RECENT ENGLISH DECISIONS.

In the Court of Exchequer.—Easter Term.

GIBBS AND OTHERS *vs.* GRAY AND OTHERS—GRAY AND OTHERS *vs.* GIBBS AND OTHERS.

A merchant loaded a Spanish vessel at C., chartered to deliver the cargo in London. The vessel put into an intermediate port disabled; whereupon the captain, without any communication with the merchant or his agents at that port, though aware of their existence, entered into a charter party with the captain of another vessel to take the cargo to its destination, which the charter party described to be 470 tons, the captain of the disabled vessel agreeing to load the other and pay freight at a rate per ton exceeding the rate of freight for which the first vessel was chartered. The vessel was loaded, and a bill of lading in accordance with the terms of the charter party was signed by the captain of the second vessel. On the arrival of the cargo at its destination it was discovered to be only 344 tons, and the merchant offered to pay freight on that amount at the rate agreed on by the charter party, which having been refused, he paid for 470 tons under protest, and brought an action for money had and received to recover the difference:—Held,

1. First, that the merchant was entitled to recover.
2. Secondly, that the master had no authority to bind the merchant to pay the freight mentioned in the bill of lading.
3. Thirdly, that the merchant was not liable in an action upon the charter party for the neglect to provide a full cargo.
4. Fourthly, that the representation in the charter party that the cargo amounted to 470 tons did not amount to a warranty.
5. Fifthly, supposing that representation had been a false and fraudulent one, the merchant would not be accountable for it.

This was a special case for the opinion of the court, which was argued on a previous day in this term by Cleasby and Tomlinson for the respective parties.

The questions involved fully appear in the judgment of the court. It will therefore be sufficient to add that the following authorities were referred to:—*Shipton* vs. *Thornton*, 9 Ad. & El. 414; *The Gratitudine*, 3 Rob. Adm. 240; *Longridge* vs. *Dorville*, 5 B. & Al. 117; *Freeman* vs. *The East India Company*, ibid, 617; *Cross* vs. *Eglin*, 5 B. & Ad. 106; *Brigs* vs. *The Merchant Traders' Association*, 13 Q. B. 167; *Arthur* vs. *Barton*, 6 M. & W. 138; *Cornfoot* vs. *Fowke*, ibid, 358; *Duncan* vs. *Benson*, 1 Exch. 537; *Windle* vs. *Barker*, 25 L. J., Q. B. 349; Abb. Ship. 367, 8th ed.; and Story on Agency, 69.—*Cur. adv. vult.*

The judgment of the court was now delivered by—

POLLOCK, C. B.—This was a special case for the opinion of the court. The pleadings were set out at length, but it is not necessary to state them with particularity, as it was agreed by the learned counsel that the real question arose upon the count for money had and received, and the question as to the right of the plaintiffs to nominal damages on the other count was not discussed.

