The Legal News.

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APPEALS IN ENGLAND.

Statistics show that there is about the same degree of uncertainty everywhere as to the ultimate fate of cases appealed. A Parliamentary return just issued states that the number of decrees and orders made by the Master of the Rolls, the three Vice-Chancellors, and Mr. Justice Fry, being all the judges of the Chancery Division of the High Court of Justice in England, appealed against since the 1st January, 1877, up to the 11th March, 1878, were 253. Of these, 147 were affirmed, and 106 were reversed or materially varied.

RESPONSIBILITY OF CARRIERS.

The case of *Allan and Woodward*, in the present issue, involved two points of some interest to travellers. The first was as to the effect of a condition, printed on the back of an ordinary passenger ticket for an ocean voyage from Liverpool to Portland, stipulating that the carriers should be free from all responsibility for safe keeping of the passengers' baggage. The condition in the present instance was in these words:—"It is expressly agreed between the passengers within named and the Montreal Ocean Steamship Company, that the latter is not responsible for the safe keeping during the voyage, and delivery at the termination thereof, of the baggage of said passengers." The Company, on being sued by Miss Woodward, a passenger, who, on reaching her home in Sherbrooke, discovered that the greater portion of the contents of her trunk had been abstracted, urged with considerable earnestness that by the conditions of the ticket they were relieved from all responsibility.

The articles of the code regulating the subject are 1672, 1676, 1802 and 1814. Article 1672 says: "Carriers by land and by water are subject, with respect to the safe-keeping of things entrusted to them, to the same obligations and duties as inn-keepers, declared under the title "Of Deposit." Referring to Art. 1814, we find the obligations of inn-keepers thus defined: "Keepers of inns, of boarding houses, and of taverns, are responsible as depositaries for the things brought by travellers who lodge in their houses." And the depositary (by Art. 1802), "is bound to apply in the keeping of the thing deposited, the care of a prudent administrator." Art. 1676 says: "Notice by carriers, of special conditions limiting their liability, is binding only upon persons to whom it is made known; and, notwithstanding such notice and the knowledge thereof, carriers are liable whenever it is proved that the damage is caused by their fault, or the fault of those for whom they are responsible." The Court of Appeal do not appear to have attached any importance to the notice, and it must be presumed they did not think it had been brought to the knowledge of the passenger, within the meaning of Art. 1676. The company did not put the question to Miss Woodward, whether she had read the condition; they contented themselves with proving that she could read, and that the ticket remained in her possession several months. It may be that even if such notice had been proved the result would not have been different, the case falling under the latter head of the article, namely, a loss caused by the fault of persons for whom the Company was responsible. The judgment of the Court below, which was confirmed in appeal, held the loss to have occurred through the want of care of the carriers. That is to say, the notice had no effect one way or the other, and the Company was held liable as not exercising the care of a prudent administrator.

In appeal, two of the judges dissented, on the ground that the loss was not proved to have occurred during the voyage, and this, of course, would take away any right of action against the carriers. This brings us to the second point—the proof of loss. The majority of the Court admitted that the proof made by the plaintiff was somewhat weak, because it was not established very clearly that the trunk remained intact from the moment of its arrival at Portland until it reached the residence of the plaintiff. But the Court attached great importance to the fact that when the trunk was opened on board ship before reaching Portland, it bore traces of having been tampered with, and it was held that a presumption was thereby created that the theft had then been commit-

ted, which presumption it was the duty of the other side to rebut by counter evidence. This is a ruling which would doubtless elicit considerable difference of opinion, especially when it is remembered that the indications of the trunk having been tampered with did not excite the suspicion of the passenger herself sufficiently to cause her to make an examination then and there. The judgment is of a nature to guard the interests of travellers, and to urge carriers to greater vigilance in the protection of the property of which they take charge.

REPORTS AND NOTES OF CASES.

COURT OF QUEEN'S BENCH.

Montreal, Sept. 18, 1878.

Present: DORION, C. J., MONK, RAMSAY, TESSIER, and CROSS, JJ.

LARIN (plaintiff in the Court below), appellant; and CHAPMAN (defendant below), respondent.

Sale—Delivery—Mode of Sale of Goods after Tender and Non-acceptance.

The plaintiff, May 7, sold defendant 500 tons of hay, deliverable "at such times and in such quantities" as defendant should order. The defendant having ordered only a portion of the hay, the plaintiff, July 28, notified his readiness to deliver the balance, and then disposed of it by private sale. *Held*, that the terms of the contract bound the purchaser to order the hay within a reasonable time, before the new hay was put on the market, and that the vendor was at liberty to sell at private sale, and hold the purchaser responsible for the loss sustained.

The appellant claimed damages under the following circumstances: He sold respondent, on 7th May, 1874, 500 tons of hay at $21 per ton, the same to be delivered "at such times and in such quantities" as respondent should order. The respondent ordered a portion of the hay, but the balance not being asked for, the appellant, on the 28th July, notified the respondent that he was ready to deliver the hay according to contract, and would hold him responsible for all loss and damages incurred by reason of his not receiving it. He then stored it in Montreal, and subsequently sold it in small quantities during a period of several months. The action was for the difference of price. The Court of first instance maintained the claim, but in Review this decision was set aside, the Court holding that even if Larin had a right under the contract to tender the hay at the time he did, he ought to have caused it to be sold at public sale after proper notice.

