a common or joint interest of a material character if the duty between them is to be recognised. There have been various forms of common interest which have been recognised. To take one instance to which I shall later refer, *Horton's* case, it has been shown there that there is a common interest between a contractor to refit a

[9] *Workington Harbour and Dock Board v. Towerfield (Owners)*, [1951] A.C. 112.

[10] (1866) L.R. 1 C.P. 274, at 288.

trawler and an electric welder employed by a sub-contractor to execute that part of the repairs. One entering a shop as a possible or prospective customer has a common interest with the shopkeeper though he eventually makes no purchase. These are simple illustrations, because the existence of a common interest has been very widely applied; I suppose because of a feeling that as far as possible the benefits in favour of invitees should be extended. The Courts have declined to define the exact scope of the word common or as it is sometimes called a joint interest. The reason for this requirement is probably a lingering feeling that though invitation does not create a contract, there should be, all the same, something like a quid pro quo. It is, however natural, an illogical requirement. The true facts of liability should be that the injured party should lawfully be on the other party's premises, to the knowledge of the occupier, whether as guest, licensee, or invitee. The cases on this topic are perhaps the best illustration in English law of the mischief of treating decisions on facts as if they were formulations of legal principle. That involves, besides its other defects, an enormous multiplication of "legal" rules, I suppose nowadays I should say legal maxims. In one sense every decision of a court of law involves some modification or elucidation of some legal rule. It may be said pro tanto new law is created. Each decision, it is true, can help as a guide to the practitioner. But all this is to abuse the idea of legal rules. This is pointed out in many recent cases, where I suppose the mischief was being realised; I cite only one, the *Diamond*.[11] A rule of law should at least be general and capable of wide and numerous applications. I have read a great many of these decisions without perceiving any helpful rule. They are a chaos.

But an even more difficult and confusing problem is presented by the distinctions which have been drawn between the scope of the invitor's duties when the invitee is merely a licensee, i.e., not an invitee in the full sense at all. On that issue, or more correctly, on the issue whether in a particular case the plaintiff is invitee or licensee, there have been many conflicting decisions and much difference of opinion in the highest circles of the legal hierarchy. If I were writing a treatise, I should also include by way of contrast the case of the trespasser, who, however, is no longer regarded as a *caput lupinum*, at least if his presence is known or anticipated. The classification for the purpose of this branch of law is at present authoritatively determined to be threefold—invitee, licensee, tres-

[11] *Owners of the S.S. Heranger v. Owners of S.S. Diamond*, [1939] A.C. 94, at 101.

passer. As to the two former, the material difference in the conquences is that the invitor is liable for danger which he knows or ought to know, whereas the licensor is only liable for danger of which he actually knows. This has now been established in more than one decision of the House of Lords, though in three separate cases some of their Lordships *per incuriam* did not give effect to the difference. It is, however, obvious to anyone of experience that it will be very difficult to prove actual knowledge, whereas what is called presumptive or imputed knowledge may be well found. Many important cases have turned completely on that distinction, for example, *Fairman's*[12] case, in which there was strong dissent, followed by *Jacobs v. London County Council.*[13] The former case has been much criticised and I believe has not been generally followed in any jurisdiction in which the House of Lords is not a final authority. The decision turned on what was held to be the absence of a common interest; it was a case in which a lodger or visitor of a tenant of a block of flats was held to be the licensee, not the invitee, of the landlord. The tenant was held to be the invitee of the landlord and the tenant's lodger was held to be his licensee. This certainly seems very artificial and arbitrary (picture an express lift in a New York skyscraper), but so is the whole idea of a common interest between the parties as determining rights in this connection. The threefold classification is arbitrary: the 'common interest' is a false basis. The true criterion would be the right of the "visitor" to reasonable care being taken for his personal safety. Both invitee and licensee, as human beings lawfully on another's premises to the knowledge of the occupier, are entitled to such safeguard. This was the true effect of the decision of the House of Lords in *Lowery v. Walker;*[14] as Lord Atkinson put it, "the plaintiff was lawfully in the place where the injury happened to him. . . . the respondent owed a duty to him to take care of this dangerous animal (*sc.*, the horse) which the respondent put there, and which injured the plaintiff by the very vices of which the respondent was well aware." Though the decision has later been described as dealing with a licensee by acquiescence, it was really decided on the facts which were treated as raising a duty towards the visitor, who like others habitually used the place as a short cut. I understand that in other countries such cases are decided on the facts of the particular case according as the Courts think the case is one of negligence or, as in Roman-Dutch Law, of

12 *Fairman v. Perpetual Investment Building Society,* [1923] A.C. 74.
13 [1950] A.C. 361.
14 [1911] A.C. 10.

culpa, which for this purpose and in this context may be treated roughly and inaccurately as equivalent to the English idea of reasonable care. There is a full and instructive discussion in the South African Law on the point in *Paine's*[15] case, from which the differences and similarities between the two laws can be understood. All I am here desirous of emphasising is that the whole paraphernalia of distinguishing between invitees and licensees has been dispensed with; trespassers may be here neglected. But the present English division between invitees and licensees has been severely criticised, not only as I have already indicated as arbitrary and illogical, but as completely inadequate. It was perhaps natural for Willes J. in *Indermaur* to mention invitees and licensees; but modern conditions of life have created many other and different competitors who ask for a place within the law of invitation, for instance visitors to public parks, libraries, public conveniences, public utilities, air raid shelters and a host of similar premises to which they have a right of entry. There is also the case of public employees who in certain circumstances have a right of entry on private premises. I am relieved in examining these categories by a learned and able article by Professor G. W. Paton;[16] the learned author would favour six classes. I have not space to force a path through the jungle of all these decisions. Professor W. Friedmann would favour five classes of those qualified to be beneficiaries under the law of invitation. In the decisions will be found many illustrations of this subtle and complex branch of law which seems to have developed from reasoning and distinctions more appropriate to real property law than to the more matter-of-fact problems of the law of negligence to which it really belongs. The law of invitation would probably not have developed as more than a special branch of the law of negligence as laid down in *Heaven v. Pender*[17] and in *Donoghue v. Stevenson*[18] if it had not been so persuasively stated by Willes J. not uninfluenced by views then current of contract and real property law, it in fact being always understood to be an action in tort.

In the course of this essay I hoped to touch lightly on the important and somewhat revolutionary doctrine laid down by the majority of the House of Lords in *Horton's* case (*supra*) and I have, I fear, spent more space than I can afford in a somewhat fragmentary

15 *Cape Town Municipality v. Paine,* [1923] A.D. 207.
16 *Entry as of Right,* (1950-51) 24 Aust. Law Jnl. 47.
17 (1883) 11 Q.B.D. 503.
18 [1932] A.C. 562.

exegesis of the law of invitation, which was not intended and cannot claim to be complete. I must therefore pass on to that case.

Horton's case is so important and can so well be used as an illustration of principles that I am going to trace it through its various stages, through the proceedings in the King's Bench Division[19] before Lynskey J. and the Court of Appeal,[20] and finally in the House of Lords.[21] It is a remarkable case because of the great difference of opinion which became apparent at every stage of the proceedings, and I am not merely quoting the decisions in the three courts or criticising the particular conclusions arrived at, but I hoped before I conclude to use the case in order to point to various criticisms, which are increasingly directed against our present system of legal procedure. I shall reserve that, however, for future occasions. I shall here proceed now to summarise exactly the nature of the case and how it fared in the courts, so far as space permits.