The facts stated were, that in December, 1854, the plaintiffs loaded on board a Spanish vessel called the Oriente, at the Chincha Islands, a cargo of guano, which had been chartered by them, and for which the captain signed bills of lading, the guano being deliverable in London. In January, 1855, the Oriente put into Valparaiso, in a disabled state, and the cargo was discharged into a hulk, and it became necessary to tranship and forward the cargo by another vessel. On the 26th March the captain of the Oriente entered into a charter party with the captain of a vessel called the Fairy Queen, of which the defendants were owners. The charter party, purported to be between the master of the Fairy Queen, of the burthen of 318 tons register, or thereabouts, of the one part, and the master of the Oriente, "for account and risk of the owners of the cargo of said vessel, or whomsoever it may concern," of the other part; and stipulated that the Fairy Queen should proceed alongside the hulk, and take on board therefrom "the cargo put on board thereof, and forming the cargo brought by the Oriente, being 470 tons of guano, more or less, not exceeding, &c., and therewith proceed to Cork for orders to proceed to any port in the United Kingdom, and there deliver her cargo;" and the Captain of the Oriente, as agent as aforesaid, agreed to load the vessel, and pay freight at the rate of 5*l.* 2*s.* 6*d.* per ton; and it was agreed that the captain of the Fairy Queen should sign the bill of lading, with a clause of "weight and quality unknown," without reference to the rate of freight, and without prejudice to the charter party. The guano in the hulk was loaded on board the Fairy Queen, and what further took place at Valparaiso appeared from the evidence of a Mr. Fox, the agent of the Fairy Queen at that place, and her captain. Mr. Fox stated the fact of the arrival of the Oriente; that her cargo was loaded on board the hulk, and that she was condemned, and that afterwards the charter party of the Fairy Queen was made; that before the charter party was made several discussions took place between the captains of the Oriente and the Fairy Queen as to the quantity of guano brought by the Oriente; that the captain of the Fairy Queen expressed fear that that quantity was not a full cargo for the Fairy Queen; that the captain of the Oriente said there was fully 470 to 500 tons, and more above than below that quantity, and wished to insist on the Fairy Queen taking 500 tons, which the captain of the Fairy Queen refused to consent to take; and that the Fairy Queen was preferred by the captain of the Oriente to a small vessel called the Annie Saunderson, on account of her greater size and capacity; that after the charter party was made, and the guano put on board the Fairy Queen, the captain of the latter vessel insisted that he had not taken more than 350 tons on board; that the captain of the Oriente insisted that he had more, and that ultimately both parties went to the office of the Spanish Consul, where it was agreed that freight should be paid on the full quantity of guano mentioned in the charter party, and, in order to carry out this agreement, a bill of lading was signed by the captain of the Fairy Queen, dated the 27th April, 1855. The bill of lading stated the loading of the guano on board in the usual way, to be delivered to Murieta & Co., or their assignees, he or they paying freight for the said guano as 470 tons, as per charter party. Murieta & Co. are the agents for the general average settlement of the Oriente, and their name was suggested by Mr. Fox for the benefit of the captain of the Fairy Queen. The captain of the Fairy Queen was willing to fill up the ship with other cargo, but none could be obtained, and the captain of the Oriente urged his immediate sailing. Upon the cross-examination of Mr. Fox it was proved that the plaintiffs had, to the knowledge of the captain of the Oriente and the witness, agents at Valparaiso, and that there was a house of Messrs. Gibbs & Co. there, and that no reference was made to them;

that the Oriente, being repaired, sailed from Valparaiso with a cargo, and that the loading of the Fairy Queen was finished at the least three or four days before the bill of lading was signed, and that the agreement introduced in it was made after the loading was complete. On his re-examination he stated that the current rate of freight from Valparaiso to England, at the time of the making of the charter party, was from 5*l.* *to* 5*l.* 5*s.* The captain of the Fairy Queen was also examined, and the substance of his evidence was, that after he had taken on board all the guano supplied to him from the hulk, he insisted that he had not more than 350 tons on board, and wanted 130 tons more; that the captain of the Oriente insisted he had 470 tons, and that then the agreement was made that he should be paid freight as for 470 tons, and that on this understanding he signed the bill of lading. He further stated that he was willing to load other cargo, and that on the 29th April he received a letter from the captain of the Oriente, urging him to sail at the earliest possible opportunity; that he did so, and arrived in London, on the 4th of August following, having called at Cork for orders. The case then proceeded to state that the plaintiffs procured the bill of lading of the guano to be endorsed to them by Messrs. Murieta. The cargo loaded and delivered was 344 tons only. The plaintiffs offered to pay freight upon this 344 tons at the rate of 5*l.* 2*s.* 6*d.* per ton, being the rate fixed upon by the charter party. The defendants insisted upon being paid at that rate upon 470 tons, the quantity which might have been loaded on board, and what they alleged was payable according to the substituted agreement and the bill of lading. The result was a correspondence of some length, and ultimately, by arrangement, the plaintiffs paid, under protest, a sum of 2,388*l.* 13*s.* 9*d.*, being the freight of 5*l.* 2*s.* 6*d.* upon 470 tons, and exceeding 645*l.* 15*s.* the freight payable on the actual quantity delivered at the same rate.