DORION, C. J. On the 7th May, 1874, the respondent entered into a contract with appellant, by which the latter sold him 500 tons of hay deliverable at the canal, at such times and in such quantities as the purchaser should require it. Larin delivered 147 tons in June, 1874, but the price of hay having then declined, the respondent took advantage of the terms of the contract not to order any more. Larin offered to deliver the balance, and when it was refused he sold it at private sale, and now seeks to recover the difference between the amount realized and the contract price. The Superior Court sustained the action, but when the case was taken to Review, the judgment was reversed and the action dismissed, the reason given being that Larin had no right to dispose of the hay except at public auction or sale at one time. It is evident that this reason is bad, and the judgment is bad, and must be reversed. The contract required Chapman to accept within a reasonable time, and as to the private sale, more was realized in that way than could have been obtained by offering the whole quantity at auction at one time.

Judgment reversed.

Longpré & Dugas for Appellant.

Abbott, Tait, Wotherspoon & Abbott for Respondent.

SIR HUGH ALLAN et al. (defendants in the Court below), appellants; and Miss JOSEPHINE WOODWARD (plaintiff in the Court below), respondent.

Carrier—Condition on back of Ticket—Proof of Loss.

A condition, printed on the back of a passenger ticket, exempting the carrier from responsibility for safe-keeping of baggage during the voyage, does not relieve him from liability for loss.

The fact that a trunk, when opened by a passenger towards the close of the voyage, bore traces of the lock having been tampered with, raised a presumption that goods, afterwards discovered to be missing, had then been abstracted, though no examination was made by the passenger at the time.

The action in this case was brought by a passenger on an Allan vessel from Liverpool to Portland, and the claim was for $272, value of

articles lost or stolen from the plaintiff's trunk during the passage. The claim was resisted on the ground that, even if the loss occurred during the passage, by the condition of the passenger ticket, the appellants (defendants) were relieved from any responsibility for loss or injury to her baggage during the voyage, unless such loss or injury was proved to be the fault of the appellants or their employees in the care and safe keeping of the trunk and effects. The plaintiff had a return ticket, with the following among other conditions printed on the back :—"It is expressly agreed between the passengers within named and the Montreal Ocean Steamship Company, that the latter is not responsible for the safe keeping during the voyage, and delivery at the termination thereof, of the baggage of said passengers." The Court below maintained the plaintiff's action, considering that the articles, the value whereof was sought to be recovered by the action, were lost while in the custody of the defendants, as carriers, through their want of care of the same.

In appeal,

CROSS, J., dissenting, held that it was not proved that the loss occurred during the passage to Portland. After the trunk arrived there it was put into a sealed car and brought to Coaticook, and handed over there to the Canadian authorities, and then put into an ordinary baggage car. It was carried in that baggage car until it was landed in the usual way at Sherbrooke. The Court had no distinct proof of the way in which it was dealt with, but there was the evidence of the baggage agent that it was put into a room and kept over night. There was no proof as to how it got to Miss Woodward's residence, the excuse being that the servant man who must have brought it is not forthcoming. Now, the Court had here a contract to carry a passenger's baggage from Liverpool to Portland; it was supposed to end there, but Miss Woodward made a new contract with the Grand Trunk to carry her baggage to Sherbrooke. The question was, where and how did the baggage get astray? While the trunk remained on board the steamer the presumption was against the appellants, but once Miss Woodward had taken the trunk and made a contract for its carriage with the Grand Trunk, the presumption changed, and she was bound to show that the loss occurred on board the steamer. It was said, by way of showing this, that before leaving the steamer the trunk was opened and the hasp was found to be broken. But this evidence worked both ways, for the respondent did not follow up this discovery by making an examination of the contents. His Honor held that, although the Messrs. Allan were strictly responsible while the trunk was in their custody, they were relieved when it passed from their custody, unless it was shown that the loss of the goods occurred before that time.

MONK, J., remarked that there was no difficulty about the law, but there was a slight difference of opinion with regard to the facts. The contract of the Allans was for safe carriage from Liverpool to Portland. The lady went on to Sherbrooke before the loss was discovered, and there was no evidence where it occurred.

RAMSAY, J., for the majority of the Court, admitted that the case was not without difficulty, but said it was only a question of evidence after all. One question of law had been raised at the argument, that on the back of the contract ticket there was a clause exempting the carriers from liability. That did not apply; carriers could not evade responsibility in the way in which they proposed to do. On the question of evidence, the difficulty in the case unquestionably arose from the particular fact that Miss Woodward had not given the Court a perfectly satisfactory account of this trunk from the moment of its arrival at Portland to its delivery at the house. But there was an important piece of evidence—before the vessel had reached Portland, and while this passenger contract was in full force, one of the officers of the ship, the Doctor, got her trunk out for her, and went with her to open it, and then the lid of the trunk started up, the hasp being broken. Now, here was a fact going strongly to establish that the lock of the trunk had been tampered with on board the steamer. The appellants attempted to get over the difficulty by saying that the place where the baggage was stored was so secured that nobody could enter it; but the evidence was not conclusive or satisfactory. It was as clearly proved as could be that things belonging to passengers were found lying about in the hold of the ship. It might be said the trunk might never have been locked; but the

appellants received it without objection, and they would hardly have taken an open trunk. After that, if there was nothing to show that the loss took place on the ship, the delivery at Portland would have been a good delivery. But the facts above referred to established a presumption that it was tampered with on the ship, and the only way of getting over that presumption would be by showing that it was tampered with elsewhere. The only weak point in the case was in the little transmission from the railway station in the morning to the plaintiff's house. The case was, to a certain extent, weak, but the Court had to give a judgment. The Court below had held the weight of evidence to be in favor of Miss Woodward, and the majority of the Court here could not say that that was a bad judgment; therefore, it was their duty to confirm it.

