The Legal News.

Vol. I. SEPTEMBER 7, 1878. No. 36.

ENGLISH JUDICIAL CIRCUITS.

Those who have lived in long and familiar contact with a system seldom feel disposed to thrust it aside, whatever may be its patent disadvantages and defects. In legal reforms the judges are often the last to summon energy to press for a change which seems desirable to outsiders, and even when one member of the bench assumes the task of urging reforms, his brethren are apt to treat his efforts coldly. The report of the English judges on the subject of Circuits seems to afford a fresh illustration of this. A committee of six members of the bench — Lord Chief Justice Coleridge, Lord Justice Brett, Mr. Justice Lush, Mr. Justice Manisty, Mr. Justice Lindley, and Baron Huddleston—was recently appointed to consider, in conjunction with the Attorney and the Solicitor General, the working of the present Circuit system. It answered the questions submitted to it in April, and a Parliamentary Return has now been issued containing the answers of the judges and some comments by the Home Secretary upon them. Five questions had been propounded by Lord Cairns and Mr. Cross, to which they invited replies from the eminent personages we have named. They desired to know what, on the assumption that there are to be four gaol deliveries yearly, are the most convenient seasons for holding them; how Quarter Sessions can be best made to work in with the Assizes; whether it is desirable to enlarge the jurisdiction of Quarter Sessions; how the system of grouping counties for Assizes has worked in practice; whether, by the total or partial abolition of commission days, by the despatch of a single judge to certain Circuits, or in any other way, judicial time on Circuits can be economized; and, lastly, how the judicial needs of Leeds, Liverpool, Manchester, and Surrey for the trial of *Nisi Prius* cases can be met.

In reply, the Committee, who must be taken to represent pretty fairly the mind of the English Bench, agree in recommending very little, and seek, by expressing dissent and doubt on several of the changes contemplated or adopted, to check the ardor of the Lord Chancellor for reform. If there are to be four annual circuits, the Committee think that there should be a winter circuit and a summer circuit for the trial both of civil and of criminal business, and spring and autumn circuits for criminal trials only. But the Committee all agree in disputing the assumption that four gaol deliveries are necessary. The reasoning by which they support their views, according to the *Times* summary, is peculiar. "They cannot deny that prisoners are sometimes at present detained too long in gaol, but they assert that it is a question altogether of relative inconvenience. Prisoners, the judges declare, are generally guilty. Even of those who are acquitted only a minority are innocent. Of the very few innocent prisoners, an inconsiderable minority are kept in gaol unreasonably long. Such grievances as are suffered might be rendered infinitesimal by a more liberal use of the power of setting persons accused of minor offences at liberty on bail or even on their own recognizances. The Committee deprecates with almost unjudicial vehemence the transfer from guilty shoulders of what it considers the present very slight and avoidable inconvenience to the undoubtedly innocent judges, barristers, solicitors, sheriffs, grand and petty jurors, prosecutors, and witnesses. Are all these respectable and, many of them, prosperous gentlemen, who, the report indignantly puts it, 'as a rule, are much better than even the innocent prisoners in worth and character,' to be kept loitering about a court or rushing about the country every three months in order that an innocent girl may not be held for five months grinding her heart out in gaol on suspicion of a larceny she is proved after a ten minutes' trial never to have committed?" On this point, however, the report is not likely to have much weight. Mr. Cross expresses himself as confident that no Minister on either side of the House "would venture to propose such a retrograde measure as the abolition of the fourth Assize which has now been provided for by Parliament."

On the question of grouping counties, in order to save judicial time, the Committee entreat, that "at whatever cost of inconvenience to the judges," the system be abandoned.

It is condemned by them as imposing an unfair burden of duty on the sheriffs and grand jurors of the central county in a group in which the Assizes are practically sure to be held. It is alleged to be cruel to the petty jurymen, dragged scores of miles from their homes, and detained throughout a lengthened Assize till the whole list is gone through. It is unjust to prisoners themselves, who might afford to bring witnesses from a dozen miles away, but not from seventy or eighty, and who, if acquitted, find themselves "turned loose on the world far from their own home and from any one who knows them."

On the subject of Assizes and Quarter Sessions, the judges recommend a system somewhat like that which was introduced in this Province some years ago—that is, disposing of trifling charges at intermediate Sessions, while graver offences are reserved for the Queen's Bench. The Committee are unanimous against any radical enlargement of the jurisdiction, but, as a concession, are not absolutely opposed to its extension to the trial of simple burglaries in which no personal violence has been used. Five of the members recommend that the Judges of Assize should at every Circuit, as now on the Winter Commission, be exempted from the obligation to deliver the gaols of any but prisoners committed for trial at the Assizes. Lord Justice Brett differs from the rest on this point. All would probably agree with him in desiring that "the Assizes and the Sessions should be treated as one judicial machine for trying prisoners." The Committee generally, however, hold that this can be best effected by dividing the gaol inmates individually between the Assizes and the Quarter Sessions. Lord Justice Brett's view is that, without special injustice or inconvenience, prisoners charged with serious offences may be left in gaol for some three months, but that other prisoners should be convicted or acquitted within eight weeks at furthest. By the plan he proposes Sessions would be held in the intervals between the several Assizes, and persons accused of Quarter Sessions crimes would be triable either at Sessions or at Assizes, which ever migth be held first. Besides the speedier clearance of the gaols, an incidental benefit, the Lord Justice believes, would result from the greater uniformity of punishment likely to be attained by submitting occasionally offences commonly tried by the permanent and unpaid local magistracy to the trained and various minds of the Judges of the Superior Courts.

