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EMPLOYEE'S ACTION AGAINST EMPLOYER.

[From the Southern Law Review.]

The subject of the employee's action against his employer, for injuries received in the course of the employment, presents some very perplexing problems, upon which few courts entirely agree, and in whose solution some tribunals have adopted the reasoning of others, reluctantly, upon the confessed ground of authority rather than upon principle or conviction.

The actual adjudications are often more satisfactory in their results than the reasoning upon which they are based. The chief difficulty generally seems to be the assignment of a sufficient reason for exempting the employer from liability, for it has been commonly assumed that he would be liable but for some special exemption. The earliest and most confident method was to assume a contract on the part of the employee exempting the employer from liability, having first assumed that the employer would be liable but for such a contract. This mode of reasoning is well exhibited in the language of Lord Abinger in *Priestly* v. *Fowler*.* The opinion goes a good way beyond the facts of the case, and illustrates the legal methods against which Bentham's vigorous protest has as yet made little headway.

Dr. Wharton, in an interesting pamphlet,† which gives an account of the recent parliamentary investigation of the subject, objects to our assuming such an exemption in the contract of service; but, unless we quite misunderstand him, he offers as a substitute a contract of "co-adventure." It can make little difference by what name we call the contract. If we start with the assumption that on principle the employer should be liable, and then seek an exemption in the fact of the relation, it cannot matter whether we call the contract, out of which the relation and the consequent exemption spring, by one name or another. The mere fact that the parties to any given relation are, in some senses, "co-adventurers," will not constitute a defence to any legal liability, unless the co-adventure amount to a partnership; and we do not think this can be claimed.

Judge Cooley, in a recent work,* intimates that this theory of a contract for the exemption might hardly satisfy him, were it not supplemented by considerations of public policy. After referring to the assumed contract by the employee to bear the risks of the business, he says: "Whether this reason would be sufficient for all cases, if it were a matter of indifference to the general public whether the servant should have redress or not, may be matter of doubt; but it is supplemented by another, which considers the case from the standpoint of public interest. That reason is this: that the opposite doctrine would be unwise, not only because it would subject employers to unreasonable and often ruinous responsibilities, thereby embarrassing all branches of business, but also because 'it would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on behalf of his master, to protect him against the misconduct or negligence of others who serve him'" (p. 541). And Judge Cooley would apply this argument to all employees alike. "The negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other; and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts or omissions on the part of one class of servants, and not those of another class. Nor on grounds of public policy could the distinction be admitted, whether we consider the consequences to the parties to the relation exclusively, or those which affect the public, who, in their dealings with the employer, may be subjected to risks. Sound policy seems to require that the law should make it for the interest of the servant that he should take care, not only that he be not himself negligent, but also that any negligence of others in the same employment may be properly guarded against,

* 3 Mee. & W. 1. See also *Hutchinson* v. *Railway Co.*, 5 Exch. 351.

† Monograph on Liability of Master to Servant, by Francis Wharton, LL.D., 1878.

* Cooley on Torts, chap. 18.

by him, so far as he may find it reasonably practicable, and be reported to his employer if needful. And, in this regard, it can make little difference what is the grade of servant who is found to be negligent, except as superior authority may render the negligence more dangerous, and, consequently, increase at least the moral responsibility of any other servant, who, being aware of the negligence, should fail to report it" (p. 544). This reads well, but we find that, in applying it, we are not to inquire whether the servant injured *was* aware of the negligence, and failed to report it, nor whether it *was* reasonably practicable for him to guard against it or report. We are in all cases to assume this against the employee, and assume it conclusively, however improbable or even obviously false the assumption may be.* Why might not the same argument be carried further, and assume away the cause of action for the employer's personal negligence?

If we start with the primary assumption that the employer will be liable unless an exemption can be found in these arguments, we think it must be admitted that the arguments are unsatisfactory, and the exemption fails. In the first place, would such a contract of exemption be valid?

