of s.41 of seventh Schedule to the Copyright Act, 1956".[15] Here again, if the Copyright Act, 1956, were to be regarded as affecting the law of Australia it would be contrary to the Statute of Westminster.

R. V. GYLES, B.A., Case Editor — Third Year Student.

LIABILITY TO CONTRACTOR'S SERVANT

SMITH v. *AUSTIN LIFTS LTD. & ORS.*

Where the condition of premises exposes to the risk of injury a servant who is sent to work there by his master, duties may be owed to the servant by both his master and the occupier of the premises. Such duties, and the discharge thereof, were considered by the House of Lords in *London Graving Dock Co. Ltd.* v. *Horton*,[1] where the somewhat strict rule was laid down that, if the invitee knows of the danger which causes him to be injured, he will be deprived of his remedy against the occupier. In the recent case of *Smith* v. *Austin Lifts Ltd. & Ors.*[2] the House of Lords unanimously held their previous decision in *Horton's Case* to be distinguishable but advantage was not taken by their Lordships of the opportunity thus presented to review that previous decision and alleviate the harshness of the rule therein formulated.

In *Smith* v. *Austin Lifts Ltd.*,[3] Smith, the plaintiff, a fitter employed by the first defendants, Austin Lifts Ltd., was sent to work on premises occupied by the second defendants, with whom the first defendants had contracted to maintain a lift. The winding mechanism of the lift was situated in a machine house on the roof of the premises and access thereto was provided by a ladder leading to a pair of doors. Smith was aware of the defective condition of the left of these doors, the result of a broken lower hinge thereon, which left the door suspended by its upper hinge. Such defect had been reported to his employers who had neither visited the premises to ascertain whether the place of work and access thereto were safe, nor had they repaired the door. The employers however did, on four occasions, report the defect to the occupiers who also failed to repair the door. Subsequently Smith, finding that he was unable to bolt the defective door, or to replace it in its proper position, tied the doors together with wire in order to keep them closed. Almost three weeks later, having occasion to enter the machine house, he found the right door open and the left door jammed inside the machine house. In order to obtain access by the right-hand door, Smith, whilst mounted on the ladder, tugged at the left door to test whether it was sufficiently secure to take his weight if he were to use it to lever himself up through the right door. He thereupon tried to enter by the right door, but the left door gave way and he fell from the ladder and was injured.

Smith successfully sued his employers and the occupiers but the verdict of Oliver, J., sitting without a jury, was reversed by the Court of Appeal. The plaintiff appealed to the House of Lords, which restored the decision of Oliver, J.. Two points emerge from this case, namely the discharge of an occupier's duty to an invitee to his premises, and the extent of an employer's duty to provide safe premises for his workmen.

1. *Occupier's Duty to Invitees.* In the present case the status of the plaintiff as an invitee was not questioned by the occupiers.[4] Accordingly their Lordships,

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[15] *Per* Menzies J., *id.* at 315—the majority found it unnecessary to decide this point.
[1] (1951) A.C. 737.
[2] (1959) 1 All E.R. 81; (1959) 1 W.L.R. 100.
[3] (1959) 1 All E.R. 81.
[4] Although such status is more commonly accorded to a customer entering a shop

following the practice adopted in *London Graving Dock Co. Ltd.* v. *Horton*,[5] proceeded in separate speeches to examine firstly whether in the circumstances the occupiers owed a *prima facie* duty to the plaintiff, and secondly, if such duty were established, whether the knowledge of the invitee of the defects in the door precluded him from recovering damages. Although their Lordships arrived at the same conclusions as to the first point, they differed in their reasons. In this regard Viscount Simonds, Lord Morton and Lord Somervell considered that the inference could be drawn that the condition of the doors had been altered by the act of the occupiers or their servant. Consequently "an unusual danger was created for the appellant which not only was, or should have been, known to the second respondents (the occupiers), but was due to their own act".[6] Lord Reid, however, declined to accept such inference, but agreed that the occupiers were liable on the ground that they had not done all that was reasonable to remove an unusual danger to the plaintiff of which they had, or ought to have had, knowledge. Lord Reid's speech appears to suggest that occupiers, as invitors, must make the necessary alterations to their premises to ensure that they are safe. If this were so, it is to be observed that the occupiers' duty may be the same as if the plaintiff's entry had been made under contract. In this event the premises would be required to be as safe as reasonable care could make them, although it has been determined that an invitee cannot claim more than to take premises as they are.[7]