Judgment confirmed.

Abbott, Tait, Wotherspoon & Abbott for Appellants.

Davidson & Cushing for Respondent.

SUPERIOR COURT.

Montreal, Sept. 17, 1878.

JOHNSON, J.

MACDONALD v. JOLY et al.

Injunction—Mandamus—New Conclusions.

An injunction issued against parties about to take possession of a railway. The injunction was disregarded, and forcible possession taken of the railway. *Held*, that the petitioner, at whose instance the injunction was ordered to issue, might be allowed to add to his conclusions a prayer that he be re-instated in possession.

JOHNSON, J. The point now is one of procedure. The petitioner wants to add to his conclusions, and to be allowed to ask that he may be re-instated in his possession, on the ground that since the injunction issued, the defendants have, in violation of its provisional order, taken forcible possession. The only objection urged was that this would be an attempt to get a mandamus as well as an injunction. That can hardly, perhaps, be called an objection; it is an observation, however, of a highly technical character; but if it should turn out that substantially the right demanded ought to be granted, we must not be deterred by mere names from doing what is just and legal in itself. There are principles as well as names, in procedure, and the Court must be guided by principles, and not frightened by bugbears. This man asked for, and got an injunction. He now says:—"I have submitted myself to the law; but Her Majesty's writ was disregarded, and I want to be allowed to allege this, so that if I can prove it, I can get possession again of what has been taken from me by force." The question now is, not as to the nature and extent of his possession; that will arise hereafter. The only thing now is as to his right to allege this, and to ask—not to get—restitution. It is quite evident that if men cannot be allowed to complain to the Court of their alleged wrongs, the consequence to society would be most disastrous. Take, for instance, the case that this very man puts forward—(whether true or false is not now the question). He says:—"I tried "the authority of the law; but it was ineffect- "ual, and was overpowered by force. I must "either have the right to repel force by force, "or to tell my wrong to the court of justice." Can there be a doubt that law and order ought to prevail, and that this man ought not to be told that he has no right to come here and state his case; but that he is to be left to the savage remedy of force?—for the law can only abridge the natural rights of men by substituting its own power.

It has often been said that the only difference between a mandamus and an injunction is that the one is an order to do a thing, and the other an order not to do it, and it is said that in England the party would probably be told:—"You may take your mandamus if you like, or your injunction, according to the facts you present; but you can't take them both in one and the same case." But we have our own law, and very ancient and well settled law, that has not been abrogated by the Code, or the statutes that gave us summary *requêtes* where the remedy would in England have been by mandamus or by injunction. We have our own *procédure civile*, and by recurring to the highest authority of old Pigeau we may set right several notions that have perhaps gone a little wrong in the present case. Of course, I am not now considering whether what the plaintiff says is true or not, much less whether it can be successfully opposed by the other party. I am only looking at what it is that he says and asks, and he says

he has been dispossessed by force of arms, and without any authority or process of law, and he asks that he may be allowed to put all this before the Court. I decline to believe or to listen to all that was said as to the kind of force used. It is not necessary that I should do so at present. His possession may turn out to be worthless in the end; but that is no reason why he should not allege and prevent if he can, if he has a legal right to do so. It is mere delusion of the weakest and wildest sort to rush at once to the merits of this case, and to try and see, or, rather, fancy (for the thing itself has no existence in the allegations of the parties) any possible resemblance between the situation of the parties here and the relative situations of a proprietor and a builder of a house. Neither Macdonald nor the other party puts the case on any such ground. They both of them repudiate that ground. They both say expressly that the claim of the defendants to supersede the ordinary methods of civilization for enforcing individual rights, rests (whether truly or not, I am not now examining) on a statute giving them the power in question, and is not a claim they make by virtue of the right of property being in them, or their having a contract for the resumption of it; and Macdonald sets up expressly that no such power exists at all—that it required federal authority, which has not been obtained, to extend the operation of the Provincial statute to a federal railway. Therefore it is childish to talk of there being any analogy between the two cases. In the one the party says:—"We have a contract, and by it you consented I should retake possession." In the other, he asserts there is a statute enabling him to take possession whenever he likes; and the other side answers, not only is there no such law applying to this case, but even if there was, it must be executed by due process, and not by bayonets and bludgeons. Now, which of the two may be right, I will not stop now to discuss; but in dealing with the present motion it will suffice to say that if what Macdonald says is true, there is abundant authority for granting it. I must say that it is to me inconceivable why, if the Government had the right they claim, they did not proceed at once by action against Macdonald. I say inconceivable on legal grounds, for I can readily understand the law's delays are distasteful to those who think they have a clear right. The same thing may be said, however, as to the recovery of a debt; but the creditor nevertheless could hardly pay himself in his own way by garotting his debtor, or picking his pockets. Therefore, I look at the case by principle and authority. First, let us see what Pigeau says: Vol. II, page 8. No one will doubt that this proceeding is essentially and on principle a veritable *complainte*. Here is what Pigeau says on this subject. [His Honor read from the book cited.] It results from this authority that Macdonald has the right to make his *complainte* now; and it would be strange indeed if he had possession (as he says he had, whether truly or falsely makes no difference now, since it is only the admissibility of his demand, not the final granting of it that is in question), that the other party, by an illegal proceeding, should prevent him from asking it. I say illegal proceeding, speaking of it only as illegal of course, without prejudging the fact. The clearest principles would receive violence if this application were refused. There is a maxim dominating this subject, and pervading all the authorities. It is:—"*Que les parties doivent rester avec les mêmes avantages jusqu'à ce que justice en ait autrement ordonné.*" It is derived, says Pigeau, vol. I, page 116, from two others equally certain, "that *possession vaut titre jusqu'à la preuve du contraire, et qu'il n'est pas permis de se faire justice à soi-même.*" Another principle, or another enunciation of it is the well-known one, "*Spoliatus ante omnia restituendus.*" Commenting on the maxim, *qu'il n'est pas permis de se faire justice à soi-même*, Pigeau has some observations very applicable to the present case. See vol. I, p. 114. In conclusion I will only say that according to Pigeau, and according to all principles upon which law and order depend, this application if made in an ordinary case would certainly be granted; and whether the first process be summons or injunction can make no difference.