We referred not long ago to Mr. Justice Hawkins' fondness for seeing a sheriff in uniform. His brethren, apparently, are not less careful to abate no jot of official pomp. It had been suggested by Sir James Stephen that what are known as "commission days" might well be added to the ordinary time at the disposal of the judges holding circuits; but the committee warmly protest against the abolition of the pomp and ceremony usual on these occasions.

CONTRIBUTORY NEGLIGENCE.

The doctrine of contributory negligence has of late years assumed great importance in our courts. We have thought it might be useful to collect and review the principal cases on this subject in our Court of Appeals, and occasionally accompany them with some remarks.

Button v. *Hudson River Railroad Co.*, 18 N. Y. 248.—In this case the intestate was found lying dead on the defendants' track, having been run over by their cars. How he came there was not shown. It was held, that although the burden is on the plaintiff to show affirmatively that he was guiltless of any negligence proximately contributing to the injury, yet direct evidence to disprove such negligence is not required in the first instance; but where there is conflicting evidence, the preponderance must be with the plaintiff to enable him to recover. In this case, as the death was the combined result of the presence of the deceased on the track, and the passing of the cars over his body, it was held that the jury should have been instructed that "the only question for them to decide was, whether by the exercise of reasonable care and prudence, after the deceased was discovered, the driver might have saved his life." The judgment was reversed, for the reason that the judge charged the jury that, in order to exempt the defendant, the negligence of the defendant must *directly* have contributed to the injury.

Remarks.—In the syllabus, and in the note at the close of the report of this case, of the discussion among the judges as to what ground

they should put the reversal on, the idea is put forward that negligence on the part of the plaintiff is never *presumed*. This seems to be a mere form of words. The proposition is probably true, but it is of comparatively little importance, for the burden of establishing an absence of contributory negligence is still on the plaintiff, and it must appear from all the evidence at the close of the case. It is simply a matter regarding the right to ask for a nonsuit. As Judge Strong here says, "it would be enough, if the proof introduced of the negligence of the defendants and the circumstances of the injury, *prima facie* established that the injury was occasioned by the negligence of the defendants, as such evidence would exclude the idea of a want of due care by the intestate aiding the result."

Steves v. *Oswego, etc., Co.* id. 422.—The plaintiff approached the crossing without looking to see if there was a train within sight, and attempting to cross, was injured by an engine. The court say: "Ordinary regard for his own safety would have prompted him, as he approached the crossing, to see, as he might well have done, whether the cars were not also approaching. It is obvious that a single look would have saved him from the disaster with which he met. * * * That the plaintiff should have entirely omitted to look was the extreme of carelessness. Such carelessness is entirely inconsistent with a right to recover damages founded upon the negligence of the defendants. The plaintiff is himself the author of his own injury. Nonsuit was sustained.

Remarks.—This was not unanimous. Three judges dissented, holding "that the object of the statute requiring the ringing of the bell or sounding the whistle was to put persons, negligently approaching a crossing, upon their guard; and the question whether the negligence of the plaintiff was such, that, if the proper signals had been given, he would still have been injured, was one which should have been submitted to the jury." That is to say, whether, under all the circumstances, the deceased was negligent, was a question for the jury.

Johnson v. *Hudson River Railroad Co.*, 20 N. Y. 65.—The deceased, a sober cartman, was found dead upon the track, under the circumstances authorizing the inference that he had fastened his horse, and was groping in the dark to find a safe passage for his team, when struck by defendants' car. There was an open sewer obstructing the street, which the deceased had to cross to reach his home, and the passage left was narrow and difficult. A horse car of the defendants was proceeding, on a dark evening, without bells or light, on the track in question. *Held*, that the tendency of the defendant's conduct was so dangerous, as in the absence of any other evidence than the presumption that the deceased had the same regard for his safety as other men, to authorize the attributing of the accident to the negligence of the defendant, and the refusal of a nonsuit. The court say: "It is not a law of universal application that the plaintiff must prove affirmatively that his own conduct on the occasion of the injury was cautious and prudent. The *onus probandi* in this, as in most other cases, depends upon the disposition of the affair as it stands upon the undisputed facts. Thus if a carriage be driven furiously upon a crowded thoroughfare, and a person is run over, he would not be obliged to prove that he was cautious and attentive, and he might recover though there were no witnesses of his actual conduct. The natural instinct of self-preservation would stand in the place of positive evidence, and the dangerous tendency of the defendant's conduct would create so strong a probability that the injury happened through his fault, that no other evidence would be required. But if one make an excavation or lay an obstruction in the highway, which may or may not be the occasion of an accident to a traveller, it would be reasonable to require the party seeking damages for an injury to give general evidence that he was travelling with ordinary moderation and care." "The absence of any fault on the part of the plaintiff may be inferred from circumstances; and the disposition of men to take care of themselves and keep out of difficulty may properly be taken into consideration." And the negligence of the plaintiff, "as well as the absence of fault, may be inferred from the circumstances." "The true rule in my opinion is this: The jury must eventually be satisfied that the plaintiff did not, by any negligence of his own, contribute to the injury. The evidence to establish this may consist in that offered, to show the nature or cause of the accident, or in any

other competent proof. To carry a case to the jury, the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned solely by the negligence of the defendant. It is not absolutely essential that the plaintiff should give any affirmative proof touching his own conduct on the occasion of the accident. The character of the defendant's delinquency may be such as to prove, *prima facie*, the whole issue; or the case may be such as to make it necessary for the plaintiff to show by independent evidence that he did not bring the misfortune on himself. No more certain rule can be laid down."