In *Railroad Company* v. *Lockwood*, 17 Wall. 357, a contract was considered between a railroad company and a drover who had cattle on the train. The drover had signed an express agreement to take all risk of injury to the cattle, and of personal injury to himself, upon the consideration that the cattle should be carried at less than tariff rates. The drover rode on the same train, upon a "drover's pass," which contained an express printed stipulation that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received upon the train. The contract was held invalid. Mr. Justice Bradley, delivering the opinion of the court, said: "The inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of its validity."

* Pages 545, 562, and generally throughout the chapter wherever the doctrine is applied. This is also the fair inference from the cases cited with approval.

If this be true of an express written contract, founded on a pecuniary consideration, between the company and a shipper, will it not apply with at least equal force to an unexpressed contract, unsupported by consideration, and, in point of fact, generally unthought of, assumed by legal fiction, between the company and its employee? A comparison of the wages commonly paid railway and other mechanical employees with those paid workmen in less hazardous pursuits excludes the idea that any compensation is paid, as a rule, beyond the value of the labor. If the contract of exemption were otherwise valid, could it be supported without consideration?

But, secondly, *does* the public interest, which forbids a shipper to make this contract for value, demand it of an employee without consideration?

We are told that the public wishes to shield the employer from a responsibility which would often be embarrassing. It is true that railway companies are already favored by the law in many ways upon this principle. They are permitted to exercise the high prerogative of eminent domain; extreme tension has been given to the rules of law in order to uphold municipal aid; and special privileges and grants are showered upon them by successive legislatures;—but we may well pause before conceding that public interest calls for further and more unrestrained indulgence in the way of absolution from any lawful responsibility to a considerable portion of the public.

Employees are a part, and a large and important part, of that public whose interest as a whole makes up this "public policy." If the companies could be ranked with "the public" on one side, and the employees, as a species of public enemies, on the other, then, indeed, we might resolve all doubts in favor of the former, on the score of public policy.

The "travelling public" might well doubt the policy of exempting the employer from responsibility for "accidents," when it happens that only employees are injured; and they might doubt the efficacy of telling the brakeman that he ought to watch the telegraph operator, a hundred miles away, and report the latter's negligence which causes a collision. The brakeman first knows of the negligence when he is called upon to apply the brakes, a

the peril of his life, in the face of an approaching train. The public would probably prefer to have him remain at his post at such a time, instead of telling him that to do so is culpable contributory negligence, and that, if he chooses to take the risk, the injury which follows will serve him right. An employee would properly argue, on the doctrine of Judge Cooley, that, when a sudden danger menaces, he is in duty bound to look out for himself. If passengers are injured, they will be protected by the law; but the same law denies redress to him, on the ground that he should take care of himself. Public policy is an elastic rule, and, by the ingenuity of the advocates who invoke it, is made to cover some strange doctrines; but we think it may well be doubted whether it will help us here.

On the other hand, it seems altogether probable that the public might prefer to have the company held to a strict accountability for every negligence. It may be a servant who is injured this time, but it will be a passenger the next. To prevent that *next*, to guard against the possibility of accidents, the public might prefer to make it to the master's interest to select, to watch, to train his servants,—to use the highest possible precaution all the time, and throughout every branch of the business, under penalty of having to pay for every negligence, whoever may happen to be injured.

We find this view of the public interest has been entertained by very respectable tribunals, who have drawn from it a doctrine diametrically opposite to Judge Cooley's.* We do not wish to be understood as approving these cases, nor as holding that this view of public policy would justify us in imposing upon the master any liability which he would otherwise be free from. Neither do we think the opposite view of public interest would justify the courts in depriving the employee of any right of action which he might otherwise have. We do not understand that positive rights on either side of any lawful relation are to be overridden or disregarded on the notion that a portion of the public might derive a benefit therefrom. Such a procedure seems to savor more of confiscation than of "due process of law." Private property is not taken, under our law, for public use, except upon some sort of compensation; and it does not matter whether the property is real or personal, tangible or a chose in action.