COURT OF QUEEN'S BENCH.

Montreal, Sept. 21, 1878.

Present: DORION, C. J., MONK, RAMSAY, TESSIER, and CROSS, JJ.

MACDONALD v. The Hon. J. G. JOLY et al.

Injunction—Contempt—Appeal.

M., contractor with the Quebec Government for building a railway, learning that the Government, under Public Works Act, 32 Vict., cap. 15, ss. 179, 180 (1869), was about to take possession of the road, which

was not completed, obtained a writ of injunction to restrain the Government from interfering. The Government proceeded to take possession, and a motion to dissolve the injunction being rejected, obtained leave to appeal to the Court of Queen's Bench.

Held, that, under these circumstances, an order to suspend the injunction until the appeal could be heard, should be granted, notwithstanding the fact that the injunction had been disregarded.

The defendants moved for an order to suspend the injunction (*ante* p. 446.)

RAMSAY, J., dissenting: This is an application under the statute of Quebec of last session for an order to suspend an injunction from the Superior Court, now pending before this Court on the merits of an interlocutory order rejecting a motion of appellants to dissolve the injunction. A preliminary difficulty was suggested that the writ of appeal was not returned, and that, therefore, no order could be made by this Court. With some hesitation I concurred in the judgment overruling this objection, and the parties were heard. Respondent then filed an affidavit setting forth in effect that the injunction had not been obeyed, and that the appellant, with armed force, resisted the execution of the writ of injunction. Under these circumstances, I must persist in the view I expressed on a previous occasion, and say that the appellant, while thus a wrong-doer, cannot be allowed to answer the injunction at all. His first duty is to obey. It must be manifest that if he is above the law he need not come to us. If he defies by an armed force the process of the Superior Court—the great Court of original jurisdiction in the Province—he will not likely pay much respect to our decree, and his appeal to us is an idle ceremony. To me it appears so clear that this must be the law of every community governed by law that I should hardly expect to be called on to cite any authority to justify it; but the ground I take is sanctioned by a very respectable authority which I quoted on a previous occasion, and which I shall repeat once more at length. "And if after service it shall be disobeyed, process for contempt issues till the offender be taken and committed upon an affidavit of his disobedience. And when he is taken he shall be committed till he obey or give security for his obedience, and shall not be heard in the principal case till he obey." Comyns Dig. V. Chancery (D. 8) Injunction, Vol. 2, p. 231. Supported by this authority I might in turn ask for some *dictum* of text writer or judge, either under the French or English system, but none has been produced, and I think that I may almost predict that none will be produced. We may be told that the proceedings are summary, and all sorts of cases, some of them apparently of great hardship, may be cited, but not one that says relief was given on an injunction the execution of which was defied. Of course, no authority short of this has any bearing on the case before us. It was said yesterday that the power to suspend the injunction necessarily implies the suspension before its execution. To me it appears to imply precisely the reverse. It was also said that the *dictum* in Comyns was good so far as it goes, but that it does not apply to appeal. This commentary seems to me to admit too much, or not go far enough itself. If it is good law in the Court below, one may fairly ask why it should not be applicable here? I think we should be as jealous of disregard of the authority of the Superior Court as we should be of a contempt of our own, and until we are I fear we have much to learn. Again, if it be contended that there were two motions, although but one judgment, and that the appeal is only as to that part of the judgment rejecting appellant's motion, and that the judge in the court below heard this motion and thereby overlooked the contempt, I must say that I consider the argument as evasive. Two motions were made in the court below—one to dissolve the injunction and the other on the rule for contempt. They were heard together and decided together, and while rejecting the motion of appellant and Peterson, the latter was adjudged to be in contempt. The whole matter, therefore, was before the Court, and it was all adjudicated upon. Are we, therefore, to suppose that the Judge overlooked or absolved the contempt? He condemned it then—it exists now, and we may say what we will, the effect of our judgment is to render nugatory the order of the Court on the contempt, if still existing. The bureaucratic argument has also been pressed on our attention. We have been told that the injunction was a nullity, and that with the warrant of the Lieutenant-Governor one can disregard all process. Such doctrine

may be accepted at Berlin or Paris, but it will be repudiated by those whose ideas of administrative authority have been acquired where rational liberty within the law is a reality, and not a novel abstraction. Besides, it is obvious that if the local executive is beyond the jurisdiction of the Superior Court, it cannot be helped by us. We have also heard that it was inconvenient for Mr. Joly to obey the writ because he might be dismissed by the Lieut-Governor for so doing. It is impossible to say how far that functionary may abuse his power, but awful as his wrath may be, it seems to me less terrible than the sewage of Banbury, and its neighborhood; yet the Local Board of Health was told that Cherwell should not be polluted so as to injure Mr. Spokes. (*Spokes* v. *Board of Health of Banbury*, L. R. 1 Ex., p. 42). I therefore dissent from the judgment about to be rendered, without expressing any opinion on the merits.