The questions stated for the opinion of the court in the first of these actions, *Gibbs and others* vs. *Gray and others*, are whether the plaintiffs are entitled to recover back the sum of 645*l.* 15*s.*, and also nominal damages in respect of the detention of the cargo. The first question only has been argued before us, the other being in reality a mere question of the costs of the pleadings.

In the argument all the authorities existing, or indeed, as we believe, bearing at all upon the question, were cited.

The well-known case of *the Gratitudine*, 3 Rob. Adm. 240, and that of *Duncan* vs. *Benson*, 1 Exch. 537, were fully referred to; but it was argued by both the learned counsel that there was very little existing authority in English law upon the subject, and that the case of *Shipton* vs. *Thornton*, 9 Ad. & El. 314, and a section in Abb. Ship. 367, 8th ed., are the most material, and the most directly bearing upon it. The question is of great difficulty, and has led to much difference of opinion amongst the most eminent foreign writers on jurisprudence; but it is more especially so in the law of England, which regards with extreme jealousy the permitting any man to be bound by contract or act of another, except direct and express authority be given to him.

In the present and similar cases a merchant has loaded on board a ship a cargo, upon a contract that it is to be conveyed *in that ship* from the port of loading to the port of discharge, and a provision is contained in the contract that the shipowner is to be excused from so doing if prevented by certain perils mentioned it it. A master is placed in command of the ship, over whose appointment the merchant has no influence or control. One of the perils occurs in the course of the voyage, which, according to the contract, excuses the shipowner from conveying the cargo further; but the master, instead of acting upon it, determines to forward the cargo by another ship, of which the merchant knows nothing, and in regard to which he has no opportunity of exercising any selection or choice. The question is, what contract, if any, the master can make obligatory upon the merchant in regard to the conveyance by the substituted ship.

When the merchant has an agent or a house of business, to the knowledge of the master, at the intermediate port where the ship has put into in distress, can he, without communication with them, or giving them the option of receiving the cargo there, put it on board another ship, and forward it to the port of discharge?

We are not aware of any authority in the English law in which the master is said to have such power.

In *Shipton* vs. *Thornton*, Lord Denman, in delivering the judgment of the court, only put the case "where the shipowner or master has no opportunity of consulting the freighter;" and in the section of Abbott on Shipping before referred to, the learned author says, "the merchant should be consulted if possible." In the present case the plaintiffs had an agent at Valparaiso, and indeed it would seem that a branch of the house carrying on business in the same name was established there; and it is stated in the case, that although all the parties knew this, no reference or communication whatever was made them.

Again: has the master authority to contract that the merchant shall pay a rate of freight higher than that originally stipulated? In the present case the rate of freight by the Oriente is not stated, but we have no doubt that the rate of freight demanded and paid under protest, which was nearly 7*l.* per ton, was considerably higher than the original rate of freight by the Oriente.

Again: has the master authority to bind the merchant to a charter party, contracting not merely for the conveyance of the cargo, but for dead freight, or is his authority confined to loading the goods on board the substituted ship under the ordinary contract by a bill of lading?

Many other difficulties will readily suggest themselves to any one who has considered the subject; but upon the question in the present case we are all of opinion that the master of the Oriente had not authority to bind the plaintiffs to pay the freight mentioned in the bill of lading. He had made a charter party at the rate of 5*l.* 2*s.* 6*d.* per ton for freight, containing a stipulation as to the loading of a full cargo. All the guano was put on board, and no more was forthcoming. The consequence was, that a right in the nature of a chose in action had arisen against the person who was bound by the charter. On this state of things we are of opinion that the master had not authority to substitute or create against the plaintiffs (assuming them to be liable on the charter) a lien upon the cargo in respect of this chose in action, or, in other words, to create a lien for dead freight; and we think that the plaintiffs are not then to be liable for any thing beyond the freight mentioned in the charter party, which was the current rate of freight at the time at Valparaiso, and are therefore entitled to recover back the further sum which they were compelled to pay under the circumstances mentioned in the case.