Lord Denning arrived at the conclusion that the occupiers were liable but did not proceed directly on the footing that the relationship between the plaintiff and the second defendants was that of invitor and invitee. His Lordship relied on negligence on the part of the occupiers and examined separately the traditional constituents of that tort *viz.* duty of care, breach of that duty and damage thereby. Although any differences in the reasoning of Viscount Simonds, Lord Morton and Lord Reid may be regarded as merely verbal distinctions, Lord Denning's view would appear to be somewhat of a departure from the standard aproach. It is submitted that less confusion would have been created by this aspect of the present case if the House of Lords had seen fit to have regard to, if not to adopt, the classic statement of Willes, J. in *Indermaur* v. *Dames*[8] concerning the nature and extent of the duty owed by an occupier of property to an invitee *viz.* that "Such a visitor . . . using reasonable care on his part for his own safety is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger of which he knows or ought to know." No reference was made, however, by any of the learned Law Lords to any part of Willes, J.'s famous judgment, of which it has been said that it is the "recognised repository of the law on the subject" and that "whatever diversity of language occurs in later judgments, the authority and accuracy of the rule remain unquestioned".[9]

A *prima facie* duty on the part of the occupiers having been established, the plaintiff in the present case was bound to satisfy the court that he was not debarred from recovering by reason of his knowledge of the unusual danger of which he complained, since it was laid down in *London Graving Dock Co.*

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to do business with the proprietor, it has been held to extend to a servant sent by his master to premises occupied by persons with whom the master has contracted to provide services or goods. *Cf. Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274; *London Graving Dock Co. Ltd.* v. *Horton* (1951) A.C. 737.

[5] (1951) A.C. 737.

[6] (1959) 1 All E.R. 81.

[7] *Buckingham* v. *Luna Park (N.S.W.) Ltd.* (1943) 43 S.R. (N.S.W.) 245, 259-60 *per* Davidson, J. *Cf. Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274; *Norman* v. *Great Western Ry. Co.* (1915) 1 K.B. 584.

[8] (1866) L.R. 1 C.P. 274, 288. *Cf. Lewis* v. *Sydney Flour Pty. Ltd.* (1956) 56 S.R. (N.S.W.) 189.

[9] *South Australia Co.* v. *Richardson* (1915) 20 C.L.R. 181, 189 *per* Isaacs, J.; *Buckingham* v. *Luna Park (N.S.W.) Ltd.* (1943) 43 S.R. (N.S.W.) 245, 255. This aspect of the present case would appear to justify the statement of Davidson, J. in the latter case:

Ltd. v. *Horton*[10] that, as a general rule, notice operates to deprive an invitee of his remedy against the occupier. In that case the plaintiff was a boilermaker whose employers had contracted with the defendant to do welding work on the sides of the hold of the defendant's ship. The defendant provided and retained control of the necessary staging for the plaintiff to work upon. The plaintiff had complained to a servant of the defendant of the insufficiency of the staging, but nothing was done to remedy the situation. Shortly afterwards the plaintiff, in the course of his employment, slipped and fell from the staging and was injured. It was held that, in the circumstances, the plaintiff's conduct amounted to a "free and willing and unconstrained acceptance of the risk with full knowledge of its danger"[11] and that accordingly the plaintiff could not succeed in his claim against the defendant. From the facts in the present case,[12] however, it was clear that the knowledge of the plaintiff was not the "full knowledge of the nature and extent of the danger" stated by Lord Normand[13] to be a prerequisite to the occupier's exoneration from liability. Lord Denning pointed out that although the plaintiff knew all about the defect, he did not know all about the danger arising from it and that *Horton's Case* only applies where an invitee, whilst fully appreciating the danger, nevertheless goes on and incurs it. His Lordship continued:[14]

> It is not enough that he should know of the defective condition of the premises. It is not enough that he should realise there is some risk. If he was in any way mistaken about the danger so that the state of affairs was in fact more dangerous than he thought it was then he can recover. Put in more homely fashion it comes to this: if a man faced with a dangerous means of getting across a gap mistakes the risk, saying to himself: "I know it is a bit risky but so long as I am careful I shall be all right", he is under no disability. But if he fully measures the risk saying: "no matter how careful I am, it is very likely I shall fall", and still goes on he cannot recover.