MONK, J., also dissenting. I also have to express my regret that I cannot concur in the judgment about to be rendered by the Court. With much, if not all, that has fallen from my learned colleague, Justice Ramsay, I agree, but I do not think it necessary that I should rest my opinion on quite so broad a basis. No doubt that the fact of the appellants having disregarded, even resisted, the writ of injunction issued by the Court, is a very grave objection to the granting of this application. It is an extremely novel proceeding for a party in flagrant disobedience and contempt of the order of the Court below to apply to this Court to suspend the order or writ thus set at defiance. A great deal might be said on this part of the case—but this is an application to the discretionary power of this Court to suspend, during a period to be fixed by the Court, the writ of injunction, and the motion rests upon an alleged urgent necessity, set forth in the motion and supported by affidavit. It is said that the road requires ballasting, and many other measures must be taken to render it safe for traffic; for that purpose it is necessary that the writ should be suspended and the appellants be put in possession of the road. Now, as a matter of fact, in appears from the evidence that not only have the appellants disregarded the writ of injunction, but in doing so they have taken possession of the road, and that it is now held by them, and is under their entire and exclusive control. The ballasting may be carried on without any intervention on our part. The granting of the motion would be more or less to sanction or to countenance this defiance of the writ of injunction. This cannot be done. Such a proceeding on the part of this Court would be very much to be regretted. I do not in any way express an opinion on the merits of this writ of injunction—whether founded or not, it is not our business to determine. We are asked to suspend the writ, and I confess I cannot see how the Court should interpose its authority where there is no urgency—no necessity for such an exercise of the discretionary power of this Court. The appellants are in possession by proceedings which I am not called upon to characterize on the present occasion. They will no doubt remain in possession without any assistance from this Court. In the present state of affairs I do not think that this Court should interfere.

DORION, C. J., for the majority of the Court, said the main ground of difference of opinion in the case was that the parties asking for the suspension were in violation of an order of the Court below, and it was contended that this Court could not entertain any application from them until they had submitted. If that were so, this Court was wrong in granting an appeal, because the judgment showed the contempt, and the party should not have been heard. The rule referred to was from Comyns' Digest, and was founded on a rule of practice in the English Court of Chancery—not of the Courts which now had power to issue injunctions. His Honor did not find such rule in the new books. None was cited at the bar, and he had looked in vain in Archbold's Practice, Lush's Practice and Fisher's Digest. He found no trace whatever of such a rule, and he came to the conclusion that this, like other old rules which had existed in England with respect to *capias*, &c., had been swept away by the new legislation. It was formerly held that the order of injunction could not be touched, but the Imperial Act of 1817 says the rule may be varied and altered. Even if this old rule had not been swept away by Imperial legislation, he considered that it was abrogated by our own Provincial Act. His Honor read sections 8 and 9 of the Prov. Statute, 41 Vic. It was evident that

the Legislature wished to guard against surprise, and to give the Court in these cases the right to go back upon its own order. Suppose a writ was issued against A for refusing to give up a house, and it was served by mistake on B, the latter, according to the contention of the opposite party, would have to give up his house before he could be heard, though it would be easy for him to show the mistake. This was one of the absurd consequences to which such a cast-iron rule would bring us. His Honor referred to the case of the injunction issued against the Montreal Telegraph Company, where the injunction was set aside subsequently. The Court, then, having the right to suspend the execution of the injunction, was the present case one in which such discretion should be exercised? The law provided that the Lieutenant-Governor might notify the party holding the work, and give an order to the Sheriff to take possession of the property. An attempt had been made to show that this did not apply because the railway was under the control of the Dominion authority; but between the Government and Macdonald he was bound by his own contract; he had taken the contract from the Local Government; he had recognized their authority, and had agreed that the Lieutenant-Governor might take possession of the road, not at the completion of the work, but whenever he chose to do so. The Lieutenant-Governor was the sole judge; the Court had no right to revise the Order in Council. Here, too, it was admitted that the time for completing the work was over on the 1st October last; at that date the work was to be delivered over. It was no doubt an extraordinary power, but it was stated in Mr. Joly's affidavit that it was necessary to ballast this road to make it fit for travel, and the work must be done before winter. It was an arbitrary power, but there were arbitrary powers which were necessary to be exercised in many cases. Here, not only in virtue of the law of the land, but in virtue of the condition in the contract, the Government took possession of the road. The writ ordered the officer not to do so, and he found himself between two orders. The majority of this Court thought there had been a surprise on the Judge below, and that he was not aware of the existence of the law. However this might be, the injunction had issued for a breach of contract between the Government and Macdonald; but the injunction was not issued as against the breach of contract alleged. The breach alleged was that the Government had not paid Macdonald a million dollars that they owed him. The order issued improvidently, and this Court was bound to suspend it. If the Government had brought an action claiming the road, the contractor would not have had the right to keep it until he was paid. A strong *primâ facie* case had been made out; the road was in want of repairs, and the repairs had to be made immediately. The time for completing the works had expired long ago. The contractor could not suffer by taking possession. He could petition the legislature on the subject of his claims. The order of the Court would go that the injunction be suspended till the 14th December next. This would give the appellants four days after the opening of the December term to ask for a renewal of the suspension.

TESSIER, J., concurred entirely with the reasons given by the Chief Justice.