The case of *Gray and others* vs. *Gibbs and others,* is a cross action, and the special case upon the same facts states the question for the opinion of the court to be, whether the defendants in this action are liable on the charter party of the Fairy Queen for the neglect to provide a full cargo. We are very strongly inclined to be of opinion that the master of a ship has not authority, under such circumstances as the present, to charter a ship, and bind the merchant to provide a full cargo, or, in other words, for the payment of dead freight. If he has such authority, what is the limit to it? Can he, when the goods of the merchant are only sufficient to fill the ship to the extent of one-half or three-fourths of its capacity, enter into a contract obligatory upon the merchant to pay for the unoccupied space? It may be that the master of a disabled ship has power to send forward the cargo to the port of discharge by another ship, and upon that taking place, which would be a performance of the contract, if the original ship had arrived in safety, the master or owner may be entitled to the freight originally contracted for, the conveyance of the cargo by, and the right and true delivery from, the substituted ship being deemed a substantial performance of the voyage, and equivalent to the conveyance by, and right and true delivery from, the original ship. But we think in this case that all which by the charter party was contracted to be loaded was the cargo of the Oriente. The words of the charter party are:—*The cargo put on board the hulk, forming the cargo brought to Valparaiso by the Oriente, being* 470 *tons of guano, more or less.*" It is clear from the charter party itself, and proved beyond all doubt by the evidence, that the cargo was represented to be 470 tons at the least, but we do not think there is a warranty to this effect. If there be no warranty, the only liability which could exist would be for a false and fraudulent representation. This is not alleged to have been the case, for the statement of the captain of the Oriente is admitted to have been an honest one; but if it were not, the defendants, Messrs. Gibbs, would not be responsible for it. There is no authority or principle for holding that the owners of a cargo are, under such circumstances, liable for a false and fraudulent representation by the master.

The result, therefore, is, that the verdict is to be entered for the plaintiffs in the first action for 645*l.* 15*s.*, with interest from the 18th August, 1855, on the issue on the first count, and that, as to the other issues the jury be discharged; and, as to the second action, that the judgment be for the defendants.

In the Court of Exchequer, April, 1857.

DYNEN *vs.* LEACH.[1]

1. Where an injury happens to a servant while in the actual use of an instrument, engine or machine, in the course of his employment, of the nature of which he is as much aware as his master, and the use of which is, therefore, the proximate cause of the injury, he cannot, at all events if the evidence is consistent with his own negligence in the use of it being the real cause, nor in case of his dying from the injury can his representative, under Lord Campbell's act 9 & 10 Vict. c. 93, recover against his master, there being no evidence that the injury arose through the personal negligence of the master. Nor is it any evidence of such personal negligence of the master that he has in use in his works an engine or machine less safe than some other which is in general use.
2. Therefore, where a laborer was killed through the fall of a weight which he was raising by means of an engine to which he attached it by fastening on to it a clip, and the clip had slipped off it, it was held that there was no case to go to the jury in an action by his representative against the master, although it appeared that another and safer mode of raising the weights was usual, and had been discarded by the orders of the defendant.

This was an action, brought in the Passage Court of Liverpool, by an administratrix, under Lord Campbell's Act, 9 & 10 Vict. c. 93,[2] which provides for compensation to the families of persons killed by accident.

The declaration stated that the intestate was a servant of the

[1] 26 Law Jur. 221 Ex.

[2] A Similar act has been passed in many of the States of the Union. See 1 Tidd's Prac., 9. 3d Am. Ed. notes.

defendant, employed by him in his business as a sugar-refiner, on the terms that the defendant would take due and ordinary care that the intestate should be exposed to no extraordinary risk in the course of his said service; but that the defendant wrongfully exposed him to extraordinary risk in the said employ, so that, through the carelessness of the defendant, a sugar-mould fell upon the intestate while he was engaged in the said service and caused his death.

Pleas—First, not guilty; second, a denial that the intestate was employed on the terms stated.