Horton's Case certainly seems most illogical in view of the fact that in that case the House of Lords held (affirming the decision of the Court of Appeal on this particular point) that an unusual danger is one of a kind not usually encountered by persons of the class of the plaintiff or in the type of place or circumstances in which such danger occurs. Thus the fact that the plaintiff happens to know of the existence of the danger—even though a reasonable man would not know—does not prevent its being an unusual danger, since the test as to whether it is unusual is an objective test, and the duty nevertheless arises "to take reasonable care to prevent damage from unusual danger."[15] However, applying the rule laid down in *Horton's Case*, once the duty to take care has been established, the knowledge of the plaintiff, considered on a subjective basis, does become relevant, and operates immediately to discharge the duty. Thus it has been said that "the duty to the plaintiff exists but is destroyed at the moment of its birth. It certainly seems more natural in such a case to regard the duty as never having arisen".[16]

"It is a surprising reflection upon legal interpretation that the numerous curial efforts directed to that end (i.e. to determine the nature and extent of the duty), mostly in far more diffuse but much less simple and lucid language than was applied by Willes, J., have only resulted in an apparent conflict of judicial opinion which . . . makes it impossible to answer with any certainty the question as to the circumstances in which an occupier fulfils his duty to an invitee."

[10] (1951) A.C. 737.

[11] *Id.* at 746 *per* Lord Porter. *Cf. Cavalier* v. *Pope* (1906) A.C. 428, 432, *per* Lord Atkinson; *Brackley* v. *Midland Ry.* (1916) 85 L.J. K.B. 1956, *per* Swinfen Eady and Bankes, L.JJ.; *Thomas* v. *Quartermaine* (1887) 18 Q.B.D. 685, 696, *per* Bowen, L.J.; *Manchester, Sheffield & Lancashire Ry. Co.* v. *Woodcock* (1871) L.T. 335, 336.

[12] (1959) 1 All E.R. 81.

[13] (1951) A.C. 737, 755.

[14] (1959) 1 All E.R. 81, 93.

[15] *Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274, 288 *per* Willes, J.

[16] D. Lloyd, "Liability of Invitor for 'Unusual Danger' known to the Invitee" (1951) 14 *Mod. L.R.* 496, 497.

Moreover the decision in *Horton's Case* has been said to involve the proposition that if an invitee is *sciens*, he must also be taken to be *volens*. It has been suggested, however, that notice should not be an automatic bar to recovery but only one of the elements to be taken into consideration, that whether notice or knowledge is sufficient to absolve the occupier from liability must depend on a variety of circumstances, including the nature of the risk and the position of the injured party.[17] Lord Denning was the only learned Lord who took this view in the present case.[18] His Lordship maintained, in accordance with his views in earlier cases,[19] that "knowledge of the danger is not a bar in itself" but is only to be regarded as a factor in considering either "whether the appellant willingly accepted the risk as his[20] or whether the accident was due wholly or in part to his own fault."[21] On the other hand, Lord Reid felt that the test was "not whether he (the invitee) agreed or whether he was free to agree to accept the risk", but rather "whether he had a sufficient appreciation of the danger."[22]

2. *Employer's Duty to Provide Safe Premises.* The recent case of *Wilson* v. *Tyneside Window Cleaning Co.*[23] would appear to confirm the well-known decision in *Wilsons & Clyde Coal Co. Ltd.* v. *English*[24] that an employer's duty to a servant sent to premises occupied by a third party is to ensure that the place of employment is reasonably safe.[25]

Attempts have been made[26] to extend the duty of the employer as to the safety of the place of work to premises over which the employer has no control, but in 1942 in the case of *Taylor* v. *Sims & Sims*,[27] and again in 1954 in *Cilia* v. *H. M. James & Sons*,[28] it was held that no duty of care lay on the employer in respect of such premises. In *London Graving Dock Co. Ltd.* v. *Horton*[29] the plaintiff did not sue the employers who had sent him to work on premises not belonging to themselves; it was suggested, however, by the House of Lords that Horton would have been successful had he preferred to proceed against his employers rather than against the occupiers. Consequently in 1952, in *Christmas* v. *General Cleaning Contractors Ltd.*[30] Denning, L.J. disagreed with the decision in *Taylor* v. *Sims & Sims*[31] on the ground that *Horton's Case*[32] had shown that an occupier could allow his premises to remain dangerous with impunity provided that the workmen had notice of the defect. It therefore followed, said his Lordship, that the duty to take reasonable care to see that the premises were safe fell on the employer who sent his men to the premises. However, in the recent case of *Wilson* v. *Tyneside Window Cleaning Co.*,[33] Pearce, L.J., commented that this argument necessitated

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[17] *Lipman* v. *Clendinnen* (1932) 46 C.L.R. 550, 556, *per* Dixon, J.; *Horton* v. *London Graving Dock Co. Ltd.* (1950) 1 K.B. 421, *per* Singleton, L.J. (Court of Appeal); *Buckingham* v. *Luna Park (N.S.W.) Ltd.* (1943) 43 S.R. (N.S.W.) 245, 256 *per* Davidson, J. (251, 262-3 *per* Jordan, C.J. and *per* Halse Rogers, J. *contra*); *South Australia Co.* v. *Richardson* (1915) 20 C.L.R. 181, 186, *per* Griffith, C.J.; *Bond* v. *South Australian Ry. Com'r.* (1923) 33 C.L.R. 273, 289, *per* Isaacs, J.