Remarks.—This is a departure from the *Button* case, *supra*, although the circumstances are somewhat similar. Of that case the court say, "we were not sufficiently agreed to make it a lucid precedent." In this case, as in that, the judge charged the jury that the contributory negligence, to exonerate the defendants, must *directly* have aided the result. This charge was here sustained, the court remarking, "as there was no conceivable negligence which could be imputed to the deceased, which would operate remotely, or collaterally, or otherwise than directly, I am of opinion that the jury were not misled;" and in this all the judges but Strong concurred. They endeavor to let down the *Button* case softly, by saying, "the attention of the judge was not specially drawn to the expression, as in the case of *Button*." In this case, too, we see an indorsement of the ideas of the three dissenting judges in the *Steves* case, *supra*, namely, that in some cases the defendant's negligence may be such as to cause the plaintiff's negligence, in which cases the latter is excusable.

Wilds v. *The Hudson River Railroad Co.*, 24 N. Y. 430.—The plaintiff's intestate was killed by defendant's train, while crossing their track with a team. There was evidence that a flagman was waving a flag at the crossing, and that deceased, who was a milkman and familiar with the crossing, was warned by shouts of bystanders, and by one trying to catch and hold his horses, but that he whipped up his horses, which were already going rapidly, and drove on the track, knocking down the flagman. It also appeared by looking, Wilds could have seen the train 650 feet away. A judgment for the plaintiff was set aside.

Remarks.—The opinion was pronounced by Judge Gould, who took the ground that there was ample proof of the negligence of the deceased, and no sufficient proof that the defendant was negligent. Two judges concurred in the result; two others were also for reversal, but on the ground that the deceased was negligent; and one judge dissented, on the ground that although there was no contradiction as to the conduct of the intestate in approaching the crossing, yet the question of his negligence was for the jury. This judge observes, "A question of negligence presents the question, what a person ought or ought not to have done under the circumstances of the case;" and this he says is a question of fact and not of law. Judge Gould says that this "is a stronger case than *Steves'* case, which remains the law of this State."

This case came up again two years later, in 29 N. Y. 315. Judge Hogeboom, on evidence not very materially differing from that on the former trial, feeling himself constrained by the opinion of the Court of Appeals, granted a nonsuit, and this case was sustained by an unanimous court, except that Judge Hogeboom dissenting, observed that a more careful review of the former opinion had satisfied him that he was wrong in his construction of it. He says: "I am inclined to think it more consistent with the theory upon which the right of trial by jury rests, and safer for the general interests of parties, to resolve such doubts in favor of the submission of such questions to the jury than the withdrawal of them from their consideration." In the prevailing opinion, Judge Denio observes, "the uncontradicted evidence was such as not to present anything for the jury to deliberate upon," and the *Steves* case is again approved.

Hance v. *Cayuga & Susquehanna Railroad Company*, 26 N. Y. 428.—The plaintiff's cattle escaped from his lot, and straying upon the defendants' tracks, in consequence of the defendants' negligence in not clearing them from snow, were killed. *Held*, that the plaintiff's negligence contributed, and a judgment for him was set aside. (See, also, *Munger* v. *Tonawanda R. R. Co.*, 4 N. Y. 349. But this is now changed by statute, and negligence cannot now be imputed to a person simply from the fact that his beasts have escaped from a well-fenced

field on to a railroad track. *Spinner* v. *N. Y. Cent., etc., Co.*, 67 N. Y. 153.)

Haley v. *Earle*, 30 N. Y. 208.—The plaintiff's barge, while in tow, and without a helmsman, collided with defendant's steamboat. The judge left it to the jury to say whether the absence of the helmsman contributed to the injury; they found a verdict for the plaintiff; and this was affirmed.

Mulhado v. *Brooklyn City R. R. Co.*, 30 N. Y. 370.—The plaintiff, a passenger upon a city railroad car, asked the driver, who had stopped, to keep his brake on, and proceeded to alight from the front platform; before the plaintiff had got off, the driver let go the brake, putting the car in motion, and precipitating the plaintiff into the street and injuring him. Plaintiff had a verdict. *Held*, that the plaintiff was not chargeable with any fault in preferring his request to the driver rather than the conductor, nor in getting off at the front rather than the rear, as he had got on at the front without objection, and it did not appear that there was any notice to passengers that they must not get off in front.

Buel v. *New York Central R. R. Co.*, 31 N. Y. 314—The plaintiff, a passenger on defendants' car, which was standing still, seeing a train approaching on the same track, and men jumping from the cars to avoid the impending danger, left his seat and rushed to the door to escape. Just as he reached the platform, the collision occurred and threw him off and injured him. Other passengers who did not see the danger, and remained seated, were not hurt. A verdict for the plaintiff was sustained. The court remark: "Seeing the approaching train, and that a collision with its consequences was inevitable, it was not the part of prudence to have deliberately kept his seat without an effort at self-preservation. There is no man, under the circumstances, retaining his senses, and acting with ordinary prudence, who would not have exerted himself in some way to escape the great peril." "At all events, it was for the jury, and not the court, to say whether the plaintiff's conduct, in view of the circumstances was rash or imprudent, or amounted to negligence.

Remarks.—This seems to have been a case of uncontradicted evidence, and yet the court say the question of contributory negligence is for the jury. In view of the preceding cases, the inquiry becomes interesting, what would the court have done had the verdict been the other way?