CROSS, J., also concurred. The Court suspended the injunction, with a strong suspicion that a mistake had been made, but that would come up on the merits. Macdonald could not suffer, as he had a solvent debtor to deal with.

Injunction suspended till December 14.

E. Carter, Q.C., for Appellants.

Doutre & Co., for Respondent Macdonald.

CONTRIBUTORY NEGLIGENCE.

[Concluded from p. 455.]

Todd v. *City of Troy*, 61 N. Y. 506.—An action for injuries received by falling on an icy sidewalk. The ice was covered with a thin coating of snow; the plaintiff had on no "rubbers;" and she was walking fast, but at her usual gait. Held, a proper case for the jury. The court observes: "I know of no rule of prudence that requires every person who goes into the street in the winter to wear rubbers."

Sheehy v. *Burger*, 62 N. Y. 558.—Plaintiff stepped off a sidewalk to cross a street, when the end of a long plank on a truck swept around as the truck turned, and hit her. It was held that the failure to observe this unusual appendage dragging behind the truck,

and to calculate its dangerous sweep, was not *per se* negligent; and a non-suit was set aside.

Burrows v. *Erie Railway Co.*, 63 N. Y. 556.—Defendants' train stopped at a station, and the plaintiff endeavored to get off, but before she could alight the train started. She requested a gentleman to assist her, and he endeavored to do so, when both fell, and she was injured. Held that her acts were negligent *per se*, and she should have been nonsuited.

Messoth v. *Delaware, etc., Co.*, 64 N. Y. 524.—This was an action for injury at a railway crossing. The employer of the deceased, who was with him at the time, and driving, testified that he looked both ways, and saw no train. Held, a proper case for the jury.

The court said: "It does not necessarily follow from the fact that a skilled engineer can demonstrate that from a given point in a highway the track of a railroad is visible for any distance, that a person in charge of a team approaching the track is negligent because from the point specified he does not see a train, approaching at great speed, in time to avoid a collision."

Haycroft v. *Lake Shore, etc., Co.*, 64 N. Y. 636.—Plaintiff had crossed two railway tracks in the city of Buffalo, and then looked both ways, saw a train coming from the east on the fifth track. She waited for it to pass, standing between the second and third tracks, within about a foot of the third. As the train she was watching passed, she was struck by the tender of a locomotive backing up on the third track from the west, without giving any warning of its approach. Held, that the question of her negligence was for the jury.

Mitchell v. *N. Y. Cent., etc., Co.*, 64 N. Y. 645.—The deceased was killed at a railroad crossing in Greenbush. Before she came to the track in question she had crossed two tracks, and on the third track a running switch was being made. The view was, however, unobstructed, and it was the engine that struck her as she stepped on the third track. Held, that a nonsuit was properly granted, for it was clear that if she had used her senses she must have seen the engine in time to avoid it.

Gray v. *Second Ave. Railroad Co.*, 65 N. Y. 551.—Plaintiff's carriage and horses were standing at a hack stand. A passing snow plough on defendants' track threw mud and snow into the carriage, frightened the horses, and they ran away, sustaining injury. The plaintiff's driver did not have hold of the reins, but stood by the carriage door reading a newspaper. A nonsuit was refused, and the jury found a verdict for six cents. The plaintiff appealed, but the court refused to set it aside, holding that the error, if any, was in not granting the nonsuit.

Maber v. *Central Park, etc., Railroad Co.*, 67 N. Y. 52.—The plaintiff, a boy ten years old, hailed a street car; the driver stopped, and the plaintiff was going to the rear platform, when the driver told him to get on in front; he did so, and was on the first step, when the car started, throwing him off, and the car wheel ran over his legs. Held, that his getting on in front did not, under the circumstances, constitute negligence as matter of law, but it was a question for the jury.

Ginna v. *Second Ave. Railroad Co.*, 67 N. Y. 596.—The deceased got upon a crowded street car and stood upon the platform. The conductor took his fare. A jolt of the car, produced by the defendants' neglect, threw him off and killed him. A recovery was affirmed.

In this case two cases were cited as authority which we have remarked upon. One was *Willis* v. *L. I. Railroad Co.*, 34 N. Y. 670. There it was held that passengers are not to be deemed guilty of negligence for standing on the platform of a car in motion, when there are no vacant seats inside, nor is it their duty to pass from one car to another in search of seats when the cars are in rapid motion. The other was *Edgerton* v. *N. Y. & Harlem Railroad Co.*, 39 N. Y. 227, in which it was held that it was not negligent for a passenger to enter a caboose car attached to a freight train; although it was not a passenger car, yet passengers were carried in it and the defendant received fare from them, and so incurred the ordinary liability.

Cleveland v. *N. J. Steamboat Co.*, 68 N. Y. 306.—The plaintiff, a passenger on defendants' steamboat, was standing, before the boat had started, on the gangway, in front of the opening, across which was a gate. Another person endeavoring to jump ashore, just as the boat moved away, fell into the water. This caused a rush of passengers, who pushed plaintiff

against the gate, which gave way, and he fell overboard and was injured. Held, that his position was not negligent *per se*.

Hoffman v. *Union Ferry Co.*, 68 N. Y. 385.—In an action for a collision between vessels, the omission of the injured vessel to comply with statutory regulations, or with the usages and customary laws of the sea, is not *per se* a bar to a recovery. It is a circumstance to be considered in ascertaining the proximate cause of the injury.