The case itself on the facts was extremely simple. The plaintiff, who was a man of 67 years of age, was an experienced welder. He was working on a trawler in the defendant's graving dock when he sustained serious injuries. The repairs consisted of the reconversion into a fishing vessel of the trawler, which had been in Government service. The vessel, while under repair, was in the defendant's graving dock; the defendants were the principal contractors. The plaintiff, who was one of the employees of a sub-contracting firm, had been engaged for over a month in welding work in the fishing hold of the vessel. To enable the welders to carry out their work, the defendants had erected staging consisting of two planks on either side of the hold, running fore and aft at either end of angle irons. No boards were provided for crossing the space of $4\frac{1}{2}$ feet from the planks on one side to those on the other side, and for that purpose the workmen had to make use of the angle irons. The workmen had complained to a representative of the defendants of the inadequacy of the staging, but nothing had been done. The plaintiff, when handing a bag of tools to a fellow workman, was stepping on an angle iron when his foot slipped and he fell astride the iron and sustained injury, and for that he claimed damages from the defendants. As he was not in the employment of the defendants there was no question of contract between him and the defendants. The claim was purely in tort. Lynskey J. held that the plaintiff could not succeed. His judg-

19 [1949] 2 K.B. 584.
20 [1950] 1 K.B. 421 (C.A.).
21 [1951] A.C. 737.

ment was primarily—and perhaps entirely—based upon the actual words used by Willes J., in particular on his words that "the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know." Lynskey J. held that there was an "unusual danger" there and that that danger might have been prevented by a more sufficient planking for the plaintiff to work upon. It was perfectly clear, however, that the inadequacy of the planking was known to the defendants because the men, of whom plaintiff was one, had complained; but nothing had been done by the defendants. Lynskey J. held that the danger was not unusual because in his opinion unusual meant a danger unusual from the point of view of the particular invitee. In the judge's words: ". . . if an invitee does appreciate the existence upon the premises to which he is invited of a danger and its nature and extent, it cannot be to him an unusual danger." He held that it was enough in his view that the invitee appreciated the existence of the danger and its nature and extent, even though he did not freely and voluntarily, expressly or impliedly agree to incur it. Finally the judge said,

> "If it were necessary to decide it, I should have held on the facts of this case that the plaintiff did freely and volntarily impliedly agree to accept the risk of working on the staging with full knowledge of the nature and the extent of the risk he ran."

I may, however, observe in passing that there was no plea of *volenti non fit injuria* on the record. The judge in truth decided on his consideration of the word 'unusual' in the judgment of Willes J. in *Indermaur v. Dames,* where the defence of *volenti non fit injuria* was not considered or even pleaded. Willes J. in his judgment referred to contributory negligence but not to *volenti non fit injuria.* As we shall see, the Court of Appeal said that that defence involved issues of fact which had not been adequately considered or dealt with in the evidence at the trial. In the Court of Appeal the decision of the trial judge was reversed; they held that 'unusual' in this context did not bear the meaning attached to it by the judge but meant that the defect in the staging was one of a kind not usually encountered in such circumstances, and that the defendants had failed in their duty to take reasonable care to make the premises safe, and, having failed to prove that the plaintiff had voluntarily accepted the risk, were liable to him for damages.

All three members of the Court of Appeal which heard the case unanimously agreed in that conclusion. Their judgments are very clear and precise and are based upon the cases on this point already decided and, indeed, to my mind are models of the

statement of generally accepted common law principles in their application to the case before the court. Singleton L.J. said:—

> "In the condition in which it was the staging was defective in that it was insufficient. There is no doubt of that. It could have been made satisfactory by the use of more deals—for example, by the use of a couple of cross-boards. As it was, it constituted a danger which led to an accident to the plaintiff. The staging was erected by the defendants, and the sub-contractors' men had no right to interfere with it . . . It is clear that before the date of the accident . . . complaints of the insufficiency of the staging were made by the plaintiff and by other welders to the defendant's charge-hand."

The Lord Justice points out that there was no plea of volenti non fit injuria. On the words "unusual danger", the Lord Justice said:—

> " 'Unusual' may be defined as 'Not usual; uncommon; exceptional'. It indicates the kind of thing which would not normally be expected. The danger created by the staging was through its being insufficient, and the danger was an unusual one in that it was of a kind not usually encountered . . . A danger which is unusual does not become other than unusual merely because the person suing knew of it before his accident. If it were otherwise, notice of an unusual danger might of itself render the rule in *Indermaur v. Dames* wholly inapplicable, whereas notice is only an element to be considered."

On the construction of the language of Willes J. the Lord Justice said:—

> "I am not sure that there is any ambiguity in the rule as stated by Willes J., if, as I think, the rule itself ends with the words "knows or ought to know" and the words which follow are regarded as indicating possible defences. Once there is evidence of neglect—and I think it clear that there was, on the judge's finding as to the staging—it is a question of fact whether notice given is sufficient to absolve the occupier from liability. I agree that one who has knowledge of the danger may well be treated as though he had been given notice of it. Whether the notice (or knowledge) is sufficient to absolve the occupier must depend on a variety of circumstances, including the nature of the risk and the position of the injured party."

He then goes on to point out that the plaintiff may have hoped he would be able to carry on safely, and perhaps thought that the defendants would put the staging into a better position. He was entitled to rely on the defendants' charge-hand's promise that something would be done, and thus there is no question of contributory negligence.

> "Can it be said that reasonable care was taken "by notice . . . or otherwise", so that the defendants are relieved from responsibility? In fact they did nothing. I do not regard knowledge on the part of the plaintiff as an answer to the claim unless it can be shown, not only that he realised the extent of the risk, but also that he freely and voluntarily undertook it—in other words, that the defence of volenti non fit injuria applies: See *Letang v. Ottawa Electric Railway Company*.[22] I do not know how far volenti as a defence was considered in

[22] [1926] A.C. 725.

the court of first instance. It was argued on the appeal, and I had not then noticed that it was not raised by the defence as pleaded. We were referred to *Bowater v. Rowley Regis Corporation*,[23] in which it was said that the defence of volenti could seldom apply when the plaintiff was a servant of the defendants. It is difficult to see any real difference in principle between that case and this, for, though here the plaintiff was not a servant of the defendants, he was a servant of a sub-contractor and was working alongside the defendants' employees. He had complained to the defendants' charge-hand, who had promised to do the best he could but who in fact did nothing. The defence of volenti ought not to prevail against a workman who has complained but who thinks it right to get on with his work as best he can and as carefully as he can, especially if there is a promise on behalf of the occupiers to put the matter right or to do 'the best I can'."

The Lord Justice then went on to consider an alternative way of putting the case and treating it as one falling within the more general statement of duty to be found in *Heaven v. Pender*[24] in the Master of the Rolls' words, and in *Donoghue v. Stevenson*,[25] which are very well known. Applying these views to the facts before him, the Lord Justice went on:—

> "I consider that the defendants were under a duty towards the plaintiff to use ordinary care and skill in the erection of the staging, and that they failed in the performance of that duty. The defendants owed to their own workmen a duty to use due care and skill to provide proper plant and appliances. If an accident had occurred to one of their own men through this defective staging, it seems to me that, apart from questions such as contributory negligence, they would have been responsible in damages, and I fail to see why the position should be different in the case of sub-contractors' men, for whose use, also, the staging was erected by the defendants. In truth there would not appear to be a great deal of difference between this aspect of the case and that of invitor and invitee, if the view which I have expressed of the rule in *Indermaur v. Dames* is correct. In *Addie (Robert) & Sons (Collieries), Ltd. v. Dumbreck*,[26] Lord Hailsham L.C. said of invitees: "Towards such persons the occupier has the duty of taking reasonable care that the premises are safe." That was a shorter way of expressing the law, and it omitted that part of the words of Willes J., which indicates what may provide a defence when there is evidence of neglect on the part of the occupier. The judge found that the the staging was as described by the plaintiff and his witnesses. The defendants' charge-hand shipwright admitted that the staging would be dangerous if it was as they had described it. Another of the defendants' witnesses agreed that the staging was quite unsafe for welders, and he said that there were complaints every day about the staging. Clearly there was evidence of neglect on the part of the defendants, and I do not see anything in the evidence which can excuse them from liability, unless it can be said that the plaintiff freely and voluntarily undertook the risk. For the reasons given, I do not think that that avails the defendants in the circumstances of this case."