At the trial, the plaintiff's counsel stated the case thus:—That the defendant was a sugar-refiner, and had employed the intestate as a laborer; that it was part of the intestate's duty to fill the sugar-moulds and hoist them up to higher floors in the warehouse by means of machinery; that the usual mode of attaching the moulds to the machine was by placing them in a sort of net-bag, and which effectually prevented any accident; that this was the mode adopted by the defendant until, from motives of economy, he substituted a kind of clip, which laid hold of the rim of the mould; that the deceased, on the occasion in question, had himself filled the mould, and fastened it to the clip, but that, when it was being raised, the clip, by some jerk, slipped off the mould, which fell on his head and killed him. The learned judge on this statement, nonsuited the plaintiff, but gave him leave to move to set the nonsuit aside.[1]

C. Blackburn, now moved according to the leave reserved.

MARTIN, B.—Does not the case come within the principle of *Priestley* vs. *Fowler*,[2] and the class of cases decided upon it[3]?

POLLOCK, C. B.—These cases show that the deceased could not have recovered against his master for an injury caused by the negligence of a fellow-servant[4]; can his representative, then, recover for a death caused by his own negligence? He himself fixed the clip.

[1] And stated and signed a case for the purpose, of which the above is the substance.

[2] 3 Mee. & W. 1; s. c. 7 Law J. Rep. N. s, Exch. 42.

[3] *Vide* Wigmore *vs.* Jay, 19 Law J. Rep. N. s. Exch. 300.

[4] And the representative cannot recover for the death in a case in which the deceased could not have recovered for an injury, *vide supra, et vide* Hutchinson *vs.* the York, Newcastle and Berwick Railway Company, 19 Law J. Rep. N. s Exch. 296

The negligence imputed is not in the way of fixng the clip, or in the manner of using it, but in the use of it at all. It is not the usual mode, and not a proper mode of raising the mould.

BRAMWELL, B.—As to its not being usual, that is immaterial. It was unsafe.

POLLOCK, C. B.—Then the deceased should not have used it.

There is a recent case in the House of Lords which seems to show that it was the duty of the master not to have adopted such a mode —*Patterson* vs. *Wallace*.[1] There, in an appeal on a Scotch case, the Lord Chancellor, in giving judgment, said that the law in England and Scotland on the subject was the same; and that when a master employed his servant in a work which was dangerous, he was bound to take all reasonable precautions for the safety of his workman.

POLLOCK, C. B.—That was an *obiter dictum* as regards the law of England; the appeal being from Scotland.

No doubt, it is no direct decision on the question, but is a weighty expression of opinion.

POLLOCK, C. B.—But it must be taken with reference to the facts. The master was a miner; the workman had pointed out that a stone overhanging the works was dangerous and likely to fall, and it did fall soon after and killed him. The House of Lords held,

[1] 1 M'Queen's Reports of Scotch cases in the House of Lords. 748. See also Brydon *vs.* Stewart, 2 Ibid. 30, in which the Solicitor General (for the defendant, the master,) citing the former case, says "the law of both countries on questions of this sort is the same, except that in Scotland it would appear that a master is responsible for injuries done by a fellow workman; and the Lord Chancellor in giving judgment said, 'a master by the laws of both countries is liable for accidents occasioned by his neglect towards those whom he employs.'" There the action was by the representatives of a miner who had been killed by the fall of a stone upon him while he was being drawn up through the shaft of the mine, "the stone falling by reason of the shaft being in an unsafe state from causes for which the master, the defendant, was responsible." That was the form of the issue on which the jury found for the complainant. See as to the difference between the law of England in such cases as regards master and servant, Seymour *vs.* Madox, 20 Law J. Rep. N. S. Q. B. 327, Hutchinson *vs.* the York, Newcastle and Berwick Railway Company, 19 Law J. Rep. N. S. Exch. 296; and as regards strangers, Reedie *vs.* the London and North-Western Railway Company, 4 Exch. Rep. 244, Barnes *vs.* Ward, 9 Com. B. Rep. 392; S. C. 19 Law J. Rep. N. S. C. P. 115.

that, by the law of Scotland, there was a case to go to the jury So there was in the present case.

BRAMWELL, B.—The case is clearly distinguishable.

In circumstances, but not in principle.

BRAMWELL, B.—There the workman had no connection or concern with the cause of accident, whereas here he was in the actual use of it.

No doubt; but it was not his fault that it was perilous.

POLLOCK, C. B.—There was no contract, and there was no general duty thrown by law upon the master to the effect stated in the declaration. If the work is more than ordinarily dangerous, the servant should know it and decline to continue in it.