Another serious objection to this argument, as it seems, is that it must apply exclusively to railroads. The general public may have no interest in the management of a mine, a mill, or a manufactory. Must we, therefore, seek another set of principles to decide the liability of employers in such cases?

Aside from any supposed public interest in the matter, the argument that one servant has the opportunity to complain of his fellow-servant, and thus prevent the injury, is often based on a false assumption of fact. In the great majority of cases, the sufferer neither has, nor could have had, the slightest opportunity to complain, or to provide against the negligence which sends him instantly to his doom. Of railway cases, have the train-hands who are injured by the misplacement of a switch, the careless orders of a train-despatcher, or the negligent direction of a conductor on their own or an approaching train, any opportunity to complain, or in any way to obviate the danger, or even to anticipate it? Analogous cases are found in all other hazardous employments. The law will not permanently rest any adjudication of the rights between one man and another on an assumption of fact which is often not only improbable, but confessedly false. We find, therefore, that if the employer must be liabl. unless these arguments are sufficient to exempt him, he is liable still, for the arguments are insufficient.

Let us look at the matter from another point of view. Instead of asking why the employer should be exempt, let us inquire why he should be liable. Let us look into the reason of the thing as fairly as if the question were new; not starting with any theorem in regard to the exemption, *quid est demonstrandum*.

There are three branches of the subject

* *Dixon* v. *Ranken*, 1 Am. Ry. Cas. 569, from which it appears that this was the current of the Scotch decisions for over fifty years. *Haynes* v. *East Tennessee & Georgia R. Co.*, 3 Coldw. 222; *Chamberlain* v. *Milwaukee & Mississippi R. Co.*, 11 Wis. 238. This case was overruled in *Mosely* v. *Chamberlain*, 18 Wis. 736. The chief justice (Dixon) said, as he gave the casting vote: "I recede [from the decision in *Chamberlain* v. *Milwaukee & Mississippi R. Co.*] more from that deference and respect which is always due to the enlightened and well-considered opinions of others, than from any actual change in my own mind."

which seem especially to invite this method of consideration :—

1. The general principle or theory upon which the liability or non-liability is to be determined.

2. The application of this principle or theory to cases of injury from the negligence of other employees under the same master; and,—

3. The measure of damages.

Laying aside, for the present, any contract or relation of the parties, it will be admitted that, in general, every man must bear his own misfortunes; and this is no less a principle of law than a dictate of necessity; for if the sufferer seek to throw his burden on another, or to make another share the evil, by an action for damages, the law requires him to show the reason why, in good conscience, the other ought to be thus liable. One reason, and we think only one, has ever been considered by the law sufficient to justify its interference to shift the burden from the first sufferer to another, by a judgment in damages. It must be shown that the injury was caused by the wrongful act or neglect of the defendant, while the plaintiff himself was free from blame. Some courts have sought to distinguish between the degrees of blame on one side and the other, with a view to adjust the balance, and throw the consequences on him who was most in fault. The principle more commonly accepted seems to be, that where the plaintiff has himself been guilty of an act contributing directly to the injury, he puts himself within the operation of the rule *Volenti non fit injuria*, and the law will not inquire who else may have been instrumental in producing the injury.

We may confine the present discussion to cases where the plaintiff has been free from blame. In these cases, it must be shown that the defendant has given occasion to the injury by some wrongful act or omission. We can conceive of no reasonable ground of complaint except upon this theory. In applying it, we have to determine what is a wrongful act or omission, and also what acts or omissions are justly attributable to the defendant. Upon the first point, we may accept it as a comprehensive definition that an act or omission, to be wrongful within the meaning of the rule, must amount to a violation of some duty; and upon the second point, that it is justly attributable to the defendant when it violates a duty owed by defendant to the plaintiff. These duties may arise from legislative enactment, from the common undertakings of the social compact, or from the stipulations of an express contract. To ascertain them, we may have to examine all three of these sources. This examination will be seen to differ very essentially from a search among the provisions of the contract for an exemption from some prior liability. We examine the contract with no view to find either exemption or liability provided for in its mutual undertakings. The contract neither gives nor takes away the right of action, but it creates certain mutual duties between the parties to it, and for any violation of these duties the law gives an appropriate remedy. Thus, in the case of a railway company, certain duties are owed to a passenger, and certain duties are owed to an engineer; it is probable that the duties will not be precisely the same in each case, because the contracts out of which the duties grow are materially different in their scope and general intention. It will not help the engineer, to show that his injury resulted from the violation of some duty owed by the company to the passenger. He must show that it resulted from a violation of some duty owed *to him*.