Brown v. *N. Y. Cent. R. R. Co.*, 32 N. Y. 597—The plaintiff, who was a passenger on a stage coach, was injured by a "running switch." There was no pretence that she herself was negligent, but it was claimed that the driver was; and although Judge Davis, who delivered the opinion, thought his negligence not imputable to her, yet as the rest of the court thought otherwise, it examined that question. As the driver approached the track, seeing a train coming, he stopped; when it had passed he started on, but seeing a detached car approaching, stopped again; when this had passed, seeing nothing more, he started again, but when on the track he saw another detached car coming within two rods of him, and he concluded that the safest way to escape was to pass the track. The court held that the question was for the jury, because it was whether under all the circumstances the driver did not exercise his best faculties and proper care. A verdict for plaintiff was affirmed, two judges dissenting.

Remarks.—This, it will be perceived, was a case where, if the driver was negligent at all, his negligence was induced by the defendant's negligence in executing the running-switch. As the judge observes: "The signals of the train had told him where the danger was, but gave no warning of unsignaled danger to follow." As to the doctrine of imputed negligence, we shall speak further on.

Beisiegel v. *N. Y. Cent. R. R. Co.* 34 N. Y. 622.—The plaintiff was attempting to cross a track-way of five tracks in the city; a long train was approaching, and he waited for it; he then started on, and, looking to the east as far as he could, saw that the track was clear; he then turned his head west, and, while looking west, was struck by an engine backing down from the east; there was no flagman, bell or whistle; some freight cars on the track obstructed his view, or he would have seen the engine in time to avoid it. The plaintiff was nonsuited. This was reversed, the court holding that, under the circumstances—the peculiar position of the plaintiff, his proximity to the track, the few moments it would take to clear it, his

obstructed vision, the noise and confusion, the absence of signals and the unusual speed—it was a proper question for the jury whether plaintiff was negligent. The court also lay down the doctrine that "a defendant cannot impute a want of vigilance to one injured by his act or negligence, if that very want of vigilance was the consequence of an omission of duty on the part of the defendant;" and that, as one judge says, the plaintiff "was not bound to be on the lookout for danger when assured by the company that the crossing was safe;" or as another expresses it, "the omission of a railroad company to sound an alarm when approaching a crossing, especially when the view is obstructed by intermediate objects, is some excuse for the inattention of a way-traveller to the danger of an approaching train."

Remarks.—The cases of *Steves* and *Wilds* were distinguished on the ground that there were signals in those cases. Judge Porter very cogently remarked: "The non-suit seems to have been granted on the theory that a citizen, who crosses a railway track at its intersection with a highway, is an absolute insurer of his own safety against the criminal negligence of a wrong-doer. It was sustained at the General Term, on the equally untenable theory that the plaintiff, who looked in each direction before crossing, and saw no engine approaching, was guilty of culpable negligence in not continuing to look both ways simultaneously!"—*Albany Law Journal.*

WHO ARE FELLOW-SERVANTS.

COURT OF APPEAL, JUNE 3, 1878.

CHARLES v. TAYLOR, WALKER & Co., 38 L. T Rep. (N. S.) 773.

Where two persons are working for the same master for a common general object, there is a common employment, which exempts the master from liability to one of them for injury caused by the negligence of the other, although the work on which they are engaged is not the same.

The plaintiff was hired by a man who had contracted to unload a coal barge at defendants' brewery, to assist in unloading; he was paid by the defendants, and defendants alone could discharge him. While employed in carrying coal he was injured through the negligence of defendants' servants, who were moving barrels in the brewery.

Held (affirming the decision of Lopes, J.), that there was evidence to justify a finding that plaintiff was defendants' servant, that plaintiff was engaged in a common employment with the persons who caused the injury, and therefore he could not recover.

Appeal by the plaintiff from the judgment of Lopes, J.

The action was brought to recover damages for injury caused to the plaintiff by the negligence of the servants of the defendants. The defendants were owners of a brewery situated on a wharf by the side of a river, and the plaintiff was employed at the wharf in unloading a barge containing coals which were intended to be used in the defendants' brewery.

The plaintiff was engaged by a man named Ansell, who was what is called a "lumper," and who had contracted with the defendants to unload the barge and carry the coal on to the defendants' premises for 1*s.* 9*d.* a ton, Ansell finding the necessary labor. He engaged the plaintiff and some other men, and the money paid by the defendants was divided among those who were employed. Ansell, who was called at the trial, said in his evidence, "I hired Charles" (the plaintiff), "and could have hired any one I liked;" he also said, "I was servant to the defendants; I could not discharge Charles without asking the defendants;" and when asked, "Who would discharge Charles?" he answered, "I could not; they would look to me as foreman; I could not discharge him." The plaintiff was carrying a sack of coal, and was ascending some stone steps underneath a heavy flap which was kept in its place by a chain; some of the defendants' men were engaged above in moving barrels of beer, and one of the barrels slipped, through the negligence of those who were moving it, and fell against the chain which kept up the flap, and broke it, in consequence of which the flap came down upon the plaintiff and seriously injured him. The damages to be paid, if the defendants were liable, were fixed by agreement, and the case was reserved for the consideration of Lopes, J., with power to draw inferences of fact.

The learned judge said the case could be distinguished from *Abraham* v. *Reynolds*, 5 H. & N. 143, and was more like *Wiggett* v. *Fox*, 11 Ex. 832; 25 L. J. 188, Ex., that the plaintiff could not be said to be servant to Ansell, that the case was undistinguishable from *Morgan* v. *The*

Vale of Neath Railway Co., 13 L. T. Rep. (N. S.) 564; L. R., 1 Q. B. 149; 35 L. J. 23, Q. B., and gave judgment for the defendants, on the ground that the injury to the plaintiff was caused by the negligence of his fellow-servants acting in a common employment with him.