There is no legal presumption that an unskilled laborer should know the nature of machinery employed.

POLLOCK, C. B.—Every workman is bound to know the nature of the instrument he uses. Even a hammer or a ladder may be dangerous.

It was surely for the jury whether the particular mode of raising the mould was unsafe, and whether the deceased could know it?

POLLOCK, C. B.—No; there was nothing for the jury. As to the method being usual, there was no evidence, except that a safer method had been used; but a master is not bound to use the safest method. A pair of steps is safer than a ladder, but business could not go on if ladders were discarded. And as to the man's knowledge, he was bound to know what he actually did; he himself fastened the clip, and it would be impossible for the jury to tell whether it was his careless mode of doing it which caused the accident.

It would be for the jury on the whole whether the method was reasonable and proper.

POLLOCK, C. B.—No; if the man did not think it so, he should have left. A servant cannot continue to use a machine he knows to be dangerous, at the risk of his employer.

He might not know it, and his means of knowledge would be a question for the jury.

POLLOCK, C. B.—No; it is a question of law.

BRAMWELL, B.—There was no evidence that the method was improper; that it was less safe than another did not make it improper to be used.

POLLOCK, C. B.—The deceased not only contributed to the accident which caused his death, but did the act which directly caused it. It is impossible to speculate as to the cause, but it is consistent with the evidence that it was his own carelessness in fastening the clip. At all events, his own act was the proximate cause of the occurrence, and it is impossible to hold that to be a ground of action.

BRAMWELL, B.—There is nothing legally wrongful in the use by an employer of works or machinery more or less dangerous to his workmen, or less safe than others that might be adopted. It may be inhuman so to carry on his works as to expose his workmen to peril of their lives, but it does not create a right of action for an injury which it may occasion when, as in this case, the workman has known all the facts and is as well acquainted as the master with the nature of the machinery and voluntarily uses it. That was not so in the case cited from the House of Lords, in which the workman had nothing to do with the stone the fall of which was the proximate cause of the occurrence. Here on the contrary, the workman's own act was the proximate cause. Whether, therefore, on the principle that the party contributed to or was the proximate cause of the injury, or upon the principle that a servant cannot sustain an action against a master for the mere negligence of a servant, this action cannot be sustained.

CHANNELL, B.—If I were to speculate on the cause of the accident, I should be disposed to think that it was the careless fixing of the clip by the defendant himself. But we cannot speculate on that point; and I rest my judgment on the ground that the deceased himself continued in the employ of the defendant and in the use of the clip with full knowledge of all the circumstances, so that he directly contributed to the accident.[1]

[1] As to this defence, where the plaintiff has employed the defendant to do work, &c. see Dakin vs. Brown, 8 Com. B. Rep. 92, s. c. 18 Law J. Rep. N. S. C. P. 344; as to the personal negligence reputed to sustain such an action by a servant against his master, see the judgment in the recent case, Scott vs. the Mayor of Manchester, 26 Law Jour. Rep. p. 132, vide particularly, p. 134.

In the Exchequer Chamber, May, 1857.

ROBERTS *vs.* SMITH AND ANOTHER.[1]

The defendant, a master builder, being engaged to repair a house, employed one of his workmen, A., to erect the scaffolding for that purpose. A. knew how to build scaffoldings. The materials which were supplied to him by the defendant were in bad condition. The workman broke several of the putlogs, (the pieces of wood between the wall and the upright poles), but was ordered by the defendant not to break any more, as they would do very well. The scaffolding having been erected by A. of the materials which were furnished to him, an accident happened to another workman, B., in consequence of the bad condition of the putlogs:—Held, in an action by B. to recover compensation for the injuries received, that there was evidence to go to the jury in support of the plaintiff's case, and that such evidence ought to have been left to the jury.