23 [1944] K.B. 476.
24 (1883) 11 Q.B.D. 503.
25 [1932] A.C. 562.
26 [1929] A.C. 358.

Tucker L.J. (now Lord Tucker) agreed with that judgment. He said that it does not appear that in the long history of cases concerning invitors and invitees it has ever been necessary to the actual decision to answer the question which he had just stated: "Does the rule in *Indermaur v. Dames* require the occupier to take reasonable care to make the premises or structure reasonably safe for the purposes for which the invitee is invited thereto, or is the occupier's duty confined to taking reasonable care to prevent accidents from arising from unusual dangers, of which he is or ought to be aware, so that, if the danger is known to the injured person as the result of notice or otherwise, he is precluded from recovering?" Tucker L.J. quoted in addition to the words of Lord Hailsham, which I have already quoted a little above, the language of Goddard L.J. in *Haseldine v. Daw*:[27] "Towards an invitee the occupier has the duty of taking care that the premises are reasonably safe." Tucker L.J. emphasised the importance of stating the duty in a way which is apt to cover all the infinite variations of facts and circumstances which may exist in these cases, and to meet the plain requirements of justice. He also referred to the caution given to Indermaur as to the dangers in sugar factories like the locus in quo in *Indermaur's* case. He added that the precise language used by Willes J. in *Indermaur v. Dames* must be considered in relation to the particular facts which require decision. In his final paragraph Tucker L.J. uses these important words:—

> "It would, I think, be strange and unfortunate if our law allowed an occupier, who has supplied gear or equipment for immediate use by those whom he has invited to his premises without having taken reasonable care to see that such gear or equipment is reasonably safe, to escape liability in whole or in part, unless he proves contributory negligence or establishes a plea of volenti non fit injuria. In the present case contributory negligence has not been found and on the facts proved was clearly not established. Volenti was not pleaded and, although it depends in every case on questions of fact, I am clearly of opinion that the facts proved went no further than to establish scienti, there being no material distinction between this case and that of master and servant. For these reasons I agree the the appeal succeeds."

Jenkins L.J. in a full and lucid judgment, which only space prevents me from quoting in full, came to the same conclusion.

When the case came on appeal to the House of Lords, there was not only a sharp difference of opinion among the Lords of Appeal but also an almost complete *volte-face* on the case presented by the appellants. Lord Porter, Lord Normand, and Lord Oaksey held against the welder, the plaintiff, that his knowledge of the "unusual risk"

[27] [1941] 2 K.B. 343.

exonerated the ship-repairers from liability for the damage sustained by him and that it was not essential to the appellants' defence to establish that he was volens or that he was not under any feeling of constraint in accepting the risk. Their Lordships unanimously held, agreeing on this with the Court of Appeal, that an unusual risk is one which is not usually found in carrying out the task which the invitee has in hand. That was the view taken in the Court of Appeal and I need not discuss it in this essay any further. In the result therefore, Horton (the invitee-plaintiff) failed. It is clear that this decision involved a very important principle in this context, namely, that if a person was sciens he must also be taken to have been volens. In other words, the distinction between sciens and volens, which had been elaborately stated by Bowen L.J. and others in the cases and by the House of Lords which are so familiar and to which I shall refer, disappears. On a careful reading of the judgments in the House of Lords, the impression is inevitable that the attention of their Lordships was concentrated on the doctrine of volenti non fit injuria, which did not come up for consideration in *Indermaur v. Dames*. Indeed, the facts were clear and beyond controversy as to the inadequacy of the staging.

Before passing on to the judgments in the House of Lords, I must make some observations on the judgments in the Court of Appeal and on the basis of law on which they proceeded. Though they have been reversed by the majority in the House, they and the judgments of the minority of the Lords constitute an admirable statement of the law on this topic and deserve and will, I hope, receive careful consideration by any court in common law jurisdictions which do not accept the doctrine that the decisions and perhaps even the dicta of the majority of the Lords are infallible. We have been told by high authority that the judges are less concerned de lege lata, not de lege ferenda. No doubt the judgments in *Horton's* case have changed the law, but it may be useful to understand what was the law as understood previously and so admirably expounded and applied by the Court of Appeal. Their Lordships who formed the majority in the House of Lords quite fairly recognised that they were breaking new ground, without any coercive authority behind them. No one I think disputed that the duty of the invitor to the invitee was to exercise reasonable care to make the premises reasonably safe for the invitee who acted on the invitation. No one contested, as I read the whole authority, that there might be cases in which that duty might be performed by notice of dangers, which would enable the invitee while accepting the

invitation to avoid the dangers. The most obvious exemplification is the case of ports and harbours and the like, in which the dangers to vessels approaching and entering them under the invitation may be avoided by sufficient buoys or leading signals or the like, which those in charge of the vessel may see. I have already quoted the *Towerfield*[28] as one illustration among many. But the position may be different if the incurring of the particular danger is inescapable wherever the invitee acts on the invitation. The issue relates to circumstances in which there is danger of damage, not certainty of damage. The question is one of assumption of the risk, as it is often so called. What is assumed is the physical risk, not the legal risk, that is, the responsibility or liability to compensate for the consequences. The whole question thus flows from the invitor's duty to take reasonable care for the invitee's safety. What amounts to reasonable care, like other questions of that nature, depends on the actual circumstances of the particular case. The doctrine rests on the basis of a definite breach of duty between the invitor and the invitee, and the latter's reasonable conduct in the situation created by the breach. Willes J. did not consider this possible defence in *Indermaur's* case, though he did refer to a different defence, namely contributory negligence. The Judicial Committee did, however, reject the defence definitely in *Letang v. Ottawa Electric Railway Company.*[29] The case was a claim for damages in tort by an invitee who, in the ordinary course, used the normal approaches to a railway station, but as they were iced and dangerous, slipped and was injured. Her claim was met by the defence (inter alia) of volenti non fit injuria, as she was aware of the iced and dangerous condition of the approach to the station, but the Judicial Committee rejected that defence. It was clear that the plaintiff was aware of the danger, but none the less used the approach. The Board said in its judgment that the maxim volenti non fit injuria affords no defence to an action for damages for personal injuries due to the dangerous conditions to which the plaintiff has been invited on an errand of business, when it is not found as a fact that he "freely and voluntarily with full knowledge of the nature and extent of the risk he ran, expressly or impliedly agreed to incur it." The Board quoted *Thomas v. Quartermaine,*[30] and the statement of Bowen L.J. that, "The maxim, be it observed, is not "scienti" non fit injuria, but "volenti" . . . The defendant in such circumstances does not discharge his legal obligation by merely affect-

28 See note 9, *supra.*

29 [1926] A.C. 725.