[18] *Smith* v. *Austin Lifts Ltd.* (1959) 1 All E.R. 81.

[19] *Cf. Greene* v. *Chelsea Borough Council* (1954) 2 Q.B. 127, 139: "Knowledge of the danger is only a bar where the party is free to act on it, so that his injury can be said to be due solely to his own fault". See also *Slater* v. *Clay Cross Coal Co.* (1956) 3 W.L.R. 232, 236-37; *Riden* v. *A. C. Billings & Sons Ltd.* (1956) 3 All E.R. 357.

[20] *Letang* v. *Ottawa Electric Ry. Co.* (1926) A.C. 725.

[21] *A. C. Billings & Sons Ltd.* v. *Riden* (1957) 3 All E.R. 1 (H.L.).

[22] (1959) 1 All E.R. 81, 91.

[23] (1958) 2 All E.R. 265.

[24] (1938) A.C. 57. Birkett, L.J. has recently commented, however, that this decision is becoming "the most overworked case in our courts", *Bastable* v. *Eastern Electric Board* (1956) 2 Ll.L.R. 586.

[25] An expansion of the definition of this duty was not countenanced by the High Court in *Jury* v. *Commissioner for Rys.* (1935) 53 C.L.R. 273.

[26] For a discussion of this point see *Wilson* v. *Tyneside Window Cleaning Co.* (1958) 2 All E.R. 265, 266, *per* Pearce, L.J.

[27] (1942) 2 All E.R. 375.

[28] (1954) 2 All E.R. 9.

[29] (1951) A.C. 737.

[30] (1952) 1 All E.R. 39, 41.

[31] (1942) 2 All E.R. 375.

[32] (1951) A.C. 737.

[33] (1958) 2 All E.R. 265, 271.

the fiction, which seemed to him unjustifiable, that the duty of providing safe premises was delegated by the occupier to the master so that the master was vicariously liable for the occupier's failure to provide safe premises. The learned Lord Justice said, further, that the preferable approach to the question was that of Hilbery, J. in *Hodgson* v. *British Arc Welding Co. Ltd.*,[34] who had implied "not that employers had no duty at all in respect of things over which they had no control but that the discharge of that duty was of a wholly different kind from that where the master was in control."[35]

Despite these considerations, however, it was held in the present case,[36] Lord Reid dissenting, that although no duty on the part of the employers arose to repair the door, a duty did arise "to take such steps, if any, as a reasonable employer, careful of the safety of his servants, could and would have taken in light of the knowledge of the situation which the first respondents (the employers) had or ought to have had".[37] Lord Reid felt that it was difficult to believe "that any employer in real life would in similar circumstances have made a special inspection before allowing experienced men to go to work."[38]

Formerly, in order that a plaintiff might succeed, he was required to prove knowledge of the danger in the master and ignorance in himself. This rule has now been abandoned and these once essential elements have become merely relevant factors to determine whether the master was negligent and whether the plaintiff voluntarily incurred the risk. Yet it would appear in the present case that the knowledge of the employers of the existence of the defect complained of, and their awareness that nothing had been done in response to their frequent communications thereon with the occupiers, was the sole factor which led the House of Lords to hold that the employers' duty to provide reasonably safe premises had not been discharged. Indeed, Lord Denning observed that the employers would not have been responsible had the defect not been reported to them, since "they would have been entitled to assume that the means of access provided by the occupiers were reasonably safe".[39] However the fact that the plaintiff in the present case[40] was not ignorant of the danger did not prevent his recovering from his employer owing to the decision of the House of Lords in *Smith* v. *Baker & Sons*.[41] There the plaintiff was injured by the falling of stones which had been hauled over his head by a crane. It was held that he was not debarred from recovering from his employer since the knowledge which he had of the risk did not necessarily involve a consent to run the risk, and was accordingly not sufficient to satisfy the defence of *volenti non fit iniuria*. In this regard Lord Porter[42] has observed that although acceptance of the risk with full knowledge of the dangers involved is sufficient to debar an invitee's recovery from the occupier, still—

> If the parties were master and servant it may well be that one should go further and say that a full appreciation of the risk is not enough, the servant must not be put in a position in which he is obliged either to obey orders or to run the risk of dismissal.

