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CASES IN APPEAL.

The Court of Appeal at Montreal delivered a considerable number of judgments on Wednesday. A person unacquainted with legal business in this Province would be astonished to learn that there were two lower courts through which the cases arriving at this tribunal had been filtered. The impression would naturally be created that this was a court of original jurisdiction, and not the highest appellate tribunal of the Province. For among all these appeals, carried up to this court at considerable expense, and entailing long delays, there did not appear to be a single one which the learned judges deemed worthy of a considered opinion in writing, and there was hardly a single precedent cited. The appeals were disposed of in an off-hand manner, and in several instances upon purely equitable considerations. We do not pretend to impugn the judgments rendered; on the contrary, they seem for the most part unimpeachable. We merely remark the singular fact, which cannot but arrest the attention of those acquainted with the care bestowed on some of the judgments in the courts below, thus summarily overruled in appeal.

THE FRANKFORT CONFERENCE.

The sixth Annual Conference of the Association for the reform and codification of the Laws of Nations has been held at Frankfort, Mr. David Dudley Field having been chosen president of the Conference. According to the report of the Council there has been a satisfactory increase during the past year in membership and in the interest evinced in the proceedings of the Association. It is worthy of note that even China and Japan were not unrepresented. The envoy of Japan to the English Court delivered an address on the relations of the Asiatic nations to those of the West, in which particular reference was made to the subjects of trade and consular jurisdiction. He expressed the hope that in time the commercial nations would recognize that, as regards Japan, it was their interest to submit to native jurisdiction. The ambassador from China had also prepared an address which was read by Mr. Jencken. Both of the essayists were added to the list of honorary vice-presidents of the Association. A discussion ensued on the Suez canal, and a resolution was passed to the effect that "this Association is of opinion that it is for the interest of the commerce of the world that the Suez canal and other similar international works should be declared by an international Act to be forever open, and free and exempt from hostile attack in case of war." Reports from Committees were received on the subjects of Bills of Exchange, Patent Law, General Average, Bankruptcy and Copyright. The subjects of collisions at sea, and the necessity of international concert to punish criminally the non-observance of the rules of navigation for the prevention of collisions, were considered and referred to Committee. Other papers treating on topics of international law were read, and the result of the meeting was considered generally satisfactory.

EXECUTIVE PARDON.

Applications are being constantly made to our Provincial Executive for reduction of punishment or for absolute pardon in criminal cases adjudged before the Provincial Courts, and upon this matter the following extract from an influential Provincial newspaper will not be out of place here. Referring to the application to the Provincial Executive in an extreme criminal case, in which the Executive had cast the responsibility upon the judge, it is said: "The Lieutenant-Governor has sounded the true note in saying that the Executive privilege of pardon should not be turned into a court of criminal appeal. It should only be brought into play where there has been a clear and admitted failure of justice, or error of a court, not capable of remedy in any other way, or where from some special reason it is made apparent to the head of the Government that mercy should be shown to a convicted person. But does the Lieutenant-Governor carry out this doctrine when he finally refers the matter in hand to the judge who tried the case, to see if he thinks that the man ought to be pardoned? Home secretaries in England have