We shall not attempt, in the limits of this article, to enumerate all the duties which an employer may owe to his employee. There is one broad duty which belongs to all persons, in the social compact, in relation to all others, whether they stand towards each other as employer and employee, or in any other relation, though no doubt the relation may affect the strictness of its interpretation in a given case. This duty is expressed in the familiar maxim, *Sic utere tuo ut alienum non lædas*. This maxim has been interpreted, with reference to the class of cases we are now considering, "that a person in the management of his business, whether he does it himself, or acts through agents, must so conduct that business as not to interfere with the rights of, or produce injury to, others."* But a man's business may assume a certain aspect in his relation to one class of persons, and be a very different affair in respect to others. Thus, in

* *Little Miami R. Co.* v. *Stevens*, 20 Ohio, 431.

the instance already cited, as to a passenger, the business of a railway company is that of a common carrier of passengers, complete, including every branch and portion of that business, with its attendant duties. The passenger on the one hand, and the carrier on the other, are individuals, complete in their respective functions. The carrier, as such, has contracted with the passenger; its duties to him are the duties of a contracting unit; and it cannot excuse the violation of any such duty by throwing the blame on one of its members or instruments, to whom it has chosen to delegate the performance of the duty. But the employee undertakes to act as one of the constituent parts of the defendant's organization; he has his office and duties as a member of the complex body which acts as a unit toward third persons, while between the members it remains a congregation of individuals; and the duties of the members one to another, from the head to the most insignificant employee, may be very different from those owed by the corporate mass, as a unit, to third persons.

The words "corporate" and "members" are not used here in their technical sense as implying incorporation and the ownership of shares; but that, again, would furnish illustrations of the same principle, that the duty owed will depend on the relation of the the parties.

[To be concluded in next issue.]

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, Dec. 20, 1878.

LEDOUX v. PICOTTE, and THE MUNICIPALITY OF MILE END, T. S.

Saisie-Arrêt—Contestation of declaration of T. S.—Settlement between defendant and Municipality, T. S., by a note in hands of a person not a party to the suit.

MACKAY, J. The plaintiff, having obtained a judgment against Picotte, took a *saisie-arrêt* against him to attach money due him by the municipality. The municipality declared it owes nothing. The plaintiff contested, and alleged that the municipality was and is indebted to Picotte, and must be held to pay to plaintiff. It appears that Picotte was creditor of the municipality once; before this attachment, but after plaintiff's judgment, he had pressed for payment, and asked for a note, which he got, and has endorsed away to a man named Bessette, who is *bonâ fide* holder of it, and it is now past due. The plaintiff seeks to have it declared that the note gotten by Picotte was *ultra vires* of the municipality, and that Picotte's treaty with the municipality was to be held for nought, so that, at plaintiff's seizure, the municipality might be regarded as debtor still to Picotte, and, owing to the seizure, bound now to pay in money to plaintiff instead of to Picotte. The municipality contends that whereas by resolution of Council the note was authorized, and Picotte has discharged them, (as in fact he has), and their note is in the hands of Bessette, a third party, it cannot be made pay the plaintiff anything.

