McTiernan J.'s view are forced to rely on a very doubtful Privy Council decision which has been subjected to conflicting explanations. It would appear that modern English decisions support the "juridical capacity" test. A recent case of some relevance to this problem is *Newsome v. Darton Urban District Council.*[14] In this case both Greer L.J. and Slesser L.J. emphasised that the question of liability for failure to repair a road which had subsided at a place where twelve months previously the defendant corporation had filled in a trench, which they had constructed for the purpose of executing certain drainage work, depended on the capacity in which the authority acted. Greer L.J. stated the problem in such cases as follows: "When there is something that may be regarded as non-feasance by a local authority who may happen also to be a road authority, then the action will lie for that which they have done, not as a road authority, although they happen to be a road authority, but in some other capacity."[15]

There is a rather hasty tendency to describe the rule exempting highway authorities from liability for non-feasance as an historical anachronism which should be cut down in its operation wherever possible. The difficulties of proving contributory negligence against a plaintiff who alleges injury incurred through non-repair of such a structure as a drain or a highway should be taken into consideration—the rule may indeed relieve the highway from vexatious actions. As far as the condition of roads is concerned, there is always the public remedy.

It is submitted that the logic of Dixon J.'s judgment and its respect for later English authorities, combined with what would appear to be a more realistic view as to the facts in this case, will carry great weight in future cases in which highway authorities are concerned.

—T. A. PYMAN.

14. (1938) 3 All E.R. 93.
15. Ibid., p. 95.

COMMON EMPLOYMENT.

Radcliffe v. Ribble Motor Services Ltd.[1]

The doctrine of common employment had its beginning in *Priestley v. Fowler*[2] decided in 1837 and since that year has caused much trouble and injustice. Lord Abinger was afraid that if the decision was given in favour of the plaintiff, all employers would be entirely responsible to their employees for all the negligent acts of their minor servants and "inferior agents." He explained that although the master was bound to provide for the safety of the servant to the best of his ability, the servant was the best judge of the risks he was running and, if he did not wish to undertake them, he could abandon that particular employment. Thus he confused the two distinct ideas of *scienti* and *volenti*. His final justification is somewhat vague. The servant's best protection was to inform his master of the risks. If he received compensation for accidents arising out of his employment he would become careless. In

1. (1939) 1 All E.R. 637.

this way arose the common law exception to the rule of *respondeat superior* because of the apprehensions of a timorous judge rather than from any logical process of law or from any necessity. On this ground it is severely criticised by the House of Lords in the recent decision in *Radcliffe v. Ribble Motor Services Ltd.*[2]

Later it was justified by a strange idea of public policy. In the middle of the nineteenth century public policy was based on the economic theory of *laissez-faire*. Leave the employers to manage the business as they wish and the greater economic gain will result. Basing his conclusions on this idea Shaw C.J. in the American case of *Farwell v. Boston & Worcester Railroad Corporation*[3] expressed the view that in contracts of employment there was an implied term denying the liability of the master for injuries inflicted on a servant through the negligence of a fellow servant. The workman receives compensation for the risks he undergoes in the form of part of his wages. This was not true for the wages of most men were barely enough for subsistence. But accepting the prevalent economic theory Shaw C.J. did not consider this side of the question. His view was that goods would be cheaper if the employers did not have to raise prices in order to cover possible loss due to compensating workmen for injuries received during their employment. The view that the workman knows the risks he runs and can avoid them by giving up his job ignores his lack of bargaining power as an individual. This idea of an implied term was introduced to England in 1848 in *Hutchinson v. York, Newcastle & Norwich Railway Company*,[4] and in 1878 this one sided idea of public policy reached its climax when Lord Thesiger decided (in *Charles v. Taylor Walker & Co.*[5]) that common employment existed because there was a general object, namely, to further the end of a common master. This perhaps was not so unjust in small businesses but now modern collectivism and large combines have greatly magnified its results. The doctrine might have been in accordance with the public policy of last century, but it is certainly contrary to modern notions and out of harmony with changed conditions. Lord Macmillan adequately expresses the court's disapproval, "The danger attendant on all doctrines founded on presumptions, implications or fictions, originally thought to be equitable, is that they are apt to be extended by a process of logical development which loses sight of their origin and carries them far beyond the reach of any such justification as they may have originally possessed. This has been the case with the doctrine of common employment."

All that the courts can now do is to cut down the application of the doctrine as far as possible. It cannot be over-ruled for it has been upheld and approved on various occasions by the House of Lords themselves. It has been recognised and modified by legislation in the form of the Employers' Liability Act of 1880 and various clauses of the Workers' Compensation Acts, but the doctrine itself still has a wide scope. To abolish it entirely requires an Act of Parliament. The courts however,

2. 3 M. & W. 1.
3. (1842) 3 Macq. 316.
4. (1850) 5 Excheq. 343.
5. 3 C.P.D. 492.

have been decreasing the area to which the rule applies. Lord Chelmsford in *Reid v. Bartonshill Coal Co.*[6] was of the opinion that the employee "cannot be expected to anticipate those (risks) which may happen to him on occasions foreign to his employment." His view was that, before the exception to *respondeat superior* can take effect, the two workmen must be doing a similar task and be dependent on each other. But it was not until *The Petrel*[7] that the doctrine began to be cut down. There Sir Francis Jeune basing his decision on the words of Blackburn J. in *Morgan v. Vale of Neath Railway Company,*[8] said his opinion was that before the defence of common employment could apply "the risk of injury from the negligence of one must be so much a natural and necessary consequence of the employment which the other accepts that it must be included in the risks considered in his wages." Sir Francis Jeune decided that a collision between two ships belonging to the same master was not a natural and necessary consequence of which a seaman must be implied to have undertaken the risk. It was merely an accident that the negligent ship belonged to the same company as the injured one. Any other ship might have been the negligent party. It was not a risk incidental to the performance of their separate duties.

It is by analogy with this that *Radcliffe v. Ribble Motor Services Ltd.* was decided by the House of Lords. Here three separate orders for coaches were made, one order of three and two orders of one. Radcliffe drove one of the singly hired coaches. They were all to do the same trip. The hire was over once the passengers were discharged. The drivers' orders were to return to the garage choosing their own routes which were alternative after they had gone through the Mersey Tunnel. Jones saw Radcliffe's coach stopped and saw Radcliffe alight for what purpose is unknown. He drove up behind Radcliffe's coach and then pulled out to pass and park in front. But he drove so negligently that Radcliffe was crushed between the two vehicles. The House of Lords decided this was outside the rule of common employment for the safety of one bus driver did not in reality depend on the actions of a fellow servant to such an extent that an implied contract to run the risk should be imagined.

In this case, the learned Lords criticised the doctrine of common employment severely because of its curious origin, the injustice it causes, and its contradiction of modern views of social policy. It is "looked at askance by the judges and text-book writers: there are none to praise and very few to love." A frank plea is made for legislative reforms. This criticism has already had some effect, for the Court of Appeal have reversed the decision in *Metcalfe's* case,[9] which was a glaring example of the injustice caused by applying the rule to the highly centralised London transport.

—E.O.C.C.

6. (1858) 3 Macq. 266.
7. (1893) P. 320.
8. (1864) 5 B. & S. 570, (1865) L.R. 1 Q.B. 149.
9. *Metcalfe v. London Passenger Transport Board* (1939) 2 All E.R. 542.