fallen into this routine to escape responsibility, till people have come to consider a reference to the judge in such cases constitutionally orthodox, the proper course for the sovereign, or the holder of the sovereign's prerogative, to take. No position can be more illogical, unless on the assumption that the scheme of British justice is terribly faulty. If a judge is bound hand and foot to follow a routine so rigid that he is liable to give sentences that he himself feels to be unjust, there would be some sense in the idea of the executive officer asking him, "in the case of A or B did you give a just or an unjust decision?" But if it may be reckoned, that as a rule, a judge, at all events, thinks that the sentence he records is just, how can he do otherwise, when the executive power refers the pardon question to him, than say that he thinks his decision ought to stand? Nor can it be alleged, there are *nuances* of guilt that a judge may feel but cannot recognize in court. The theory of criminal law is, that statutes define punishments so broadly, leaving so wide a range of discretion to the court, that the judge is enabled to consider these *nuances* in passing sentence. True, the statutes, though they profess to be thus elastic, are often still a great deal too rigid; but then surely orthodox practice should bind a judge, constrained by a clumsy law to give a sentence he felt to be unjust, to take the initiative in seeking the executive pardon for the victim. The true character of the executive pardon emerges from these considerations clearly enough; it does not constitute the executive power a Court of Criminal Appeal, but it is safe to go further than this, and venture on something more satisfactory than a negative. The Royal pardon, of course, is first of all, an attribute of sovereignty, which, while sovereignty exists, needs no excuse for its arbitrary exercise, nor for its arbitrary denial. If its denial ever leaves an innocent man to suffer punishment, so much the worse for law, but that is another branch of the subject. In modern times, when political refinements aim at leaving sovereigns as little sovereignty as possible, the pardon becomes a means of letting off offenders whom the consensus of opinion—taking the place of the sovereign's personal fancy—is in favor of letting off. The difficulty of getting at that consensus is the torment of home secretaries. Of course memorials are false guides—newspapers are almost equally so—faithfully representing public opinion only in respect to tendencies that can be estimated in reference to long periods of time, never in respect to individual incidents. All that the home secretary or Provincial Governor can do is to try and find out what the consensus of opinion ought to be and work on those lines."

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, Sept. 13, 1878.

JOHNSON, J.

MACDONALD v. Hon. J. G. JOLY et al., and CHAUVEAU and PETERSON, *mis en cause.*

Injunction—Contempt—Railway.

Where an injunction, which *primâ facie* appears to be legal and valid, has been issued by a judge of the Superior Court, and the parties to whom the writ was addressed have disregarded it, the Court will not consider an application to revise the order for injunction while the parties remain in contempt.

The Government of the Province of Quebec having adopted proceedings to take possession of the Montreal, Ottawa & Occidental Railway, Mr. Macdonald, the contractor for building the railway, who claimed a large balance due to him, obtained an injunction from a judge in chambers to stop the proceedings. This writ was disregarded by Mr. Peterson, the government engineer, whereupon a motion was made on behalf of the contractor that he be committed for contempt.

JOHNSON, J. In this case a motion to commit Peterson, one of the defendants, and also Mr. Chauveau, the Sheriff, for contempt in disregarding an injunction, was made and answered on Friday the 6th, and part of the answer then made by both of these gentlemen depended upon a question which they raised by a motion to revise the order of Mr. Justice Rainville upon which the injunction was issued; and the grounds urged for revising it were substantially that it had been improvidently issued, because the proceedings complained of in the petition for injunction were taken under an order of the Executive Council of the Province, made in pursuance of the authority given by the Provincial Act, 32 Vic., Chap. 15, having reference to the resumption, under certain circumstances,