It is to be observed that Picotte does not seek to have his dealing with the municipality about that note declared null, nor does the municipality complain of it, nor does any *contribuable*. Plaintiff nevertheless urges that whereas it is held generally that corporations, not formed for trading purposes, cannot make notes or bills, and whereas our municipal Code has ordered how municipalities may borrow, and that it is not by notes or bills, the note given to Picotte was radically null, and he has referred to the case of *Pacaud* and *Corporation of Halifax*; where the municipality pleaded the nullity of its own act. The present differs in many respects from that case, and the question in this case is upon very different process, or procedure, from what was in Pacaud's case. If the municipality, the *tiers saisi*, were offered back the note held by Bessette; if it could be put into the position in which it was before it gave its note to Picotte, the case for plaintiff would savor less of want of equity; but can the *tiers saisi* be made to renounce the benefit of the discharge it has from Picotte? Again, is Bessette, the holder of the note gotten from Picotte, to have that note declared radically null, he not a party to this litigation? The plaintiff seems to be unwarranted in his contestation. He does not affect to be urging rights and actions of his debtor. Could Picotte, not offering back that note held by Bessette, sue the *tiers saisi* on any pretence? I doubt it. Picotte, however, does not seek to

disturb the settlement he has made with the municipality. Before concluding, I would say, with reference to one argument made before me, to wit, that this promissory note involved a loan of money made irregularly by the *tiers saisi*, that this note was *not* granted in order to the municipality's getting money. The contestation by the plaintiff is dismissed with costs.

De Bellefeuille & Turgeon for plaintiff.

J. A. Ouimet for Tiers Saisi.

[In Chambers.]

MONTREAL, Jan'y 13, 1879.

CANTWELL v. MADDEN.

Effects under execution which have ceased to be in the possession of the Guardian—Order to seize in possession of third party.

The plaintiff, by petition, alleged that the defendant, who had been appointed guardian of effects seized in the cause, under execution, had left the country, and that the effects were now in the possession of one Warren, who pretended that he had bought them. Plaintiff asked for an order to the bailiff to remove these effects from Warren's possession, in order that they might be sold under the execution in due course.

Pagnuelo, for the petitioner, cited l'Ordonnance de 1667, Tit. 19, Art. 17; 1 Pigeau, p. 628; 4 Quebec Law Rep. pp. 47, 49, *Moisan & Roche*, and *Gilbert & Coindet*.

PAPINEAU, J., granted an order authorizing any bailiff of the Court to take and remove from the possession of said Warren the effects seized in the cause, "et pour ce d'employer et de se faire assister de toute la force nécessaire," a copy of the order to be served on Warren, with notice to him to appear and show cause why he should not be condemned personally in the costs of the petition and removal of the effects, &c.

Duhamel, Pagnuelo & Rainville for petitioner.

Keller & McCorkill for defendant, and Warren *mis en cause*.

AYLMER, October 7, 1878.

PHILION v. BISSON, and GRAHAM, opposant.

Immoveables by destination—Opposition to annul by a hypothecary creditor of defendant.

The case came up on an opposition to a seizure, as of moveables in the possession of defendant, the proprietor of a steam carding mill, of "one ten-horse power steam engine, with boiler, belting, shafting and chimney complete, and one machine called a picker, painted red."

Graham, a hypothecary creditor, by opposition *à fin d'annuler*, set up that the steam engine and machinery formed essential parts of a steam carding mill, and that by destination and actual use, and as a fixture of the mill, it was immoveable.

The Court (BOURGEOIS, J.) held the seizure to be an absolute nullity, the articles seized being immoveables by destination. The principal difficulty was as to the right of the opposant, who had a *bailleur de fonds* claim, to oppose the seizure. His Honor considered that he was entitled to oppose, and cited Guyot *vo.* Opposition, p. 424: "La partie saisie n'est pas la seule qui puisse former opposition afin d'annuler; cette voie peut aussi être employée par les créanciers du saisi." Also 1031 C.C.: "Creditors may exercise the rights and actions of their debtor, when to their prejudice he refuses or neglects to do so." Opposition maintained.

M. McLeod for opposant.

Aylen & Lawlor for plaintiff contesting.

COURT OF QUEEN'S BENCH.

