

of, the vagrancy section of the Criminal Code, in the part from which I have quoted, would have, in conformity to other sections I have referred to, have had added to it the words "or betting" after the word "gaming." If this were not so, there would have been a great waste of energy in "barking up the wrong tree" in such cases as *Saunders v. The King*, 38 S.C.R. 382.

I would answer the question in the negative and direct that the accused be discharged.

OSLER, J.A., agreed, for reasons to be stated in writing.

MOSS, C.J.O., GARROW and MACLAREN, J.J.A., also concurred.

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KIMBALL v. BUTLER.

*Master and servant—Injury to and consequent death of servant—Negligence—Servant not acting in course of duty—Voluntary incurring of risk—No duty owing by master—Contributory negligence.*

Appeal by the plaintiff from the order of a Divisional Court, dismissing an appeal by the plaintiff from the judgment of TEETZEL, J., at the trial, dismissing the action, which was brought by the widow of Wallace Kimball, deceased, to recover damages for the death of her husband while in the employment of the defendants, under circumstances of alleged negligence on the part of the defendants.

The work upon which the deceased was employed at the time of his death was that of constructing a tunnel under the Detroit river, and, being a civil engineer, his position was that of superintendent of shaft No. 2.

On the night of the 14th September, 1908, a fire occurred in shaft No. 4 which, it was supposed, was caused by the use of candles in the hands of some of the defendants' workmen engaged in making repairs to a bulkhead containing compressed air, which was leaking. The place where the fire occurred was about 2,000 feet distant from shaft No. 2, where the deceased was employed, and was territorially quite beyond any place in the tunnel where his duty to the defendants required him to be.

At the time of the fire there were workmen in the tunnel, and the deceased, attracted to shaft No. 2 by the fire, went, with others, down that shaft for the purpose of assisting to extinguish the fire and in the rescue of the workmen in the tunnel; and, while in the tunnel, was suffocated by the smoke, which