of public works. The papers were put before me the following day (Saturday), and I had but a very short time to look at them, and on Monday I requested the counsel to speak to a point that had presented itself to me, and counsel were heard upon that point the day before yesterday. I have now, therefore, to give judgment on the motion for contempt and on the answer that is made to it; and first as to the motion to revise the order for injunction: I am of opinion that that motion cannot be granted, and therefore that that part of the answer made to this proceeding for contempt fails. I do not regret the discussion that took place the day before yesterday as to whether the act of 1869, c. 15, gave the Provincial Government power over any but Provincial works, because too much light cannot be thrown upon so important a subject; but I observed to counsel then, and I must observe again now, that I am concerned only at present with the proceedings for contempt; and as regards the question whether a contempt has been committed, it is immaterial whether a good defence can ultimately be made to this injunction or not, the question at this moment being only whether this order, on the face of it, is such a nullity (as a necessary conclusion from what is alleged in the Petition) that it could be treated as if it had no existence; because if the learned Judge saw on the face of this petition that it was averred, and sworn to, as it undoubtedly was, that the Company from which the Quebec Government purchased being a Federal corporation had no power to sell, and the Quebec Government no power to buy; and if he further saw, as he might have seen, that in another case to which the Quebec Government was itself a party, it had been held that they had nothing, at the very utmost, but proprietary rights in this railway after it had ceased to be a Provincial work, and had changed its character into a Federal railway, it will hardly be contended that, under such circumstances, he ought not to have granted the injunction; indeed, it appears plain that the learned Judge, who is known to be one of the most accurate and painstaking judges on the Bench, would have violated his duty if he had refused it; for, after all, whether Mr. Macdonald's asserted rights ultimately prevail or not was not the question; whether those rights involve, as he asserts, over a million of dollars, or whether it ultimately turns out that he has nothing to lose, makes no difference. There was one right that he clearly had when he asked for that order—a right common to the wealthiest contractor and the humblest laborer on the line, both exactly to the same extent, neither more nor less,—and that was the right to be heard, and to have his case heard, and to make those of whom he complained come and answer him, and show their right, if they had any; and he got that right acknowledged, and properly acknowledged; and those to whom the injunction was addressed might have come and answered him, and have exercised their undoubted right also of being heard; but, instead of that, it is asserted that they set themselves above the law, and therefore the question now is whether this was a legal injunction *prima facie* to be regarded and obeyed, or whether these gentlemen, without giving themselves the trouble to come and answer it at all, could disregard and disobey it, —in one word, whether the authority of the Queen, conveyed in the usual form of a writ, under the seal of her Court, can be overpowered by the mere brutal assertion of force. I say that is the question now, and so on the clearest grounds it is the question, if there is to be in this country such a thing as liberty under the law. It is, indeed, conceivable that the rights of the executive administering different departments of the Government for the public may have been vested in them in a different form, as regards the mode of their exercise, from those of individuals; but the exercising of those rights must be subject to the law of the land, and it appears to me that in a country possessing at least some of the essential forms of the English political constitution, it ought to be obvious to every one that there is and can be no power that is not in some shape amenable to the law, or that can venture, at least as far as the instruments of that exercise are concerned, to set the supreme authority of the law at defiance. It is clear therefore under this view of the case, that it would be equally premature, at this moment, to say anything as to the ultimate validity on the one hand of this writ of injunction, or on the other of the Lieutenant-Governor's warrant that may be opposed to the injunction on the merits. All we are concerned with now, having once

ascertained the legal existence of the writ, will therefore be the facts that constitute the contempt complained of, and those that constitute the answer to it. These facts are, as far as the sheriff is concerned, distinctly traversed; and I think fairly and successfully traversed. All that was done by that officer was done previously to his getting notice of the requirements of the writ. In Mr. Peterson's case, however, the matter stands very differently. He does not traverse the facts at all; but merely justifies them by setting up the warrant and saying that he acted in obedience to it. As far as regards Mr. Chauveau, therefore, the plaintiff will take nothing by his motion for contempt against him and it will be dismissed, but without costs. In the case of Mr. Peterson, though I have said, and still say, that as a matter of law his position is a very grave one, I should be sorry to believe that that was the light in which the matter presented itself to him, for he says he acted under advice, and the circumstances were undoubtedly such as would impose upon him. Although, therefore, he may be without excuse in law, there may have been much to excuse him in point of fact, and the judgment I am about to give is one that will be suited to the singular circumstances of the case. This gentleman seems to have had everything on his side except the law, and that was clearly against him. The law is supreme, and, unless we are in a state of anarchy, it must be so held and regarded by all men, and they can only disregard it at their peril. The law, in this case, received its clearest expression in the terms of the writ that Mr. Peterson had seen, and that writ told him and all concerned to stop for the present, and to come before the Court and make proper answer to it, where they could be heard and their rights decided. It cannot, in a civilized community, admit of doubt that it was Mr. Peterson's duty to obey this writ. The judgment of the Court upon this motion is, that Peter Alexander Peterson is adjudged guilty of contempt; and, as regards the punishment for his offence, the Court reserves to itself to pronounce hereafter, and it is further ordered that he enter into his own recognizance in the sum of $1,000, to be and appear in his own proper person before this Court whenever he shall be called upon by a twenty four hours' notice in writing so to do—then and there to receive the judgment of the Court in his own person, or (if he shall make default to appear) in his absence—and that he pay the costs of the present motion.

Carter, Q.C., representing the Government, took exception to the judgment dismissing his motion to revise the order, and intimated that an appeal would be had.

Doutre, Q.C., for Macdonald.

Carter, Q.C., for the Quebec government.