30 (1887) 18 Q.B.D. 685.

ing the plaintiff with knowledge of a danger . . ." The Court of Appeal in *Horton's* case acted upon that view of the law. In the House of Lords neither the dissenting minority nor the majority were able to find in the defendants' favour that Horton had voluntarily consented to incur the risk. What the defendant (appellant) did was, as I have stated, to start in the Lords what was actually a new case, which was that if the invitee knew of the danger in the premises to which he was invited, he acted in law on the invitation at his peril; the risk both in a legal sense and in a physical sense fell on him, that meant that the invitor owed no duty of care to the invitee at all; there was no need of warning as to danger already apparent; Lords MacDermott and Reid strenuously opposed this new view, but it was accepted by the majority. It involved a complete departure from the concept of duty to invitees. I shall, I hope, refer to the new view and state the objections to it, both in principle and on authority. As to authority, there was not merely the reasoning and decision of the Privy Council but earlier English cases, in particular *Smith v. Baker*,[31] in which the House of Lords held that where a workman is engaged in an employment not in itself dangerous, but is exposed to danger arising from an operation in another department, the danger being enhanced by the negligence of the employer, the mere fact that the workman undertakes or continues in such employment, with full knowledge and understanding of the danger, is not conclusive to show that he undertakes the risk so as to make the maxim volenti non fit injuria applicable in case of injury; the question whether he has so undertaken the risk is one of fact and not of law. There was a direct decision on the maxim 'volenti etc.' It was a general ruling on the maxim; it was not limited to cases of master and servant and where it applies it applies equally to a stranger as to anyone else; see the judgment of Lord Halsbury L.C. (at 337) where he goes on to refer to *Thomas v. Quartermaine*[32] and *Yarmouth v. France*[33] and says that since these cases it has been taken for granted that mere knowledge of the risk does not necessarily involve consent to the risk; the maxim is not scienti non fit injuria but volenti non fit injuria; there must be consent of the workman to take the risk on himself though such consent may be implied from circumstances; mere continuing in the work with knowledge of the danger and after he had complained of being exposed to the risk is not conclusive of his having accepted the risk (see Lord Watson

31 [1891] A.C. 325.
32 See note 30, *supra*.
33 (1888) 19 Q.B.D. 647.

at 354, 355). Thus Lord Herschell (at 363) says categorically that if the employer fails in his duty to his employee, "I do not think that because he (the employee) does not straightway refuse to continue his service, it is true to say that he is willing that the employer should thus act towards him. I believe it would be contrary to fact to assert that he either invited or assented to the act or default which he complains of as a wrong, and I know of no principle of law which compels the conclusion that the maxim, "Volenti non fit injuria", becomes applicable." Such was the law as stated in 1891 and as generally understood ever since to my knowledge, which, however, only extends to half a century. It was so acted upon in *Letang's* case which was not a case of master and servant but of an invitee in the general legal sense. The principle is part of the general law; it applies wherever the maxim *volenti* applies whatever the duty of which there is a breach. It certainly applies in *Horton's* case and I cannot understand how *Smith v. Baker* was almost ignored; it was only cited in one of the dissenting judgments in the Lords. As a mere matter of words *volens* is not well translated by voluntarily; it does not mean what Lord Bramwell attributes to it, i.e., that the act was a conscious obedience of the body to a volition. The man in such a case may not have acted willingly, though in one sense his conduct was voluntary. Lord Herschell is particularly clear (at 365) where he says volenti non fit injuria does not apply where a man, exposed to a risk in a operation not inherently dangerous by the breach of a duty of his employer, continues to work with knowledge of the danger after a remonstrance. The man's poverty not his will consents. In the United States Restatement of the Law of Negligence,[34] questions in connection with voluntary exposure to a risk are discussed. It is impossible to summarise, still less to enumerate, all the possible complications of fact which may raise the question. One recurring type is that illustrated in *Letang's* case where a man chooses to use an obviously dangerous way or staircase, made so by the defendants' negligence, in order to exercise a legal right of access. Lord MacDermott has chosen this type of illustration; where the approach to a ticket office is by neglect of the railway company made obviously dangerous, the man who uses it to get his ticket and falls and is damaged may have a right of action as invitee if he acts reasonably and with due care. The Restatement[35] sums it up, "where the defendant had no right to maintain a dangerous condition . . . the fact that the plaintiff chooses to subject himself to a

[34] Torts, Vol. IV, sec. 893.
[35] *Op. cit.*, p. 495.

known risk does not necessarily bar him from recovery." The House of Lords' majority do not seem to have considered the manifold implications or applications in the affairs of ordinary life involved in their sweeping conclusion that knowledge or warning of a danger can nullify the ordinary duty of an invitor to care for the invitee's safety. In many cases, the duty may be broken with impunity because the danger does not eventuate in actual damage. However, the invitor's immunity has been laid down as the law of the land and as a rule of law. Notwithstanding all that has been said and understood to be the law, the maxim should now be read scienti non fit injuria.

I think it will be desirable to summarise briefly the views of the different Lords of Appeal when the case came before them; they are reported in [1951] Appeal Cases 737. The five Lords were Lords Porter, Normand, and Oaksey who formed the majority, and Lords MacDermott and Reid who dissented. As it was by the majority that the case was decided in favour of the appellant Company so that the appeal was allowed, I shall first attempt to indicate their separate opinions, which agree in the result, though I have difficulty in deciding how far they agreed in their reasoning. The important issue in principle was whether in a case of that type, the defence was established by establishing the plaintiff was sciens, when he acted on the invitation, whether he was also volens being immaterial. I have cut down my summary to the bare minimum for reasons of space. I shall now quote from Lord Porter's opinion:—

> ". . . the duty towards an invitee was said to be to take reasonable care that the premises were safe or, alternatively, if the duty was not so high, at any rate to establish that the danger was appreciated by the invitee, and was freely undertaken by him with full knowledge of the risk he was running and unconstrained by any feeling which would interfere with the freedom of his will. In other words, it must be shown that he was volens within the meaning applied to that word in the phrase volenti non fit injuria as interpreted by Scott L.J. in *Bowater v. Rowley Regis Corporation.*[36]
>
> "The appellants on their part contended that the duty of an invitor was of a lesser order than either of those claimed by the respondent. In their submission they had fulfilled their duty if either they took reasonable care to make the premises safe or if the invitee had knowledge or notice of the danger.
>
> "My Lords, I have put the contentions on either side in a broad way because it is apparent that in one aspect the case demands a solution of the much discussed problem of the distance to which the burden imposed by the decision in *Indermaur v. Dames* is to be carried and in what manner Willes J.'s dictum is to be interpreted. If the respondent is right in saying that notice or knowledge is immaterial, that the invitor is under an obligation to use reasonable care to make

[36] [1944] K.B. 476.

the premises safe, however manifest the risk may be, then unless the appellants can show that the respondent was volens they cannot escape liability. To this distance at least I understand Singleton, L.J., to have carried the doctrine in this case."

Lord Porter, however, goes on to refer to the plea of volenti non fit injuria which, as he says, does not appear in the defence.

". . . nor, as I explain hereafter, was it, in my opinion, necessary for the appellants to prove such facts as would warrant a finding to that effect, but in any case even if it was incumbent on the appellants to establish that the respondent undertook the risk willingly and without constraint, I do not think a formal pleading to that effect was necessary. The protagonists are invitor and invitee and the former is entitled to set up by way of defence any circumstance which would enable him to escape liability at the suit of the latter. If notice or knowledge of the danger on the part of the invitee is enough, then he can prove and rely on the existence of either or both. If in order to succeed in that defence the appellants must prove such facts as would establish a plea of volenti non fit injuria, then the appellants can cross-examine or call evidence to that effect, and if this testimony is accepted will escape liability, not because they have pleaded that the respondent was volens but because they have established the fact that they have performed the obligations incumbent upon invitors . . .