Thus the position would appear to be that the duty of an employer to take reasonable care to provide safe premises for his workmen is more stringent than the duty of an invitor. Hence notice will not automatically absolve the employer from liability for injuries sustained by his servant as a result of a

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[34] (1946) 1 All E.R. 95.

[35] (1958) 2 All E.R. 265, 271. This view was adopted in *Davie* v. *New Merton Board Mills Ltd.* (1958) 1 All E.R. 67 and in *Wilson* v. *Tyneside Window Cleaning Co.* (1958) 2 All E.R. 265, by Parker, L.J., who also preferred the alternative *ratio decidendi* in *Taylor* v. *Sims & Sims* (1942) 2 All E.R. 275 and *Cilia* v. *H. M. James & Sons* (1954) 2 All E.R. 9 to the effect that the duty had been discharged.

[36] (1959) 1 All E.R. 81.

[37] *Id.* at 88.

[38] *Id.* at 90.

[39] *Id.* at 94.

[40] *Ibid.*

[41] (1891) A.C. 325.

[42] (1951) A.C. 737, 746; *Cf. Smith* v. *Austin Lifts Ltd.* (1959) 1 All E.R. 81, 94, *per* Lord Denning.

breach of such duty, provided that the case does not fall within the sphere "in which it is reasonable to leave to a skilled workman the decision whether the difficulty that he encounters is one in which he needs help."[43]

Conclusion. Prior to *Smith's Case*[44] Lord Wright had adverted to the policy aspect of *Horton's Case*[45] and had deplored the failure of the majority of the House of Lords in the latter case to consider 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".[46] These observations, it would seem, were not taken into consideration by the House of Lords in *Smith* v. *Austin Lifts Ltd.* The speeches in that case appear to confirm the illogical distinction made in *Horton's Case* between the notice which would absolve an occupier from liability to an invitee, and the knowledge required on the part of an employee to preclude recovery by him of damages from his master for injuries suffered as a result of unsafe premises. To negative liability an occupier apparently is obliged to establish only a full and complete knowledge on the part of the invitee of the risk. An employer, on the other hand, must prove not only his servant's knowledge of the risk but also the servant's consent to run the risk. In this regard, however, the contract of service may also be taken into account insofar as it is restrictive of the employee's choice as to whether he will incur the risk.

In England in 1957 the Occupiers Liability Act[47] was passed with the object, *inter alia*, of minimising the harsh results flowing from *Horton's Case*. The cause of action in the present case arose before that statute came into operation, and consequently its benefits were not available to the present plaintiff. Accordingly, until the passing of Australian legislation corresponding to the English Occupiers Liability Act it would seem that our courts would follow[48] the decisions in *London Graving Dock Co. Ltd.* v. *Horton* and *Smith* v. *Austin Lifts Ltd.*

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EXTRA-TERRITORIAL OPERATION OF INDUSTRIAL AWARDS

R. v. *FOSTER; EX PARTE EASTERN & AUSTRALIAN STEAMSHIP CO. LTD.*

The problem of the extent of the effective operation of industrial awards beyond Australia is likely to be of more frequent occurrence in future years, having regard to the recent rapid growth in the modes of travel and communication between Australia and other countries. Consideration was given to this question, and the matter has been to a certain degree clarified, by the High Court[1] in *R.* v. *Foster & Ors.; ex parte Eastern & Australian Steamship Co. Ltd.*[2]

The case came before the Court by way of an application to make absolute

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[43] *Id.* at 85, *per* Viscount Simonds; *cf. Winter* v. *Cardiff R.D.C.* (1950) 1 All E.R. 819; *Bastable* v. *Eastern Electricity Board* (1956) 2Ll.L.R. 586; *Smith* v. *Broken Hill Pty. Co. Ltd.* (1956) 74 W.N. (N.S.W.) 195.

[44] (1959) 1 All E.R. 81.

[45] (1951) A.C. 737.

[46] "Invitation" (1951-1953) 2 *W.A. Ann. L.R.* 543.

[47] 5 & 6 Eliz. 2, c. 31 (Eng.). Section 2 (4) (a) of that Act reads: "Where damage is caused to a visitor by a danger of which he had been warned by the occupier the warning is not to be treated without more as absolving the occupier from liability unless in all the circumstances it was enough to enable the visitor to be reasonably safe."

[48] See e.g. *Walter H. Wright Pty. Ltd.* v. *Commonwealth* (1958) V.L.R. 318; *Australian Shipping Board* v. *Walker* (1959) V.L.R. 152.

[1] Full Court (Dixon, C.J., McTiernan, Fullagar, Kitto, Taylor, Menzies and Windeyer, JJ.).

[2] (1959) A.L.R. 485.