This case came before the court by way of appeal from the Court of Exchequer. The declaration stated, that before and until and at the respective times of the plaintiff entering into the service of the defendants, and the committing of the grievances hereinafter mentioned, the defendants carried on the business of carpenters and builders; and thereupon the plaintiff, being a bricklayer, entered and was received, and until the time of the said grievances remained and continued in the service and employ of the defendants, in the way of their said trade, upon the terms and conditions, amongst others, that the defendants should take and use all due, reasonable, and proper means and precautions in order to prevent accident, damage, or injury, or unreasonable and unnecessary risk or danger from happening or occurring to the plaintiff in the performance of his duty as such servant of the defendants; and although the plaintiff did all things, and all things concurred and happened, which were necessary to entitle him to have the said terms and conditions performed by the defendants, yet the defendants did not take or use such due or reasonable or proper means or precautions as aforesaid, but altogether omitted so to do; and by reason thereof, and of the default and neglect of duty of the defendants in that behalf, the

[1] Appeal from the Court of Exchequer. 21 Jur. 469.

plaintiff was directed and employed by the defendants, as such their servant as aforesaid, to perform certain work upon the wall of a house, and for that purpose to be and remain at a great height from the ground, upon a certain scaffold affixed to such house, and which scaffold, for want of the use of such means and precautions as aforesaid, and by reason of the negligence and default of the defendants in that behalf, then was and remained constructed very unsafely and insecurely, and in such a defective, rotten, and improper state and condition as to render it dangerous to be and remain upon the same for the purpose of doing the said work, which the defendants then well knew, but whereof the plaintiff was wholly ignorant; and in consequence thereof, whilst the plaintiff was so engaged as aforesaid, a part of the said scaffold broke and gave way, and the plaintiff was precipitated and fell to the ground with great violence. [Then followed a description of the injury.] The defendants pleaded —first, not guilty; secondly, that the plaintiff was not employed on the terms and conditions and in manner in that behalf in the declaration alleged. At the trial, which took place before the Lord Chief Baron at Westminster on the 29th November, 1856, the following evidence was given on behalf of the plaintiff. The plaintiff proved that he was engaged by one White to go into the employ of the defendants; that he was sent to the house, and that while he was upon the scaffold doing his work the scaffold broke; he fell to the ground and broke his thigh: that the putlog broke. In cross-examination he stated—"White engaged me. My attention was not directed to the state of the putlog; it was under the board upon which I was standing. The man who built the scaffold knew well how to do it. The putlog rested on the window-sill." John Nellegan was examined, and swore—"I am a laborer. I was employed to get the scaffolding out of Mr. Smith's yard to erect the same. It is usual to examine the poles, &c. I examined the materials; I found them in bad condition, light, and worm-eaten. I broke several that were rotten and worm-eaten. William Smith came afterwards; he asked me who broke the putlogs. I told him I did. He then told me I had no business to do so, and said, 'They will do very well, as there was no bricks or mortar going on.' He said, 'Don't break any more.' I put aside such as I thought sound. I was not there when the accident happened. I used three putlogs where one would have done. I have been a laborer and scaffolder for twenty-five years. A sound putlog ought to bear from 15 cwt. to 1 ton, or twenty men. The putlogs appeared as if they had got the rot." Other evidence was given to the same effect. At the conclusion of the plaintiff's case it was objected that there was no evidence to go to the jury; and on that ground the Lord Chief Baron directed a nonsuit, with liberty to the plaintiff to move for a new trial if there was evidence to go to the jury. A rule was afterwards obtained by the plaintiff, calling upon the defendants to show cause why the nonsuit entered on the trial, and the judgment signed thereon, if any, should not be set aside, and a new trial had, on the grounds that there was evidence for the jury in behalf of the plaintiff's case, and that the evidence ought to have been left to the jury for them to decide upon it. It was agreed between the plaintiff's and the defendants' counsel, in order that the plaintiff might appeal, that the rule should be discharged by the Court of Exchequer; and it was against this ruling by such arrangement that this appeal was brought.