". . . I accept the contention that an invitor's duty to an invitee is to provide reasonably safe premises or else show that the invitee accepted the risk with full knowledge of the dangers involved."

Lord Porter at times seems to make it all turn on the distinction between the cases of master and servant and other cases of invitation. He states that to his mind the position is different where the injured person is not a servant but an invitee. He goes on to emphasise that the duty is not to prevent damage but to use reasonable care to prevent it, and it has to be determined what is reasonable care. He has quoted the words of Willes J. in *Indermaur v. Dames,* "damage from unusual danger which he knows or ought to know." He again emphasises the distinction between the invitee and the employee, and he states that the duties of an invitor are to be judged by a less exacting standard than those of an employer.

Later Lord Porter put the question, "Did the invitee undertake the risk of performing his task with full appreciation of the danger? This, as has been said more than once, is a question of fact for a jury to decide, if there be a jury; if not, it must be decided, like all other questions of fact, by a tribunal which tries the case."

Lord Porter seems to identify full knowledge with consent and a little later he goes on to say that "Such a finding, I think, is a sufficient answer to a contention by an invitee that the invitor fell short of the standard of care which the law imposes upon him."

"It is true", he proceeds, "that the staging was and remained unsafe, notwithstanding that complaints were made and it is true also

that the appellants did nothing to improve it, but the invitee has been held to have had full knowledge of his risk and such notice or knowledge is sufficient to exculpate the invitor provided the full significance of the risk is recognised by the invitee.

"I cannot myself find much assistance in the decided cases. The exact meaning of Willes J.'s words in *Indermaur v. Dames* and their true legal consequences have long been in dispute and for many years formed a basis of discussion by the text-book writers.

"The difference between sciens and volens has by now been firmly established, but where the exact line is to be drawn is a matter of more difficulty. The accurate demarcation, however, in my opinion, need not be laid down in the present case, since it is enough to protect the invitor from liability if he proves that the invitee knew and fully appreciated the risk. The further step, that he must be shown not . . . to have been volens, is not an essential to the defence. Whether the learned judge meant to find that the respondent was volens I am not sure, nor am I sure that if he had meant to do so he had evidence which entitled him to reach that conclusion. But, as I have said, my view is that the question does not arise."

Lord Porter then quotes some authorities and proceeds:

"None seems to me conclusive of the matter under discussion, and though natural sympathy must make the inclination lean towards a desire to compensate the respondent for his injury, the true principle is, in my opinion, that a full appreciation of the danger on the part part of the invitee and a continuance of his work with that knowledge is sufficient to free the invitor from liability for damage occasioned by the insecurity of the premises to which resort is made."

These words seem to sum up the learned Lord's conclusion; when he proceeds to say full appreciation of the danger and a continuance of work with that knowledge is sufficient, he is stating the position as a proposition of law. I should have liked to know how he distinguished for this purpose *Smith v. Baker,* which he ignores; I should also have liked to know precisely what was the distinction in principle as to volens. A short passing reference to *Letang's* case seems to suggest that that decision was based on a misapprehension of the law; but again I ask, why?

Lord Normand came to the same conclusion as Lord Porter, though it may seem for a different reason. Lord Normand, in an important though brief passage, observes that there are murmurs increasing with the passage of time against a clear cut division between invitees and licensees with a hard and fast delimitation of the duties owed to each category.

I need not quote his acute and convincing analysis of the meaning of the word "unusual" as employed by Willes J. in *Indermaur's* case; in effect he agrees with the Court of Appeal on that and with Lord Porter. After referring to the Harbour and Dock cases, Lord

Normand then observes, in two paragraphs which I feel bound to quote in full:—

> "Where there is already knowledge, notice or warning will have no effect and the omission of it can do no harm. So the defendant who has failed to give the warning may yet succeed if he proves that the injured person had knowledge of the unusual danger. But whether it be knowledge gained without a warning or knowledge conveyed by a warning, it must be sufficient to avert the peril arising from the unusual danger. The knowledge must, therefore, be full knowledge of the nature and the extent of the danger. In the present case the judge has found that the plaintiff had full knowledge of the nature and the extent of the peril, and the finding is beyond doubt warranted by the evidence, which shows that the plaintiff had before his accident complained of the same defects in the staging as were proved at the trial."

Lord Normand, however, pursues the discussion rather further in the following paragraph:—

> "The real difficulty of the case is in the argument that a warning may sometimes be a discharge of the invitor's duty, for example, if it excludes a part of the premises from the area of the invitation, or if it is given to a person who has nothing to consider but his own safety and pleasure, it is not sufficient if the invitee is under a duty to his employer to work in the area of the danger. In such a case, it is said, the invitor must prove not merely that the invitee knew of the danger but that, knowing it, either he was himself negligent or he freely and voluntarily agreed to accept the risk. In the present case this argument is of vital importance, for the plaintiff was under his contract of service engaged on the repair of the ship, and for that work the use of the defective staging was necessary. Contributory negligence was pleaded but not proved. The defence of volenti non fit injuria was not pleaded, and the defendants relied on the plaintiff's knowledge of the danger not towards establishing the plea volenti non fit injuria but as an equivalent to the discharge of their duty by warning. The issue between the parties may be stated in this way: the defendants say that if the plaintiff incurred the risk sciens he must fail; whereas the plaintiff says that he succeeds unless it is shown that he incurred the risk sciens et volens."

Lord Normand then goes on to say:—

> "On this issue I am not aware of any direct authority. In *Letang v. Ottawa Electric Railway Co.* the invitors argued that the defence volenti non fit injuria was established and it was held that it was not. If the appellant's argument in this appeal is sound, the defendants in *Letang* assumed a greater onus than was necessary for their success. It is impossible to say what the result would have been if *Letang* had been argued on the lines of the appellant's argument in this case. The solution must therefore be attempted on principle unaided by authority. The strength of the plaintiff's case is that the defendants knew that the welders were coming daily to their work and using the staging as their invitees and that they were under a contract of service to do so. Yet the plaintiff's contract of service with his employer cannot be pleaded either by or against the invitor who is a stranger to it. Otherwise the invitor would owe to the invitee the same duty as an employer owes to his employees, and the invitee could sue with an equal prospect of success either his employer or an occupier of the premises who had erected staging thereon under a contract with his employer. Such a result

> would be just if the employer found liable in damages to his workmen could in all circumstances recover the damages from the occupier. But counsel for the plaintiff recognised that the right of recovery might not be always available. The principle of avoiding circuity of actions cannot be invoked, and to say that the invitor had agreed to perform the employer's duty to his employees is to resort to a fiction, and fiction is no longer an acceptable solution for the problems of industrial relationships. The sufferer must make up his mind whether to sue as an invitee or as an employee under his contract of service. He cannot, in my opinion, sue as an invitee and at the same time found upon his contract of service as restricting his freedom to act upon a warning of unusual danger given to him by the invitor."