The plaintiff appealed.

Bucknill, for the plaintiff. In the first place, the plaintiff was not in the service of the defendants. *Swainson* v. *The North-Eastern Railway Co.*, 38 L. T. Rep. (N. S.) 201. He was in the service of Ansell, who was an independent contractor, and therefore the defendants are liable to him for the negligence of their servants. Ansell's position was something like that of a stevedore, and *Murray* v. *Currie*, 23 L. T. Rep. (N. S.) 557; L. R., 6 C. P. 24; 40 L. J. 26, C. P., shows that a stevedore is an independent contractor. The defendants did not pay the plaintiff, and were not liable to him for wages; they were only liable to pay Ansell. If the plaintiff had been guilty of negligence the defendants could not have been made liable for his negligence; only Ansell or the plaintiff himself would have been liable. Secondly, even if the plaintiff was the servant of the defendants, there was no common employment as between him and the men who were moving the barrels, so as to exempt the defendants from liability to him for their negligence. The case which appears at first sight to be most against the plaintiff on this point is *Lavell* v. *Howell*, 34 L. T. Rep. (N. S.) 183; L. R., 1 C. P. Div. 161; 45 L. J. 387, C. P.; but that case really differs from the present, for there the plaintiff had himself undertaken the particular risk by going out through a particular door, which made the case like *Degg* v. *The Midland Railway Co.*, 1 H. & N. 773; 26 L. J. 171, Ex. For the same reason *Woodley* v. *The Metropolitan District Railway Co.*, 36 L. T. Rep. (N. S.) 419; L. R., 2 Ex. Div. 384; 46 L. J. 521, Ex., is not an authority against the plaintiff. No positive general rule governing all cases of this kind can be laid down, but each case must depend on its own particular circumstances. *Rourke* v. *The Whitemoss Colliery Co.*, 35 L. T. Rep. (N. S.) 160; L. R. 1 C. P. Div. 556; 46 L. J. 283, C. P.; affirmed in the Court of Appeal, 36 L. T. Rep. (N. S.) 49; L. R., 2 C. P. Div. 205; 46 L. J. 285, C. P., is a stronger case against common employment than this; and see *Indermaur* v. *Dames*, 14 L. T. Rep. (N. S.) 484; L. R. 1 C. P. 274; 35 L. J. 184, C. P.; affirmed, 16 L. T. Rep. (N. S.) 293; L. R., 2 C. P. 311; 36 L. J. 181, C. P. *Morgan* v. *The Vale of Neath Railway Co.*, 5 B. & S. 570; 33 L. J. 260, Q. B.; affirmed 13 L. T. Rep. (N. S.) 564; L. R., 1 Q. B. 149; 35 L. J. 23, Q. B., is distinguishable, because there the plaintiff was a carpenter in the general employment of the railway company, and could have been sent to work anywhere. The plaintiff here was engaged in entirely distinct and separate work from the persons who caused the injury, and this prevents the rule as to common employment from applying. See the judgments of Lord Chelmsford in *McNorton* v. *The Caledonian Railway Co.*, 28 L. T. Rep. (N. S.) 376, cited in Smith's Master and Servant 205 (3rd ed.) and *Bartonshill Coal Co.* v. *McGuire*, 3 Macqueen, 307. *Abraham* v. *Reynolds*, 5 H. & N. 143, is an authority for the plaintiff; and *Wiggett* v. *Fox*, 11 Ex. 832; 25 L. J. 188, Ex., which is relied on for the defendants, is questioned by Cockburn, C. J., in *Rourke* v. *The Whitemoss Colliery Co.*, L. R., 2 C. P. Div. 207, 208. [Thesiger, L. J., referred to *Wilson* v. *Merry*, 19 L. T. Rep. (N. S.) 30; L. R., 1 Sc. & Div. App. 326.] In *Smith* v. *Steele*, 32 L. T. Rep. (N. S.) 195; L. R., 10 Q. B. 125; 44 L. J. 60, Q. B., the executrix of a pilot who had been employed by shipowners, where the employment of a pilot was compulsory, was held entitled to recover against the owners for the negligence of their servants which caused the testator's death. Thirdly, assuming that the plaintiff was the defendants' servant, and that there was a common employment, the defendants are liable, for it does not appear that the danger was known to the plaintiff. See the judgment of Lord Chelmsford in *Bartonshill Coal Co.* v. *McGuire*, 3 Macqueen, 308.

Day, Q. C., and *Erskine Pollock*, for the defendants.

BRETT, L. J. I cannot help saying that Mr. Bucknill has argued this case very ably, and everything has been said that could be said on behalf of the plaintiff; but, notwithstanding, I am of opinion that we must support the judgment of Lopes, J. The first point is, was the plaintiff a servant of the defendants at all? The evidence was left to Lopes, J., by agreement to draw inferences and arrive at a conclusion. He has come to the conclusion that

