calculated. The only difference between the decisions is, that the Commission say, that as matter of law he had no right to rely on his "calculations," and the court say it is for the jury to determine that question. We suppose a man must "calculate" his chances in nearly every case of crossing a crowded street. If he did not, he never would get across, but would, like the timid saints in the hymn, "stand lingering on the brink." He must have a right to take his chances on such a "calculation." Whether he acts reasonably in so doing is a question of fact, not of law, and the Court of Appeals merely sought a polite way of differing from the Commission.

McCall v. *N. Y. Cent., etc., Co.*, 54 N. Y. 642.—The deceased was riding in a covered carriage with another person who was driving, near Suspension Bridge, at a point where the railroad track crosses the highway at an acute angle. The carriage and a train were going in the same direction. The driver was familiar with the locality, and knew he was in proximity to railroads, but was not aware of this particular crossing, nor thinking of the railroad at all. He heard a rumbling sound; did not know whether it was the falls, or what; looked around and saw nothing; just then saw the track within ten feet, slapped the horses with the reins, they started on a gallop, and the train struck the carriage. These facts were held to constitute contributory negligence.

Morrison v. *Erie Railroad Co.*, 56 N. Y. 302.—Plaintiff, 12 years old, with her parents, being a passenger on defendants' train, desired to stop at Niagara Falls; it was dark; the conductor announced the station, and the cars stopped, but before the party got off, the cars started and moved slowly past the platform, when the father, taking plaintiff under his arm, stepped off, fell, and the plaintiff was injured. Held, that plaintiff was chargeable with contributory negligence, as matter of law. Two judges dissented.

Reynolds v. *N. Y. Cent. R. R. Co.*, 58 N. Y. 248.—Deceased, an intelligent lad, 13 years of age, was going home from school, about noon, and when last seen alive was going toward the tracks where they crossed the highway, and about one hundred feet therefrom. He was familiar with the crossing, passing over it daily, and with the times of the trains. Soon after this two trains passed each other near this crossing, and immediately after the boy was found dead in the cattle guard. The day was clear, and ten feet from the crossing, in the highway, the train by which it appeared he was struck could be seen 750 feet distant. No signal of the approach of the train was given. The proof was held insufficient to sustain a verdict for the plaintiff, because it did not warrant a finding that the deceased was not negligent.

The court remark: "Doubtless the jury might infer that the deceased was governed by the natural instinct of self-preservation, and would not put himself recklessly and consciously in peril of death, but that men are careless and subject themselves thereby to injury, is the common experience of mankind, and when injured no presumption exists in the absence of proof that they were exercising due care at the time."

Remarks.—At first sight, it would seem difficult to reconcile this with the *Johnson* case, 20 N. Y. *supra*. But it is distinguishable, probably, by the fact that the conduct of the defendants, in the latter, was of so dangerous a nature as to justify the inference of care on the part of the deceased.

Weber v. *N. Y. Cent., etc., Co.*, 58 N. Y. 451.—It is here held, that if the "negligence of the plaintiff in such action, contributing to the injury, clearly appears from all the circumstances, or is established by uncontroverted evidence," it is the duty of the court to nonsuit. "But if a finding by the jury that the plaintiff was free from the charge of negligence could not be set aside as wholly unsupported by evidence, although the evidence might be slight, and the question doubtful, a nonsuit would be improper." The court quote with approval the language of Judge Selden, in *Bernhard* v. *Renss. & S. R. R. Co.*, 1 Abb. Ct. of App. Dec. 131: "If it is necessary to determine, as in most cases it is, what a man of ordinary care and ordinary prudence would be likely to do under the circumstances proved, this, involving as it generally must more or less of conjecture, can only be settled by a jury."

McGrath v. *N. Y. Cent., etc., Co.*, 59 N. Y. 468.—Where a railroad company has been accustomed to keep a flagman at a crossing, the fact of his absence does not excuse a traveller