COURT OF QUEEN'S BENCH—APPEAL SIDE.

Montreal, Sept. 18, 1878.

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

MACDONALD v. JOLY et al.

Injunction—Contempt—Appeal.

Held, that a party seeking relief from an injunction, and whose motion to dissolve it has been rejected by the lower court, may, in the discretion of the court, be permitted to appeal, though he appears to have disregarded the injunction and to be in contempt of court.

This was a petition to be permitted to appeal from the judgment reported above.

RAMSAY, J., dissenting, remarked that as a general rule it would be extremely inexpedient to grant lightly an appeal in a proceeding of a summary character, and here there had been brought to the knowledge of the court another matter which should prevent it from passing at this time upon the question. It appeared that this writ of injunction had been absolutely set at defiance by the persons to whom it was addressed. They had not obeyed the writ, and so long as they had not obeyed the writ, it appeared to him that they had no right to appeal or proceed upon the original suit. The authority for this was very ancient. It was to be found in Comyns's Digest under the words Chancery and Injunction The rule was laid down in the most express terms. The first thing to be done was to obey the order of the Court, and however illegal the order might be it must be obeyed before the party seeking relief from it could come into Court and take any proceeding whatever. His Honor was under the impression that unless this rule was adhered to, parties would frequently delay to obey the orders of the Court, and appeal to avoid compliance. He did not feel

called upon at this stage to express any opinion upon the legality of the proceeding adopted here by the Government.

MONK, J., also dissented, considering it irregular that a motion of this description should be made to dissolve an injunction when the same grounds were taken in a *défense en droit*. His Honor thought the appeal should be refused on the ground that it was one of those judgments that could be remedied by the final judgment, and to allow an appeal would be to defeat the object of the injunction.

DORION, C. J., after referring to the terms of the contract between Macdonald and the Government, proceeded to say that long after the time when the contract was to be completed, there was a dispute between him and the Government as to the amount due. Macdonald claimed that there was a large amount due him. He admitted that the works were not completed, but he alleged that this was the fault of the Government, which did not allow him to complete them. The petitioner went on to say that an order in Council had been passed, and that the Government were going to dispossess him of the road. He alleged that this would be an injury to him, and he asked for a writ of injunction, saying that Peterson, the engineer, had given a notice interfering with his possession, and he prayed for an injunction to prevent interference with him until the works were completed and paid for. So the petition was that of a contractor who said: "I have got your property, your railroad; I contracted to give it over in a certain time, it is not completed; I will keep it until it is completed, and I will get an order to prevent any interference with me because I am not paid for my work." If Macdonald might do this, the contractor for building or repairing a house might do it. He might say, "I will keep your house until I have finished the work." It was an important point, whether a man, not alleging any title, could have a right of this kind against the proprietors: the question was so novel that it deserved to be looked into. It might be said the injunction was a remedy of an extensive kind; but on this account it was liable to abuses. Story says it ought to be granted with extreme caution, and to be applied only in extreme cases. This case was of great importance, affecting a long line of railway. The injunction, moreover, had been granted without any notice to the adverse party. But the only thing the Court had to look to at present was this: Was there something on the face of the proceedings that deserved to be inquired into, to see whether this contractor had a right to keep the property as long as he had not completed his contract? The majority of the Court thought that was a very important question, and one which might properly be brought to the Court of Appeal, but this Court was not going to suspend the proceedings in the Court below. At present the only question was this: was the question submitted by the motion to dissolve the injunction of sufficient importance to deserve an appeal? It might be said that this could be remedied at the final judgment, but an important injury might be sustained before a final decision was arrived at, perhaps ten years hence. Therefore, the Court considered that it was one of those cases in which the parties should be heard. The judgment here would not affect the proceedings in the Court below for the execution of the injunction, which must be executed in the meantime. The judgment of the Court simply went this far: a motion was made to dissolve the injunction; that motion was rejected, and this Court considered that there was enough to authorize the Court to take notice of that judgment. It might be said the granting of the injunction was in the discretion of the Court, but this was rather an extraordinary case, for which no precedent had been adduced, of such a writ being addressed to such officers of the Government.