Eppendorff v. *Brooklyn, etc., Co.*, 15 A. L. J. 431.—Plaintiff signaled a street car; the driver slowed up; the plaintiff put one foot on the side rail, and grasped the end of a seat, but before he could put up the other foot the driver, while looking at him, and without any signal or notice from him, let go the brake, the car received a jerk in consequence, and the plaintiff was thrown under the car and injured. A nonsuit was held to have been properly denied. It is not always negligent for a person to get on a street car in motion.

Lambert v. *Staten Island R. Co.*, 4 N. Y. W. Dig. 574.—Anchoring a sail-boat at night, with a light set, in a channel which is the customary path of a ferry boat, is not *per se* negligent.

Coulter v. *American, etc., Co.*, 56 N. Y. 585.—Plaintiff was walking on a sidewalk in Syracuse when defendants' express wagon, driven rapidly, came up behind her. Without looking around, she sprang sideways to avoid the danger, and struck her head against a wall and was injured. Held, that it was a case for the jury.

The court say: "An instinctive effort to escape a sudden impending danger resulting from the negligence of another does not relieve the latter from liability. The law does not require a delay in the efforts to escape until the exact nature and measure of the danger is ascertained."

Lanigan v. *N. Y. Gas-light Co.*, 5 N. Y. Week. Dig. 281.—The service pipe in plaintiff's house leaked, to plaintiff's knowledge. His servant went into the cellar where the leak was, with a light, and the gas exploded, injuring the house. Held, that the plaintiff must be supposed to have known the danger of bringing a lighted lamp in contact with escaping gas, and to be responsible for a disregard of the peril. That it was a voluntary and negligent exposure of his property to danger, not to see that the escape of gas was properly prevented.

Gillespie v. *City of Newburgh*, 54 N. Y. 468.—Plaintiff was driving in a top buggy wagon along an embankment on a public street, and approaching a railroad crossing. The edge of the embankment had been guarded by a railing, but for a space of about eleven feet the railing was gone. Seeing a train approaching, and the railing at his right, he backed his wagon to the right in order to turn his horse away from the train. The wagon fell down the embankment through the open space, and he was injured. The top of the wagon was up and prevented his seeing the defect, but he might have discovered it by turning his head and looking out of the back, or putting his head out of the side of the wagon. This was held a proper case for the jury.

McGovern v. *N. Y. Cent., etc., Railroad Co.*, 67 N. Y. 417.—The deceased, eight years old, was killed at a crossing while on his way to school with several other children. It was claimed that the deceased was guilty of contributory negligence because he did not look to the west before stepping on the track. But held, that the rule which requires persons before crossing a railroad, to look out for approaching trains, is not applied inflexibly, without regard to age or circumstances; the same maturity of judgment or degree of care and circumspection is not required or expected in a child of tender years as in an adult.

Evans v. *City of Utica*, 15 A. L. J. 353.—Plaintiff was injured by falling on an icy sidewalk. When asked if he paid attention when he passed upon it, he answered that he stepped on the ice right along. Held, that the law does not demand of one passing along a street in a city extraordinary vigilance when there are no manifestations of difficulty or apparent danger. The mere fact that there is ice on a sidewalk does not necessarily establish that it is negligent or dangerous to pass over it.

McGarry v. *Loomis*, 63 N. Y. 104.—Plaintiff, four years old, went out from his parents' house, near the defendants' steam planing mill, and fell into a hole in the sidewalk, through which the defendant conducted waste hot water and steam, and was scalded. It was held that the circumstance did not show contributory negligence on the part of the child, and that negli-

gence on the part of the parents was therefore not a question.

On the question of imputable negligence we will refer to *Mangam* v. *Brooklyn R. R. Co.*, 38 N. Y. 455, and *Prendergast* v. *N. Y. Cent. R. R. Co.*, 58 id. 652; both cases of persons *non sui juris*.

We think the foregoing review comprises all the important cases on this subject in our Court of Appeals. It will be noticed, however, that we have not embraced those growing out of the relation of master and servant. Those we have reserved for separate review at some future day.

From the foregoing cases we think the following conclusions may fairly be derived:

1. One cannot recover damages from another for an injury alleged to have been occasioned by the negligence of that other, if his own negligence in any degree contributed to the injury.

2. In order to recover in such an action, although the burden is on the plaintiff to show that he himself was not guilty of such contributory negligence, yet he need not produce evidence in the first instance to show it; it is sufficient if it appears from the whole evidence.

3. Although due care on the part of a person injured is not presumed without proof, yet direct evidence is not always demanded. Where, from the nature of the case, it is manifestly impossible to give such proof, the locality and circumstances may be of such a kind, and the act producing the injury of so dangerous and reckless a nature, and the person injured of such experience, intelligence, and circumspection, that the jury may infer due care on his part from the ordinary instinct of self-preservation.

4. What is contributory negligence is a question of fact for a jury, unless the evidence adduced to prove it is uncontroverted, or is of such a character that honest and intelligent men cannot possibly differ as to its effect.

5. The test as to whether the complainant has been guilty of contributory negligence is, whether he acted as ordinarily prudent persons, of the same age and capacity, would have acted under similar circumstances.

6. In consciously approaching a place of known danger, one cannot assume that another will perform his legal duty toward him, and so neglect to avail himself of the vigilant exercise of his own senses for protection; and if he fails to exercise such caution he is not excused by the other's neglect to perform such duty. On the other hand, in a place where no danger can ordinarily or reasonably be apprehended, no such high degree of caution is exacted, but ordinary prudence will suffice.

7. Although contributory negligence on the part of the plaintiff will permit a recovery in such cases, yet if in spite of it the defendant could by the exercise of ordinary care have prevented or avoided the injury, he is liable therefor.—*Albany Law Journal.*

NEW PUBLICATIONS.