MONTREAL, December 18, 1878.

Sir A. A. DORION, C. J., MONK, RAMSAY, TESSIER and CROSS, JJ.

BRUNEAU et al. v. MASSUE.

Appeal in Contested Election Cases—Constitutionality of Dominion Controverted Election Act.

Massue moved for leave to appeal from a judgment of the Superior Court on an election petition under the Dominion Controverted Elections Act. His election as a member of the House of Commons for the County of Richelieu had been contested by the petitioners, Bruneau et al., and respondent had pleaded a declinatory exception, alleging that the Dominion Parliament had no right to impose upon the Superior Court the duty of trying contested elections of members elected to the House of Commons. The exception was dismissed, and it was from this judgment that Massue asked leave to appeal.

Sir A. A. DORION, C.J., remarked that this Court had already decided in the case of

Mackenzie & White, 20 L. C. Jurist, p. 22, that that there was no appeal to the Court of Queen's Bench in controverted election cases. A similar decision had been given in the case of *Cushing & Owens*.

But, further, the Court entertained no doubt that the Dominion Parliament had the right to pass the Act in question, by which the trial of controverted election cases was imposed on the Judges of the Superior Court.

Motion for appeal rejected.

Mathieu for petitioners.

Germain for respondent.

CIRCUIT COURT.

MONTREAL, November 23, 1878.

SMITH et vir v. CHRETIEN.

Wife sued as widow—Authorization.

The action was in ejectment, on a lease in which the defendant, the lessee, was described as "widow of Charles Gauthier."

She pleaded, however, an *exception à la forme*, that her husband was still living, and that she could not be sued without her husband being in the cause to authorize her.

The plaintiffs answered that the defendant was sued in the quality which she had taken in the lease, and further, that if she was really *sous puissance de mari*, she could not *ester en justice*, without authorization, as she had done.

RAINVILLE, J., before deciding the exception *à la forme*, ordered that the defendant's husband be called in within 15 days.

D'Amour & Dumas for plaintiffs.

Geoffrion, Rinfret, Archambault & Dorion for defendant.

CURRENT EVENTS.

ENGLAND.

REG v. HUGHES.—A new and remarkable defence to an indictment for perjury was lately, after prolonged argument and consideration, held to be bad in law by the Court for Crown Cases Reserved. This defence reflects the highest credit upon the ingenuity of the prisoner; and its success, if it had been successful, would have reflected the deepest discredit upon our criminal law. The facts were as follows: A policeman, named Hughes, illegally obtained a warrant for the arrest of a man named Stanley, without exhibiting any written information upon oath of the alleged offence at the time of obtaining the warrant. Hughes arrested Stanley under the warrant, who was brought before the magistrates; where he raised no objection against the jurisdiction of the magistrates or the legality of the warrant, not being aware of the illegality. Here Hughes gave evidence against Stanley (who was convicted and sentenced to imprisonment with hard labor), in the course of which he committed sundry perjuries, for which he was afterward indicted and convicted. He then raised the ingenious objection, that, the magistrates having had no jurisdiction to hear the case by reason of the illegality of the warrant, any false swearings committed by him during the proceedings were not perjuries in the legal sense of the term. The case (*Reg.* v. *Hughes*) was twice argued, at first before five judges, and afterwards before ten. Nine of the judges have now concurred in sustaining the conviction of the perjurer; and, after hearing the arguments upon which they decided, we are rather disposed to wonder that the case should at first have been thought so difficult. They held that a legal warrant was not necessary to give the magistrates jurisdiction; in a word, that the warrant is merely a process to compel the person accused to appear, not the source of the jurisdiction to hear his case when he does appear. We cannot but be very glad that the court found themselves able to sustain the conviction of Hughes; for the perils of the public would be visibly increased if a policeman, by surreptitiously obtaining an illegal warrant, could put a prisoner in much the same peril of being sent to prison as if the warrant were legal, while the policeman himself obtained *carte blanche* to commit as many perjuries as he chose without any fear of legal consequences.—*Law Times*.