the plaintiff was the servant of the defendants, and the question is not, should we have come to the same conclusion ourselves; but was the learned judge wrong in the conclusion at which he arrived in such a way that we ought to set aside his finding as being against the weight of evidence? Among the witnesses called at the trial was a man named Ansell; he was what is called a "lumper," and the defendants employed him, the terms of the employment being that he should get the barge discharged at 1*s.* 9*d.* a ton, and obtained men to do the work, he doing part of it himself; the men were paid out of the 1*s.* 9*d.* a ton. Ansell went on to state that he did the work and selected the men; that they used to work under him as men work under a foreman; he worked as if he were a foreman; he also said that he could not dismiss the men himself. I think, therefore, that Lopes, J., was justified in saying that Ansell was not a master, but, as he himself said, a foreman. If this is true, the plaintiff was the servant of the defendants, and he was injured by the negligent act of another person, and that other person was a servant of the defendants; therefore both were servants. Then it is said that they were not fellow-servants within the rule which has been established, so as to exempt the defendants from liability. Many cases and views of different judges have been cited to show the principle on which, though a master is liable to all other persons in the world for the negligence of his servant, he is not liable to a servant of his own who was engaged in a common employment with the servant who was guilty of negligence. It would be contrary to our duty to say anything as to the policy of the law; that question is not one for our consideration; we have to find out the principle, and apply it to the circumstances of the case before us. I have heard and read many views which have been expressed on the subject; they are not all the same, but it is not material to consider here which is absolutely correct, for they all come to this in substance, where the negligence of one servant of the defendant has caused injury to another servant of the defendant, in general the defendant is not liable; the rule absolves the master where a man is injured by the act of a servant, if the plaintiff is also a servant; that is, if they are both servants of the same master, and the service of each brings him to the same place, and at the same time with the other, and one is negligently injured by the other fellow-servant, then the master is absolved from liability. Here the service of the plaintiff would oblige him to work at the same place and at the same time as the servants who were engaged in moving the casks, and here there is more than that, for both were working for the brewery. I put it on this, that both were servants of the same master, and were at work at the same place and at the same time. This eliminates "at the same moment," and "for the same object," for I do not think that is necessary. Lord Cairns, in *Wilson* v. *Merry*, *ubi sup.*, meant that, and not that the servants need be of the same class, or working for the same result, but that if they were engaged in one general employment the master was not liable. Therefore, I think there was evidence on which Lopes, J., rightly found that the plaintiff and the person whose negligence caused the injury to him were working for the same master in a common employment, so as to exempt the defendants from liability.

COTTON, L. J. I also think that the judgment is right. The plaintiff was injured by negligence, and the first point which it is necessary to make out on behalf of the defendants in order to bring the case within the exception to the general rule is to show that he was the servant of the defendants. I had some doubt on that point at one time, but we are not here to form an independent conclusion on the question. The judge found on the evidence that the plaintiff was the defendants' servant; he saw the witnesses, and had an opportunity of observing the mode in which they gave their evidence. I do not know how I should find if I had to decide the question, but I think we are not justified in overruling the finding of the learned judge. Therefore we must start on the footing that the plaintiff was in the service of the defendants. Then it is said that, to exempt the defendants from liability, not only must he have been their servant, but he must have been in a common employment with the person through whose negligence he was injured. In the present case it is clear there was a common employment. Many cases may be put where the master might be liable, as where he carries on

two distinct businesses, and a person employed in one of them is injured by the negligence of a person employed in the other. It is not necessary to answer that suggestion, for this is a different case; here the plaintiff was clearly acting for the brewery, and that makes it a case of common employment. For what is there in the present case? The plaintiff is bringing in coals which are necessarily brought under the flap; he knew that other persons were employed above; the coals were necessary for the brewery, and there was an employment of the plaintiff in the business of the brewery, and the risk was one to which he naturally exposed himself. When once we have the fact that the plaintiff was a servant of defendants, it comes within all the decisions to hold that he was in a common employment with the person through whose negligence he was injured. To constitute a common employment the two persons need not be working at the same thing at the same time. *Wilson* v. *Merry*, *ubi sup.*, where the negligence which caused the injury had occurred some time before, shows that it is not necessary that the two persons should be working together; if there is a common employment such that the servant must know that the master would employ other persons to the risk of whose negligence he would be exposed, that is enough to prevent his recovering. Another objection taken was that this was a danger which the plaintiff could not foresee; but the plaintiff must have known that other persons were employed, and I should say that the danger of the flap falling was a danger with reference to which he must be taken to have contracted. Whether the exception to the general rule as to liability for negligence which prevents him from recovering is a good one in point of policy is a question with which we have nothing to do. If it is bad it is for the Legislature to remedy the evil; and we should do great harm if we were to draw minute distinctions in order to avoid hardship in individual cases.

THESIGER, L. J. I am also of opinion that the judgment of Lopes, J., ought to be affirmed. The starting point is a question of fact, whether the plaintiff was the servant of the defendants or not. If that question were answered in the negative, I should hesitate to apply the case of *Woodley* v. *The Metropolitan District Ry. Co.*, *ubi sup.*, and say that the plaintiff undertook the risk; but it is unnecessary to consider this, because in my opinion Lopes, J., was justified in finding as he did, or at least there was sufficient evidence on which he could find. The facts have been dealt with by Brett, L. J. Ansell said he was servant to the defendants, and he engaged other workmen who were not the servants of Ansell, to be paid and discharged by him; they were paid a lump sum by the defendants, but that sum was divided among them. It was stated that Ansell could not discharge the plaintiff without asking the defendants; if so, the case is undistinguishable from *Morgan* v. *The Vale of Neath Railway Co.*, *ubi sup.* There it was argued that the rule as to common employment only applied where the employment as to its immediate object was common; but it was held that that argument was not well founded; and it was laid down clearly by Blackburn, J., in the Court of Queen's Bench, and upheld in the Exchequer Chamber, that if there is one general object which brings the servants into contact so that they are exposed to risk, the master is free from liability. On the facts there it was held that the nature of the carpenter's duty was such as necessarily to bring him into contact with the traffic on the line. How is that distinguishable from the present case? There was a general object here, for the work was all being done for the purposes of the brewery. The coals were for the brewery It was necessary for the plaintiff to go up the steps, and the flap had to be raised. Just as the man on the ladder, in *Morgan* v. *The Vale of Neath Railway Co.*, was brought into contact with the porters who were engaged in shifting the engine, so here the plaintiff was necessarily brought into contact with the person who was moving the barrels. If so, the principle of that case applies. I do not think the particular risk which causes the injury must be known to the servant as a matter of fact in order to exempt the master; but the case is within the rule, if he might have known of t and he must be taken to have contemplated it. Though in fact he was not aware of the danger, this does not make the master liable. I think, therefore, that the judgment ought to be affirmed.