THE CANADIAN LEGAL DIRECTORY.—A Guide to the Bench and Bar of the Dominion of Canada. Edited by Henry J. Morgan, Esq., Barrister-at-law. Toronto: R. Carswell, publisher, 1878.

Mr. Morgan describes this work "as the first attempt at bringing the Bench and Bar of the Dominion and of the several Provinces thereof under one cover;" and having some conception of the formidable obstacles which must impede the execution of such an undertaking, we confess we are surprised at the completeness of the information which has been obtained. Probably no one who had not the experience which the author has acquired in this department of literature would have persevered in the task or have succeeded half so well. The volume comprises 279 pages, and almost every page is the result of special effort in seeking the information contained in it. The Judges and officers of the Courts throughout the Dominion, with their salaries, duties, &c., are fully set out. The Bar receives equal attention. Lists of coroners, official assignees, registrars, notaries public, &c., are to be found in their proper places.

Part II. comprises 81 pages of "biographical data" respecting the Judges of all the Courts in the Dominion. This information is of an interesting character, and can be found nowhere else, the greater part having evidently been communicated by the gentlemen themselves. The Canadian Legal Directory fills a want long felt, and the editor has earned the best thanks of the profession by the painstaking manner in which he has executed the undertaking.

CURRENT EVENTS.

ENGLAND.

LAW REFORM IN ENGLAND.—The *London Law Journal* reviews the Session of 1878, and finds it barren in regard to law reform, but takes comfort in the promise of the criminal code bill. It says:—"The session of 1878 has done nothing whatever in the way of law amendment; but by this time law reformers ought not to be surprised or discouraged by a blank year. There are several reasons for the slow progress of law reform. Though the public grumble about the law and laugh at the comic abuse of lawyers, yet they hold the law to be, on the whole, excellent, and have full faith in our profession. The instincts of the nation—we do not, of course, now speak in a political sense—are fundamentally conservative, and there is a very natural disinclination to change the laws. The laws are not so faulty as to be oppressive, and the English people do not get enthusiastic about a grievance that does not pinch them. Parliament, reflecting the views and disposition of the nation, always closely examines any law bill; and the House of Commons conscientiously and firmly refuses to delegate its authority, in respect to law bills, to the experts—that is, the lawyers—in the House. Then the judicature acts were a large dose of law reform; and, for a time, it has appeared to exhaust the law-amending energy of Parliament. We are not discomfited by a session that is barren of law reform, for we know that if reform were urgent, it would not be delayed. Let it not be supposed that we have adopted the doctrine of finality, which is not, never has been, and never can be, applicable to the law. Society is not made for the law, but the law for society; and, since society is constantly changing, the law requires to be changed. The law reformer will never have to complain that his occupation has gone. But at present there is no such discrepancy between the provisions of the law and the requirements of society as to make law reform a burning question. The Criminal Code Bill, which we are very fully reviewing in our columns, is in every respect a truly grand measure. It has been referred to a Royal commission, and Parliament will not delegate its authority or compromise its dignity by accepting, so far as codification of the existing law is concerned, the decisions of the eminent jurists who constitute the commission. If so, we may hope that the session of 1879 will be distinguished as the Criminal Code Session. On the whole, there is not much reason for law reformers lamenting the barrenness of the past session, whilst they have reason to hope that the next session will be fruitful."

UNITED STATES.

LIABILITY OF CITY.—In *City of Joliet* v. *Harwood*, 86 Ill. 110, it is held that if a city employs a person to do work which is intrinsically dangerous, such as the blasting of a rock in a street for a sewer, and the contractor uses all due care, and inquiry results to a person from a stone thrown by the blasting, the city will be liable to respond in damages for the injury. The general rule is that where a person lets work, to be done by another by contract, which is innocent and lawful in itself, but which may, if carelessly or negligently done, result in injury to another, he is not charged with liability if such work is in fact carelessly and negligently performed; but he is liable, when the work to be done necessarily creates a nuisance. The blasting of rocks by the use of gunpowder or other explosives in the vicinity of another's dwelling-house, or in the vicinity of a highway, is a nuisance, and the person doing the act, or causing it to be done, is liable for all injuries that result therefrom. *Hay* v. *Cohoes Co.*, 2 N. Y. 159; *Reg.* v. *Mutter Leigh's Cases*, 491. But see *McCafferty* v. *Spuyten Duyvil, etc, R. R. Co.*, 61 N. Y. 178; 19 Am. Rep. 267. In that case, a railroad company let by contract the entire work of constructing its road. The contractor sublet a portion of the work. Through the negligence of men employed by the sub-contractor in performing the work, stones and rocks were thrown by a blast upon plaintiff's adjoining property, injuring it, and it was held that the railroad company was not responsible. The court says that this is not a case where the defendant contracted for work to be done which would necessarily produce the injuries complained of, but such injuries were caused by the negligent and unskillful manner of doing it. The cases of *Pack* v. *Mayor of New York*, 8 N. Y. 222; *Kelly* v. *Mayor of New York*, 11 id. 432, and *Storrs* v. *City of Utica*, 17 id. 103, are cited as authority; and it is said that *Hay* v. *Cohoes Co.*, *supra*, is not an authority upon the questions involved in *McCafferty* v. *Spuyten D. R. R. Co.* See, also, *Butler* v. *Hunter*, 7 H. & N. 826; *Reedie* v. *London, etc., Ry. Co.*, L. R., 4 Exch. 244.