This paragraph, I must confess, causes me very considerable difficulty. It does not give due weight to the unanimous decision of five Lords of Appeal in *Letang's* case; but in addition I find the rest of the paragraph very puzzling. The question here is between the London Graving Dock Company Ltd., the invitors, and Horton, the invitee. It is a question of tort pure and simple, with no question of contractual duty at all applicable, and the rights of the invitee depend in no way on whether the invitor has a claim for contribution, if he is held liable, from any third party; for instance the actual employer of the invitee, whose legal liability to the invitee may depend on different considerations, namely the contract of employment, from those arising in virtue of the invitation. It seems to me that in truth invitor and employer were both severally in breach of duty to Horton. They were in fact concurrent tortfeasors in that connection, and either might be sued independently and in accordance with duties on the one hand of employment and on the other of invitation, and there might be a contribution between the two, as concurrent tortfeasors.

The law on the question of contribution between joint or concurrent tortfeasors has been fully discussed in the American Restatement on Negligence.[37] In *Horton's* case, both the Dock Company and Horton's employers were concurrent tortfeasors; the employers were responsible under their contract of employment, and the invitors who were sued, on the doctrine of invitation. Each was severally responsible for a separate breach of duty, though it may be that the measure of damages was different; the employer was responsible under the doctrine of *Wilson's* case,[38] and the invitor under the duty of reasonable care to make the premises reasonably safe etc., under the rule in *Indermaur v. Dames.* Perhaps the amount of damages would in fact turn out to be the same; but I have not thought it

[37] Torts Vol. IV, c. 44.
[38] [1938] A.C. 57; see note 4, *supra.*

necessary to consider that. I may refer in passing to the case of *Grant v. Australian Knitting Mills,*[39] where the plaintiff recovered against two defendants, the one in contract and the other in tort. The whole question of concurrent tortfeasors has now been discussed by Dr. Glanville Williams in his book on *Joint Torts and Contributory Negligence.* Horton, though he had these separate causes of action, could not, of course, recover in toto more than the amount of his actual damage. I venture to submit with the greatest respect that this argument based on questions of contribution is irrelevant so far as the rights of Horton are concerned.

Lord Oaksey, the third Lord of Appeal, who joined in allowing the appeal, delivered a brief and somewhat enigmatic judgment. On the question of the meaning of the word "unusual" I may quote his words:—

> "As I read the words of Willes J. in *Indermaur v. Dames,* an occupier owes no duty to an invitee in respect of "usual" dangers, since the invitee is only entitled to expect that the invitor will take care to prevent damage from unusual danger, but "where there is evidence of neglect" that is to say, where there is danger which may be found by the tribunal of fact to be unusual, it is a question of fact whether reasonable care has been taken by notice, lighting, guarding or otherwise, and therefore there has been no neglect."

Lord Oaksey's judgment thus concludes.

Of the dissentient judgments I can best begin by quoting Lord MacDermott's very clear statement:—

> "Two other matters must be mentioned to . . . define the principal issue. First, the respondent was aware of the dangerous state of the staging and of the risk he ran in using it. And, secondly, he cannot, despite his knowledge, be taken as having freely and voluntarily agreed to accept that risk . . . At the Bar of this House, however, volenti as a defence was expressly disavowed. In truth, the appellant could not well have done otherwise. It is settled law that, even in cases of accidental harm, knowledge of a risk does not necessarily import a willingness to bear it without compensation; and here the evidence which, for good reason, was not directed to this plea, comes nowhere near sustaining it."

His Lordship then points out that the range of circumstance affecting the relationship of invitor and invitee is virtually infinite and generalisations based on some particular state of affairs must be advanced and regarded with caution. "It is one thing", said his Lordship, "to say that an invitee's claim has failed in consequence of his knowledge and, as it seems to me, quite a different thing to say that because he had knowledge his invitor had no duty towards him." He then adds that there is no satisfactory decision on the point,

[39] [1936] A.C. 65.

and that the outcome of the present appeal must ultimately rest on principle rather than precedent.

He sums up the trial judge's view as involving that, if an invitee does appreciate the existence upon the premises to which he is invited of a danger and of its nature and extent, it cannot be for him an unusual danger. But Lord MacDermott adds that the reasoning rests on a narrow ledge and lays undue stress on the import of a single word in the judgment of Willes J. He refers to the judgment as one which, however outstanding, was certainly never intended to take its place in the statute book.

Passing from his discussion of the meaning of "unusual danger" he said that no one would have been more surprised than Willes J. himself to learn that on the law as he stated it the danger was not unusual and no question of reasonable care on the part of the invitor could possibly arise. "It seems to me that the view propounded by the appellants can only be placed on a logical basis if in this particular branch of the law sciens can be said to come to the same thing as volens." He then refers to *Letang v. Ottawa Electric Railway Co.* and says that "the distinction was regarded by the Judicial Committee as material in determining the rights of an invitee and the correctness of that view is not, in my opinion, now open to doubt."

His Lordship then makes the pertinent observation: "If the invitee sciens is not necessarily volens as well, then, as I see it, the whole virtue of giving him notice of the danger, the whole relevance of knowledge on his part, must lies in his being in a position to keep clear of the danger once he knows of it." "How can knowledge", he asks, "rank as a decisive criterion of responsibility . . . where, as here, the danger is constant and inescapable for the invitee, despite his knowledge, while he remains on the premises pursuant to his invitation?" "In such circumstances I find it difficult to discern any sound reason why knowledge per se on the part of the invitee should exonerate the invitor who is content to leave unabated, on the premises he controls, an abateable danger."

Lord MacDermott sought to illustrate his point by the illustration of a man going to a railway ticket office, by the usual and only means of approach, to get his ticket, and finding a notice posted up by the company describing a danger, which could easily have been averted, namely that the roof overhead was in bad repair and might fall. The passenger reads and understands the notice, but hurries on in order to get his ticket, and is hurt by a piece of falling glass. "He was not volens or careless. Yet, if the appellants are right, he was owed no duty by the company and has no redress."

His Lordship then proceeds to refer to the relationship between the doctrines exemplified by *Heaven v. Pender* and *Donoghue v. Stevenson*, and states that, in his opinion, liability in a case like that which he is discussing depends on the doctrine of *Indermaur v. Dames*, on which he says liability must be founded. Having said that, he goes on to make the following observations:—

> "The invitor's liability being in respect of danger of which "he knows or ought to know", he is at least under an obligation to use reasonable care to make himself aware of defects that may injure his invitee. But that done, he may, according to the appellants, discharge his obligation—or perhaps I should say end it—merely by giving the invitee due notice of the danger—and even that is unnecessary if the invitee is already aware of it."

He repeats that the question here is open.

> "Your Lordships' decision will establish what was not established before, and that, as it seems to me, makes a comparison between the broad merits of the rival contentions both relevant and right."

I shall not here go through the further citations of authority made at this stage by Lord MacDermott. He does, however, referring to certain language of Willes J. in *Indermaur*, say that the judge had more in mind than dangers which are hidden and which therefore pass out of that category when revealed, but that the ultimate test he considered applicable to all cases within the rule was one of reasonable care. He illustrates that proposition by a number of quotations from cases which are familiar to students of law, as showing that the crucial test throughout is the test of reasonable care. As to *Letang's* case, he observes that its prime importance in this appeal lies in the distinction it emphasises between sciens and volens.