COTTON, L. J. I wish to add a word to avoid misapprehension. What I said was that,

even if it were necessary that the plaintiff should know of the risk, the evidence here was that he did know of it, but I think it is not necessary that he should know. I should rather put it on the ground of contract. Having undertaken the risk of the acts of his fellow-servants, the servant cannot say they were the acts of the master.

Judgment affirmed.

RECENT UNITED STATES DECISIONS.

[Continued from page 420.]

Riparian Owner.—A railway company built its road through a lake, cutting off the riparian owners from access to the lake, and leaving in front of their land a pool of stagnant water. *Held*, that they were entitled to recover damages.—*Delaplaine* v. *Chicago & N. W. Ry. Co.*, 42 Wis. 248.

2. But where a railway company, in building its road in like manner, occupied land which the riparian owner had made by filling in the lake in front of his land, it was *held* that he was entitled to no damages by reason of such occupation.—*Diedrich* v. *Northwestern Union Ry. Co.*, 42 Wis. 248.

Set-Off.—A. gave a note to B., who assigned it to C., and afterwards the note being due and unpaid, brought an action on it against A., for C.'s benefit. At the time of the assignment B. was insolvent, and C. knew it, and B. soon after became bankrupt. *Held*, that A. could not, at law or in equity, set off a note made to him by B., and not yet due.—*Spaulding* v. *Backus*, 122 Mass. 553.

Ship.—Upon the sale of a vessel, she must be registered or enrolled anew, or she ceases to be a vessel of the United States; and a subsequent mortgage of her acquires no validity by being recorded according to act of Congress.—*Johnson* v. *Merrill*,, 122 Mass. 153.

Tax.—Covenant by the lessee, in a lease, to pay the taxes of every name and kind that should be assessed on the premises at any time during the term, *held*, not to cover an assessment for benefits by permanent street improvements.—*Beals* v. *Providence Rubber Co.*, 11 R. I. 381.

Variance.—Indictment on a statute for keeping a disorderly house. The structure in question was proved to be a tent. *Held*, no variance.—*Killman* v. *The State*, 2 Tex. Ct. App. 222.

Voter.—At an election the polls were closed an hour before the lawful time. *Held*, that if no fraud was shown, and it did not appear that any one offered to vote during that hour, or was prevented from voting by reason of such closing, the election was valid.—*Cleland* v. *Porter*, 74 Ill. 76.

Way.—Plaintiff bought a lot in a cemetery, according to a plan which showed the lot as bounded on a certain avenue. *Held*, that he had, as appurtenant to the lot, a right of way over the avenue, and might have an injunction to restrain an obstruction of it, making his lot less accessible.—*Burke* v. *Wall*, 29 La. Ann. 38.

CURRENT EVENTS.

ENGLAND.

Criminal Code Bill.—A large meeting of Queen's Counsel was held in London to consider the Criminal Code Bill submitted to Parliament, but not passed, at the recent session. The meeting began on Monday, and extended over two days. The provisions of the bill underwent a minute and careful examination, and it is probable that the meeting will submit to the Attorney-General a number of important suggestions for alterations in the bill. It does not at present extend to Ireland but in all probability will be eventually extended, with some necessary modifications, to that country.

IRELAND.

Insanity of Judge Keogh.—A cable despatch conveys the melancholy intelligence that Mr. Justice Keogh is laboring under mental derangement. It states:—

Judge Keogh entertained an idea that his servant and registrar had entered into a conspiracy to shut him up in a lunatic asylum. At the dead of night, he went into the servant's room, armed with a razor, and cut him in the neck, and also severely in the stomach. He then left him and proceeded to the registrar's room. The registrar, hearing the noise, started up. Seizing a large pillow, he closed with his assailant, and shouted for help. The people in

the hotel were alarmed, and finally the judge was disarmed and shut up in a strong room of the convent, as there was no asylum in the place. Since his confinement, the judge has attempted to destroy himself. He will be placed in the asylum at Bruges. The Government have already taken steps to fill his place on the Bench.

UNITED STATES.

American Bar Association.—The organization of "The American Bar Association" is one of the most noteworthy events in the history of jurisprudence in this country. To assimilate and unify the laws of the several States, especially so far as they relate to commerce and to crime, is a consummation devoutly to be wished by every lover of his country, for not only will it facilitate intercourse and harmony among the people, but it will also be one of the strongest bonds of union among the several States. The meeting at Saratoga called together an unusual number of representative lawyers and jurists—men who have made their mark either in the forum or upon the bench, and the interest and enthusiasm manifested in the undertaking show unmistakably that the time is come for such an organization. To our thinking, it would have been better could such an association have been composed of delegates from bar associations of the several States—just as State bar associations would be more influential—more potent if formed of delegates from county or local associations, but with the few State bar associations which now exist, such a formation is at present impracticable, and that which has been made at Saratoga seems to be the best substitute. The proceedings of the two days through which the meeting extended are notable for the absence of "talk" to which lawyers are sometimes addicted. The business in hand was discussed by the best men present, and with an obvious desire to secure the best organization—the best results possible. This, we believe, has been done, and under the administration of the men who have it in charge, "The American Bar Association" can hardly fail to prove of great service to the profession and to the country.—*Albany Law Journal.*