CROSS, J., remarked that it was a case of great importance, and there could not be much doubt that it was a case in which the Court had a right to grant an appeal. He wished to say a word with reference to the reason given by Mr. Justice Ramsay. Suppose there had been no motion to dissolve the injunction, and that there had been a motion to attach Mr. Peterson for contempt. If Mr. Peterson had presented a petition to this Court to be relieved from the judgment, this Court would have said, "You are in contempt of Court; you must purge yourself of that contempt, and we will not interfere until you have done so." Even in such case, this Court might interfere if it saw a glaring error in the judgment. But here, the case was different, the party said, "We have made in

good faith a motion to dissolve the injunction, and we have had an adverse judgment on that motion. We conceive that we are aggrieved by the judgment of the Court below, and we desire to appeal." The authorities cited by Mr. Justice Ramsay showed that the Court below was entitled to see that its order was obeyed before any other proceeding was allowed; but the incident of a proceeding for contempt was not to prevent the Court of Appeal from interfering with the question raised.

Appeal allowed.

JONES (deft. in the Court below), appellant; and THE MONTREAL COTTON CO., (plffs. below) respondents.

Company—Subscription—Conditions—Payment of Calls.

The defendant subscribed for stock in a Company about to be formed, and received a letter from the secretary stating that his stock was taken on the same condition as that subscribed by three persons whose names preceded his on the book, and who had appended the condition to their subscription that the company was to be a hydraulic company. The defendant did not append such condition. The hydraulic company was not formed, but a cotton mill company only. *Held*, that the defendant having signed the book unconditionally was not entitled to be relieved from liability for calls.

RAMSAY, J., said the action was brought by the Cotton Company, claiming $750, calls on stock. The answer of Jones was that he never agreed to become a shareholder in the Cotton Company, respondents. It appeared that there were two schemes which were being promoted at the same time—one for organizing a company to turn to account certain water powers, and the other for working a cotton mill simply. Jones did not wish to take any part in a cotton company, but only in the hydraulic scheme for turning to account the water privileges. Certain other persons were of the same opinion as Mr. Jones; viz., Messrs. Brydges, Cramp and Thomas, and when they took their stock, they distinctly entered on the subscription list that they would not take any share in the cotton company. Mr. Jones was of the same frame of mind, but whatever may have transpired between him and the Secretary Mr. Hobbs, it appeared that Mr. Jones wrote down his name without any restriction. Only the cotton company was formed, and Messrs. Brydges, Cramp and Thomas representing that this was a violation of the conditions, were relieved from their stock. Mr. Jones was in a different position. He had not written anything on the list to qualify his subscription; all that he could produce was Mr. Hobbs' letter, that he had taken stock on the same condition as Messrs. Brydges, Cramp and Thomas. On this he claimed to be exonerated too, but it appeared to the Court that the position of the two parties was totally different. It was competent for the company to exonerate Messrs. Brydges, Cramp and Thomas; but even if they were improperly relieved, Mr. Jones could not avail himself of that. He might have some action against these gentlemen, charging that they had been improperly exonerated; but it was no answer to the present action, asking him to pay his own stock. The sole question here was, what was the position of Jones? Had he bound himself to pay for his stock if the hydraulic scheme was left out? The Court thought he had. The judgment maintaining the action would, therefore, be confirmed.

Davidson & Cushing for Appellant.
Lunn & Davidson for Respondents.

ELLIOTT es qual. (plff. in the court below) appellant; and THE NATIONAL INSURANCE CO. (defts. below) respondents.

Insurance—Insolvency—Transfer—Notice.

An official assignee, after receiving an assignment of an estate, insured the stock, making the loss, if any, payable to the estate. The creditors subsequently elected another assignee who, on a loss occurring, claimed under the policy. *Held*, that the insurance passed to the new assignee without notice to the Company.