COSTS.—They seem to have a great deal of trouble about "costs" in England. "A chancery lawyer" writes to the *Times*, that after a property has been sold in chancery, and nothing remains to be done but to tax the costs and divide the purchase-money—among the *parties*, we infer—it is three months before the costs can be taxed. So great is the gain of

arrears that, "in these days of telegraphs and telephones, it is three whole months before an official of the Chancery Division of the High Court of Justice can even look at the papers." He suggests to the Lord Chancellor that "the appointment of a couple of energetic men as taxing-masters would mightily help to cleanse the augean stable." This is a very severe epithet for a lawyer to apply to the sweet and savory source of his professional income. But evidently there is an immense amount of red tape about the affair of costs. On a single page of the *Law Times* we find numbers of advertisements of persons who engage to facilitate the taxation and payment of costs. One advertises the "day by day system"—a reference to "daily bread," probably; another posts "arrears of costs"; another furnishes "copyright books and forms for costs," while others "work up every description of costs in arrear," and so on. We would invite our English brethren to an adoption of our system of costs, which grants a few fixed allowances for specified services, irrespective of their extent, and thus gives trouble to nobody but the losing party. But the "taxing officers" will probably object to the change, for it seems that the fees earned by them in the year 1870-1 amounted to £28,849; 1871-2, £32,000; 1872-3, £28,807; 1873-4, £31,698; 1874-5, £30,954; 1875-6, £26,544; 1876-7, £30,780 18s. 6d. Now, if it costs so much to ascertain the costs, what must the costs themselves be?—*Albany L. J.*

SWITZERLAND.

THE DEATH PENALTY.—Up to 1874 it was competent to each canton in Switzerland to use the penalty of death at its discretion. The central authority then abolished the punishment throughout the country. Since that date there has been a re-action in public opinion; and now fourteen out of twenty-two cantons, and a majority of the whole mass of voters, have pronounced in favor of a measure to restore the right of discretion to the several cantons. Increase in the number and enormity of crimes of violence is said to have brought about the change of opinion; but it is probably to be attributed to that reflux in thought, which is almost an inevitable law in the early stages of big controversies. Believers in the march of civilization do not doubt that at some future date Europe will bid farewell to capital punishment; but, at present, the majority of people hold that the example of sparing life should be set by malefactors, and not by legislatures or judges.—*Ib.*

GENERAL NOTES.

—An ancient saw, relating to the results of referring to a personage supposed at the time to be distant, was recently illustrated at the Rolls. The learned Master of the Rolls, in the course of a case relating to infringement of a design, had just been remarking that no decision of the English courts was reported on the point before him, while there appeared to be numerous decisions of the American judges directly bearing upon it. Hereupon a gentleman came into court, sent up his card, and was requested to take a seat on the bench. After shaking hands with the visitor, the Master of the Rolls announced that he was Mr. Justice Treat, an American judge, and at once proceeded to avail himself of the legal knowledge of the assessor so opportunely and unexpectedly provided.—*Solicitors' Journal.*

—Sir Toby Butler, Solicitor-General in 1689, was pledged "not to drink a drop of liquor" until he had made his argument in a case of vast importance, and acquitted himself so ably that Bench and Bar complimented him for his able speech; yet when the attorney expressed his conviction that the success was owing to abstemiousness, "Not so fast, my friend," replied the jolly old toper, "perhaps it was the other way." "Why, Sir Toby," exclaimed the attorney, "surely you have not broken your pledge?" "What was that?" demanded Sir Toby. "You pledged your word you would not *drink a drop* of liquor until you concluded your argument." "Nor have I," answered the barrister; "I did not *drink a drop*, but I soaked two fresh penny loaves in two bottles of claret, and *I ate them!*"

—There are no divorces in France, only judicial separations. From 1846 to 1850, there was an average of 1,080 of these, which in 1876 had increased to 3,251. Out of the hundred only fourteen separations were asked for by the husband.