Temple, (*C. Wray Lewis* with him), for the plaintiff.—There was evidence here to show negligence on the part of the defendants themselves, and the Chief Baron was wrong in not leaving that evidence to the jury. The accident was caused by the breaking of the putlogs. There was evidence to go to the jury upon which the plaintiff would be entitled to a verdict; but if there was any evidence, that would be sufficient. It is not intended to dispute the correctness of the decisions in *Hutcheson* vs. *Yorke*, 19 L. J., Ex., 296, and *Priestley* vs. *Fowler*, 3 M. & W. 1, for those cases are not conclusive upon the point raised in the present case. *Paterson* vs. *Wallace*, 1 Macq. 748, is in point. In that case an action was brought upon the ground that the deceased had lost his life by reason of the masters' negligence, through their agents having carelessly left a very large stone upon the roof of a mine in so dangerous a position that it fell upon the workman, when engaged in digging out the coal, and killed him upon the spot. Evidence was given to show that the deceased and the other men employed in the mine had pointed out to the underground manager of the mine that the roof was in a very dangerous position; that he made some answer intimating that there was no danger, but that he afterwards sent some persons down to remove the stone. Before this was done, however, it fell, and killed the deceased. The Lord Chancellor Lord Cranworth said, "Now, in order to recover damages, the family must establish two propositions: first of all, they must show that the stone was in a dangerous position, owing to the negligence of the masters; and next, that the workman whose life was forfeited, lost it by reason of that negligence, and not by reason of rashness on his own part." And again—"It was not for the court below, nor is it for your Lordships, to say what would have been the conclusion at which the jury would have arrived, or ought to have arrived, upon the evidence. The question for the court below and for the House is this—was there evidence that might by possibility justly have led the jury to come to a conclusion in favor of the plaintiffs upon both the propositions to which I have adverted?" And again—"The question is, what ought to have been said by the judge to the jury after the evidence had been given? It was his duty to point out to them the evidence which bore upon the two propositions, namely, whether there had been a want of timeous removal, as they call it, upon the part of the masters, and whether they were satisfied that Paterson came by his death, not by reason of his own rashness, but by reason of his having so implicitly relied upon the assurances which were given him by the underground agent." *Brydon* vs. *Stewart*, 2 Macq. 30. In the marginal note is—"A master is bound to take all reasonable precautions to secure the safety of his workmen. It is no answer to the claim of damages by the surviving relatives of a workman accidentally killed in a mine, which was not in a safe and sufficient state, to say that he was at that moment of time in the act of leaving the work for a purpose of his own." Lord Brougham says, "the master is answerable for the state of his tackle, which in the present instance was defective, and had occasioned this lamentable accident." Upon the authority of these two cases it might be successfully contended that the judgment of the court ought to be in favor of the appellant, without the evidence of Nellegan, but that witness gave evidence which was quite conclusive as to negligence on the part of the masters themselves. It is true that he used the best materials he could out of the stock of the masters, but the masters would not allow him to test any more of the putlogs, and were informed of the bad state in which they were.

Knowles, for the defendants.—The ruling of the Lord Chief Baron was correct. Where a workman enters into the employ of a master, the business being of such a description as that he will be aware that the master will not be personally employed in the erection of the building, but that his fellow-workman will be so, and an injury occurs to him in the course of his employment, the master is not responsible if he has used due care in choosing his workmen. COCKBURN, C. J.—Not only the workmen, but the materials also. No doubt he must employ servants who will look at the materials; and here it appears that Nellegan put aside such as appeared to him to be sound. The duty of the master does not go so far as is alleged in the declaration; though he employs an unfit person, he is not responsible if he has taken due care in choosing him. In *Seymour* vs. *Maddocks*, 16 Q. B. 326, it was alleged that the defendant had suffered the floor of his theatre to be insufficiently lighted, and a hole to be open without sufficient fence, so that the plaintiff, a performer, was injured by falling into the hole; and it was held, that the duty, a breach of which was laid, did not arise from the particular facts stated in the declaration, nor from the general relation of master and servant. WIGHTMAN, J.—If the allegations had been the same there as in this case there might have been a different construction of the matter. *Tarrant* vs. *Webb*, 18 C. B. 797, was a case in which an action was brought to recover damages for an injury sustained by the plaintiff from the falling of a scaffolding on which he was working in the employ of the defendant, a house decorator. JERVIS, C. J., said—"The rule is now well established that no action lies against the master for the consequences to a servant of the mere negligence of his fellow. The master *may* be responsible where he is personally guilty of negligence, but certainly