DORION, C. J., said one Coté, a merchant tailor at St. Johns, had failed, and on the 1st May, 1876, assigned his estate to Mr. Auger, official assignee. On the 6th May Mr. Auger effected an insurance for $3,000 on the stock, the loss to be payable to the estate of C. H. Coté (the insolvent.) In the course of time the creditors met and appointed the present appellant as assignee to the estate. A loss occurred, and in consequence of the loss the present action had been brought by Elliott as assignee to the estate. The Company pleaded several pleas, alleging that there had been a change of possession by the appointment of a new assignee, and, in the second place, that Coté was declared to be the occupant of the premises, but was

not in occupation of the store either at the time of the insurance or at the time of the fire. The principal question was this: After the estate was transferred, did the insurance inure to the benefit of the new assignee without notice to the Company? The Court below held that it did not, and dismissed the action. As to the occupation, it appeared that Coté continued to occupy the dwelling above the store up to the 1st May, the store being closed. The Court was, therefore of opinion that the description was a correct one, and there could be no doubt that the agent at St. John's who took the risk knew all the facts. Under these circumstances the Court was of opinion that Auger, as official assignee, insured in his official capacity for the estate, and he provided for the case in which he should cease to be assignee, and made the insurance payable to the estate. The judgment below, which dismissed the action, must, therefore, be reversed.

Davidson & Cushing for appellant.

Lunn & Davidson for respondents.

CONTRIBUTORY NEGLIGENCE.

[Continued from p. 437.]

Nicholson v. *Erie Railway Co.*, 41 N. Y. 525.—The deceased was killed by defendants' cars while he was crossing their track. The track in question was a branch from their main track, into the premises of an iron company, and was jointly owned by the defendants and that company. The deceased had shortly before been in the employment of that iron company, and with other of the employees had been in the habit of crossing the branch track, without objection, on his way to and from his home. On this occasion he was holding down his hat to shield his face from a storm. Some coal cars of defendants, which had been standing on the branch track, without having their brakes set, were started by the wind, and driven up a slight acclivity, struck the deceased and killed him. He could have seen them by looking, as they were only two feet from him as he stepped on the crossing, but he did not look. The judge charged that it was the duty of defendants to set the brakes; there was a verdict for the plaintiff, which was now set aside.

Three opinions were delivered—by Smith, Earl, and Lott, JJ. Judge Smith held that the defendant owed the deceased no active duty, as he had no legal right on the premises. Judge Earl held the same substantially, except that he thought the deceased was lawfully on the premises, but added that at all events they were bound only to the exercise of ordinary care, and were not negligent under the circumstances. Judge Lott held that the deceased was guilty of contributory negligence, and gratuitously added his opinion that the defendants owed the deceased no active duty. With these three judges three others voted for reversal, and two were for affirmance.

Remarks—This would seem to be a clear case of contributory negligence, and for a nonsuit, if there ever was one, but the reversal seems to have been put on the ground that the defendants owed deceased no duty to set the brakes. The three judges who wrote, and Judges Grover and Ingalls voted on this ground; Judge Sutherland was for reversal on the ground of misdirection, and that it was a question for the jury whether the omission to set the brakes was negligence; Judges Lott and Grover also held that the contributory negligence was fatal to a recovery.

Harty v. *Cent. R. R. Co. of N. J.*, 42 N. Y. 468.—The deceased was walking along the track, not at a crossing, and stepped from one track to another, to avoid a coming train, and was killed by another coming up behind him. By looking he could have seen the danger, and he was familiar with the locality, and it was unnecessary for him to stand on the track. Held, first, that the defendants were not guilty of negligence, and second, that the deceased was guilty of contributory negligence.

Lannen v. *Albany Gas-light Co.*, 44 N. Y. 459.—Plaintiff was an infant. A leak had been caused in a gas-pipe in a house, owned by her father and occupied by him and others, by a tenant's piling coal against the pipe. An employee of defendants, sent by them to repair, lighted a match in the cellar and caused an explosion which injured plaintiff. There was no proof of any negligence on the part of plaintiff or her father, but even if there had been, the court said it was not contributory, for the mischief was caused solely by the negligence of defendants' servant.

Barker v. *Savage*, 45 N. Y. 191.—Plaintiff, a lame woman, 64 years old, was crossing a street

in the city of New York, at 10 o'clock in the forenoon, and the driver of a cart, going at the rate of 4 miles an hour, when at a distance of twelve feet from her, called to her, which call was heard by more distant persons, but she kept on and was run down and injured. Held, that a charge that the plaintiff was only required to look ahead along the crossing, and if in so looking she discovered no obstacle, she was not negligent in proceeding to cross, was error.