The U. S. and Mexico.—The subject of extradition with Mexico is one of considerable importance in the States of our Union bordering on that country, and on that account the decision of the Mexican Supreme Court, which has just been communicated to the government authorities at Washington, that the Mexican law will permit the delivery up of offenders, upon an application made by the authorities of one of our States, will be received with much satisfaction here. In the case passed upon, the authorities of the State of Texas applied to those of an adjoining Mexican State for the surrender of two fugitives, who were charged with murder in Texas. An inferior Mexican court, however, ordered the discharge of these persons from custody, but the Supreme Court, by a vote of nine to five, reversed this decision, and ordered the surrender.—*Ib.*

CANADA.

The Orange Association.—Several prominent Orangemen having been arrested, at Montreal, for attempting to walk in procession to church on the 12th of July, a criminal prosecution was brought against them as members of an illegal association (ante p 371). A difficulty, however, occurred in attempting to prove, before the Police Magistrate, that the accused were Orangemen, the witnesses called declining to answer the questions put to them relating to the Orange Order, on the ground that they could not answer without admitting that they were themselves Orangemen, and that they would thus incriminate themselves. In the case of Col. Smith, one of the witnesses, so refusing to answer, an application was made to commit him for contempt, and the magistrate granted it. But on petition for *habeas corpus* before the Chief Justice and two Judges of the Queen's Bench, the witness was liberated, on the ground that he was within his right in declining to answer a question which might render him liable to a criminal prosecution.

The counsel for the prosecution have addressed the following letter to the Dominion Government:

To the Honorable Richard W. Scott, Secretary of State:—

Sir,—We are acting for the prosecution in the case of the Queen *vs.* David Grant *et al.*, which originated in an information, sworn to by one Murphy, to the effect that the defendants are Orangemen, and as such are members of an illegal association, and that they met on the

12th of July last at their Lodge Room, for the purpose of walking through the streets of the city in a procession likely to endanger the public peace, or having such a tendency.

We are now proceeding with the preliminary examination before the Police Magistrate, and the witnesses so far examined to prove the constitution of the Orange Order, the nature of the oath taken by the members of the Order, and the fact that the accused are Orangemen, have refused to answer, on the ground that they may criminate themselves.

While convinced that the privilege claimed does not exist in this case, and that the decision of the Police Magistrate to that effect is in every way correct, we consider it would be in the public interest, that a pardon be offered the witnesses in question, so that there be no new pretext for mischievous agitation, in connection with a question which inflames so many passions.

We, therefore, have to require that his Excellency, the Governor-General, will grant a pardon in particular to Lieutenant-Colonel George Smith, the witness presently under examination, for any act committed which would make him liable to be prosecuted under Chap. 10 of the Consolidated Statutes of Lower Canada, relating to seditious and unlawful associations and oaths, or under the Common Law, for organizing and engaging in a procession likely to endanger the public peace, or having such a tendency.

We have authority to speak for our clients only, but we may perhaps be permitted to state that there is a very large and very influential portion of the population of the city of Montreal, who, while taking no part in the controversy between the Orangemen and their opponents, are greatly interested as property owners, and as citizens engaged in trade, in the preservation of the peace of this city and its good name, and that class, no less than our clients, are anxious that the question whether the Orangemen have a right to walk in procession should be tested before the Courts.

The anomaly of the present state of things is, that while the Orangemen loudly assert the perfect legality of their Order, and claim to be protected by the authorities, at all hazards and at whatever cost, in their attempt to walk in procession, they refuse before the Courts to acknowledge themselves Orangemen, for fear of incriminating themselves, and this they do in the hope that thereby they will render fruitless any proceeding calculated to test the validity of their pretensions.

We have the honor to be, Sir,

Your obedient servants,

EDWARD CARTER,

EDMUND BARNARD.

GENERAL NOTES.

TITLES.—The English Court of Appeal, according to the *Solicitor's Journal*, appears to be somewhat of the opinion of Sir Thomas Smith, who saith: "As tor gentlemen, they be made good cheap in this kingdom; for whosoever studieth the laws of this realm * * * he shall be called master, and shall be taken for a gentleman." In the course of the hearing of a petition in lunacy for the appointment of new trustees on the 7th ult., one of the persons proposed as a new trustee was described as an "esquire," and one of the persons who made an affidavit of fitness was described as a "gentleman." It was stated that the "esquire" was, in fact, a justice of the peace, and that the "gentleman" was a solicitor. Lord Justice Cotton said that though the legal description of a solicitor was "gentleman," that term was very indefinite, and ought not to be used. In such an affidavit a solicitor ought to be described as a "solicitor," in order that the court might know his real position in life. And the term "esquire" was even worse than that of "gentleman," for it conveyed no information whatever to the court. A man who was a justice of the peace should be described by that title.

Method is essential, and enables a larger amount of work to be got through with satisfaction. "Method," said Cecil (afterwards Lord Burleigh), "is like packing things in a box; a good packer will get in half as much again as a bad one." Cecil's despatch of business was extraordinary, his maxim being. "The shortest way to do many things is to do only one thing at once."

Henri de Tourville, the Englishman, who was convicted by an Austrian tribunal and sentenced to death for wife murder, and whose sentence was afterwards commuted to one of twenty years' penal servitude, has been disbarred, and his name removed from the list of members of the Honorable Society of the Middle Temple.