I wish to conclude my imperfect summary of Lord MacDermott's judgment by quoting his final conclusion. "In my opinion", he said, "(the view) propounded by the respondent is to be preferred":—

> "It accords better, as it seems to me, with the language employed by Willes, J. in *Indermaur v. Dames*, including his use of the expression "unusual danger". It respects the settled distinction between sciens and volens in this branch of our jurisprudence, a distinction which the appellants' contention would, in effect, obliterate. It provides a rational criterion of responsibility over a wider range of circumstance, being equally applicable to avoidable and unavoidable dangers and to invitees of all kinds and degrees. And, not least, though in a sense this is but to enlarge on what I have just said, it applies to a relationship which, as already observed, is infinitely varied in character, a test of liability which is correspondingly flexible and adaptable. For what is reasonable in any given case must depend on all the relevant circumstances, including such factors as the nature of the invitation, the nature of the danger, the knowledge of the invitee, and the practicability of the possible means of removing or reducing the risk. So, in some instances, notice may suffice—in certain cases, indeed, such as those relating to

dangers which lurk in navigable waters, notice may be the usual as well as the best means of protecting the invitee; in others fencing, or watching, or repair, or reconstruction may be requisite. And lastly, I see nothing in all this to bear harshly on the occupier. He controls the premises, he serves his own interest by the invitation, he has left to him all the pleas open to one accused of negligent conduct. Why should he be exonerated, or partly exonerated, from the duty of taking reasonable care? I have been unable to find any satisfactory answer to that question in principle or authority.

"My lords, I have already said enough to apply the view I favour to the facts of this particular case. Had the appellants taken due care for the respondent's safety they would have taken steps to make the staging adequate for its purpose. They did nothing and should, accordingly, be held liable."

The other Law Lord who dissented is Lord Reid. I begin by quoting a passage which comes early in his judgment:—

"The decision of this case depends, in my judgment, on the question whether the duty of an invitor to an invitee can never be more than to see that the invitee is fully aware of the dangerous state of premises which he is invited to use, or whether, notwithstanding that his invitee has such knowledge, the invitor can ever be under a duty to take care to make his premises reasonably safe for the use which he invites his invitee to make of them. If such a duty can exist in any circumstances the facts here are such that in my opinion it must exist in this case."

It may be convenient at once to quote Lord Reid's conclusion:—

"To return to the main question: this case will decide whether an invitor's duty is determined by a rule, which seems to me to have no foundation in principle, that he can, while continuing to hold out an invitation, always relieve himself of his duty to take care by giving notice. I do not deny that fixed rules have advantages: cases can be more readily decided, and people interested can perhaps forecast more accurately what the decision will be in any case. But in the realm of negligence, at least, rigid rules give rise to what I believe to be avoidable injustice. I see no reason to depart unnecessarily from the simple method of asking in any case what would a reasonable man in the shoes of the defendant have done. That test is subject to obvious limitations. In some cases it is impracticable, and in many cases it is for one reason or another undesirable, to make that which a reasonable man would do a legal obligation, but I see no such difficulty in this case. In this case I have no doubts that a reasonable man in the position of the appellants would have averted the danger which caused damage to the respondent by providing more adequate staging. Why then was it not the appellant's duty to do this? I have come to the conclusion that to hold that there was such a duty would infringe no principle and would conflict with no binding or well-recognised authority. I am therefore of opinion that this appeal should be dismissed."

I go back now to the earlier part of Lord Reid's judgment. He said the case was argued on the footing that the question was still an open question, and therefore he thought it should be considered first as a question of principle. He thought the respondent was undoubtedly an invitee, and therefore, as there was a danger on the appellants' premises, the first question was whether the existence

of that danger created any duty at all towards their invitee. If it did, it will then be necessary to enquire what was the extent of their duty.

He then discusses the question whether it could be called "usual" or "unusual". I need not dwell further on that point because he, like Lord MacDermott, and indeed all the members of the Court of Appeal, and the majority of the members of the House of Lords, all thought that the word "unusual" in Willes J.'s judgment was not applicable to the danger which existed in this case. Lord Reid went on to say that he thought that in this case there was a duty in respect of the danger which caused the accident, and that the real question was: what was the nature and extent of that duty?

> "Three views have been suggested. In the first place it has been said that the duty of an invitor is to make his premises reasonably safe (at least in so far as that is practicable). Secondly it can be said that the invitor has the option to make his premises reasonably safe or to give to his invitee adequate notice of the danger, and that if he adopts the latter alternative his duty is at an end. Or thirdly his duty can be said to be to use reasonable care to prevent damage to his invitee.
>
> "I think that the first of these clearly puts too high a duty on the invitor. It is easy to imagine many situations which are highly dangerous to a person without knowledge of the danger but which to a person with such knowledge become safe; the danger is so situated that the invitee can continue to accept the invitor's invitation and at the same time without difficulty avoid the danger. He can only suffer damage from the danger after he knows about it if he acts in complete disregard for his own safety. In such a case I can see no reason why an invitor should have to do any more than see that his invitee has the necessary knowledge. Reasonable care for the safety of the invitee could not require more.
>
> "But there are other cases where full knowledge of the danger gives no assurance of safety. If a man is invited to work for a long period in a place where a slight slip on his part may lead to disaster, the fact that he realises the danger goes but a short way to assure his safety. So I find it necessary to examine somewhat narrowly the view that an invitor is entitled to discharge his duty to his invitee merely by giving notice of the danger when it would be easy for him to ensure his invitee's safety by removing the danger. In such a case, if the true view is that it is the duty of the invitor to use reasonable care to prevent damage to the invitee, then it would be his duty to remove the danger. If in the present case it was the duty of the appellants to use reasonable care to prevent damage to the respondent while he was on their premises in response to their invitation doing work which it was their common interest to have done, then in my judgment the appellants clearly failed in their duty; on the other hand, if the appellants' duty to the respondent came to an end once he had knowledge of the danger, then of course the appeal must succeed."

Lord Reid did not think that the case of *Donoghue v. Stevenson* assisted towards the determination of the question then in issue.

That point, he thought, had never been the subject of decision, and there was no clear indication that it had been specifically considered in the course of any case.

Passing then to the judgment of Willes J., Lord Reid said that, though the words had clearly been chosen with great care, and "if one were dealing with facts at all comparable with the facts in that case, or indeed with any situation of a kind which Willes J. can be supposed to have had in mind, it would hardly be necessary to go beyond his judgment . . . In dealing with a situation different from anything contemplated in that judgment I do not think that it is very helpful to analyse that passage as if it were a section in an Act of Parliament."

> "I prefer", he said, "to seek the principles underlying the judgment, which are, I think, of general application. In the first place I think that the judgment recognises that it is only with regard to a certain class of dangers that any duty arises. I have stated my view about that and I do not think that my view conflicts in any way with this judgment. In the second place Willes, J. does not state the invitor's duty alternatively as a duty either to take care or to give notice. He states the invitor's duty as a general duty to use reasonable care and he does not lay down any particular method as one which an invitor is in all circumstances entitled to adopt in discharging his duty: on the contrary he mentions a variety of methods, "notice, lighting, guarding, or otherwise", and must, I think, have had in mind that such method should be adopted as reasonable care in the circumstances requires. I think that his meaning is that what reasonable care requires in any particular circumstances is a matter of fact. Therefore I can find no support in this judgment for the view that as a matter of law the invitor always has the option to give notice and do nothing more.
>
> "There are, it is true, many cases in which the duty has been stated in an alternative form, that the invitor must either make his premises safe or give notice of unusual dangers. It appears to me that those cases are of one or other of two kinds. In some of the cases the circumstances were such that the invitor was entitled to assume that once the invitee knew of the danger he would avoid it. In other a principle similar to that underlying the defence of volenti non fit injuria was assumed to be applicable: it seems to have been held that, if an invitee continues to accept the invitor's invitation after he knows the danger, the law must infer that he has agreed to accept the risk from that danger."

Lord Reid then deals with the well-known cases relating to invitations to ships, such as *The Moorcock*,[40] in which the wharfingers invited a ship to discharge at their jetty. To that list we may now add the case of the *Towerfield*,[41] decided a few months before the case now being discussed; I have already referred to that case in this

[40] (1889) 14 P.D. 64.
[41] [1951] A.C. 112.

article. As to all the cases of that type, Lord Reid observed that it seemed to him that the Harbour Authority would be entitled to expect that a ship being warned of the danger would avoid it, and therefore warning would be an adequate discharge of their duty. He adds "I do not think it necessary to consider further instances of this kind."

> "Cases", he said, "where the defendant was entitled to assume that warning would be an adequate protection are clearly distinguishable from the present case. In this case the respondent returned to the dangerous place day after day, and the appellants knew that the respondent's knowledge of the danger was no protection to him. How then does it come about that the appellants' duty towards him had ceased, unless it has to be said that the only inference which the law permits to be drawn from such circumstances is that the man returning to his work in knowledge of the danger must be held to have accepted the risk and relieved the appellants of their duty to take care?"

Lord Reid, then, after quoting *Cavalier v. Pope*[42] and *Fairman's*[43] case, points out that the somewhat sweeping observations in these cases were obiter; and a little later he said:—

> "It is, I think, clear that the court in *Brackley's* case[44] took the view that an invitee who knew the danger was presumed to have undertaken the risk. It is at this point that I think that the most difficult question in this case arises. There is no doubt that when the defence volenti non fit injuria is pleaded it is now well recognised that it is not enough to show that the plaintiff was well aware of the danger: there must also be evidence from which it can properly be inferred that he agreed to accept the risk. But it is said that the rule is different in a question between invitor and invitee. It is said, if I understand the argument rightly, that here it is not a question of a defence, but that when the invitor tells the invitee of the danger he thereby relieves himself of any further duty or liability to the invitee, with the result that, whether the invitee consciously elects to run the risk or not, he is in fact confronted with the option of continuing to accept the invitor's invitation at his own risk or of going away. There may be a technical distinction, but if I am entitled to look at the substance of the matter I can see no substantial distinction.
>
> "It seems to me that all the reasons which have led courts for many years past to stress the difference between volens and sciens are equally valid here. The defence of volenti non fit injuria is of general application; it is not confined to cases between master and servant. That is clearly explained by Lord Halsbury, L.C., in *Smith v. Charles Baker & Sons*,[45] and the limitations of that defence are founded on general considerations of good sense.
>
> "Lord Watson said in *Smith v. Charles Baker & Sons*, on the assumption that a workman appreciated his danger: "I am unable to accede to the suggestion that the mere fact of his continuing at his

42 [1906] A.C. 428.
43 [1923] A.C. 74.
44 *Brackley v. Midland Rly. Co.*, (1916) 85 L.J. K.B. 1596, 114 Law Times Rep. 1150.
45 [1891] A.C. 325.

work, with such knowledge and appreciation, will in every case necessarily imply his acceptance. Whether it will have that effect or not depends in my opinion, to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case.

"In *Bowater v. Rowley Regis Corporation*,[46] Scott, L.J., said: '. . . a man cannot be said to be truly 'willing' unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will.

"Such considerations are almost as much applicable in a case like the present as they are in a case of master and servant: it may be just as difficult for a sub-contractor's servant to leave his work because he fears danger as it is for a servant of the main contractor who is in occupation of the premises. I do not think that it is certain or even probable that every invitee who is sciens is in fact also volens, so any rule of law that an invitee who is sciens must be deemed to have accepted the risk of which he was aware can only be founded on a fiction. I would not be prepared to assent to the introduction of a further fiction into the law in any case where that could be avoided.

"Of course, if all these considerations are irrelevant, if your Lordships are forced by some over-riding principle or by binding authority to disregard them, then there is no more to be said. But if this is really an open question then such considerations do not appear to me to be irrelevant. If they were relevant when one branch of the law was being developed they are I think, equally relevant now.

"In my judgment the duty of an invitor is not merely to take care that his invitee knows of unusual dangers; it is that so long as he holds out his invitation he shall take reasonable care for the safety of his invitee unless the invitee has relieved him of that duty by accepting the risk.

"The only question which remains is whether it can be held in this case that the respondent did in fact accept the risk and relieve the appellants of their duty towards him. I do not doubt that an invitee can, if he chooses, accept the risk of injury to himself from a danger known to him, and if he does accept that risk he cannot thereafter hold the invitor liable for any injury which may result to him from that danger: in effect his acceptance of the risk brings to an end the invitor's duty to him with regard to that danger. Further, I do not doubt that a man does not have to state expressly that he accepts a risk; his acceptance can be inferred from the whole facts of the case."

He then pointed out that, as he understood it, counsel for the appellants said his case was that, "as a matter of law, no matter what the circumstances may be, an invitee who continues to accept an invitation in knowledge of the danger involved cannot be heard

[46] [1944] K.B. 476, at 479.

to say that he has not accepted the risk." As to the judgment of Lynskey J. on this point, Lord Reid made this observation:—

> "If the judge merely means that acceptance of the risk must be inferred from the respondent's having continued to work in knowledge of the danger, then for the reasons which I have given, I do not agree with that. But if he means that the whole facts of the case are sufficient to prove acceptance of the risk by the respondent. I do not think that he was entited to make such a finding, and I do not think that it is open to your Lordships to make such a finding now. We do not know what the evidence would have been if the issue had been properly raised. If there is in this matter a difference between sciens and volens, and if it is not enough to prove knowledge, then the burden of proving facts to show that the plaintiff was volens as well as sciens must lie on the defendant and it cannot in my judgment be held that that burden has been discharged in this case."

I may add here that the case was not tried before a jury, but before a judge. If it had been tried before a jury, then the question of the competence of that jury to pronounce upon it, having regard to the course taken at the trial, would have been a proper subject for enquiry and doubt. The case having been tried before a judge, then both the Court of Appeal and the House of Lords were competent to disagree with the suggested conclusion, and I should venture to think that it could not have been seriously upheld for the reasons given by Lord Reid. I have already quoted his Lordship's conclusion, and I do not think it necessary to repeat it.

I have now completed my analysis of the series of judgments in this case. They do seem to evince a remarkably complex exposition of conflicting arguments on what might seem to have been a comparatively simple though important principle, on which the interests of the unfortunate welder depended.

I should be sorry if I have to think that the common law is powerless to discourage conduct like that of the appellant company and its underlings from gratuitously exposing an employee or invitee to the danger that Horton suffered which could have been avoided by the provision of an extra plank or two. That is what appeared to the Court of Appeal and to Lords MacDermott and Reid. But that the English law is thus powerless seems to be now settled unless it can be changed. Nor can I stifle a regret that so much time labour and expenditure of money should have been lavished on the hearing and decision of what might appear an issue capable of being stated and answered in clear and simple terms. But that latter is a question which lies beyond the scope of the essay.

I regret that my attempts to summarise these important judgments are so unsatisfactory. But the judgments in their fullness are

open to any reader who desires to study them and to make up his own mind.

WRIGHT*

* *The Rt. Hon. Lord Wright of Durley, P.C., G.C.M.G.; a Judge of the High Court of Justice, King's Bench Division, 1925-1932; Master of the Rolls, 1935-1937; a Lord of Appeal in Ordinary, 1932-1935, 1937-1947.*