Gorton v. *The Erie Railway Co.*, 45 N. Y. 660, reiterates the doctrine of the *Havens* case and the *Wilcox* case.

Downs v. *N. Y. Cent. R. R. Co.*, 47 N. Y. 83.—Plaintiff, an infant, twelve years old, traveling with his mother on defendants' cars, and unable to find a seat in the car with her, by her permission went into another car, and remained there until the train reached a station; in his effort to return to his mother he received an injury. Held, that the mother's conduct was not *per se* negligent.

Ihl v. *Forty-second St., etc., Railroad Co.*, 47 N. Y. 317.—A child, three years old, was killed while crossing defendants' track unattended save by a little child nine and a half years old. If the deceased exercised due care, and defendants were negligent, the defendants would be liable without regard to the parents' negligence; and negligence in so young a child, when the parents and attendant were not negligent, would not absolve the defendants.

Davis v. *N. Y. Cent., etc., Railroad Co.*, 47 N. Y. 400.—This was a case of conflicting evidence as to the negligence of the deceased in approaching a crossing. A nonsuit was set aside. The court held, substantially, that a traveller, in approaching a railroad crossing, is required to make a vigilant use of his senses to ascertain if a train is approaching, and if by such use of his faculties, while approaching, the approach of a train may be discovered in time to avoid a collision, an omission to exercise them is such contributory negligence as will bar a recovery for an injury from a collision. But the traveller is not bound to stop, or leave his vehicle and go upon the track, or stand up in his vehicle and go upon the track in that position, in order to get a better view.

Madden v. *N. Y. Cent., etc., R. R. Co.*, 47 N. Y. 665.—A refusal to charge "that if the jury believed that the deceased, before she reached the track, saw the approaching train, and notwithstanding this, went upon the track, where she was hit by the car, she was chargeable with negligence and could not recover," was held error.

Filer v. *N. Y. Cent., etc., Co.*, 49 N. Y. 47.—The plaintiff desired to leave the defendants' train at Fort Plain, where it is advertised to stop; the train did not stop entirely, and while it was moving very slowly, she was directed by a brakeman to get off, and told by him that it would not stop or move more slowly; another passenger got off safely; she followed and was injured. Held, that the question of her negligence was a proper one for the jury. A new trial was granted.

On a new trial, there was conflicting evidence whether the direction to get off was by a brakeman or by a person not connected with the running of the train. The judge charged the jury that this was immaterial; that it was for them to say whether it was prudent for her, acting under the advice of anybody, to attempt to alight. Held, error; that if the direction had been given by an employee she had a right to assume that it was safe to attempt to leave the train even while it was under way, but not so if it was given by another passenger. (59 N. Y. 351.)

On a third trial, the evidence as to whether the person in question was an employee of defendant or not was still conflicting, and it was held properly submitted to the jury and a verdict was sustained. (68 N. Y. 124.)

Phillips v. *Rensselaer, etc, Railroad Co.*, 49 N. Y. 177.—Plaintiff attempted to get on a train slowly passing the station where he had bought a ticket; the name of the station was called by some one on the train; others were getting on, and the plaintiff and others had got on and off at this station while the train was in motion; the steps being full of passengers, a jerk of the cars threw him off, and he was injured. Held, that he was negligent, and a nonsuit was sustained. The chief judge dissented.

Cosgrove v. *Ogden*, 49 N. Y. 255.—It is not negligence *per se* for a parent, living on a quiet street where few vehicles pass, to permit a child six years old to go unattended upon the street. It is a question for the jury.

Silliman v. *Lewis*, 49 N. Y. 379.—A want of

proper lights upon the plaintiff's vessel, which so deceived defendant that his vessel ran into the plaintiff's, would be such negligence on the plaintiff's part as to prevent a recovery, unless the defendant knew the true facts and with reasonable care could have avoided the injury. In this case as there was some evidence to repel the presumption of the effect of the plaintiff's negligence in not having proper lights, a nonsuit was set aside.

Keating v. *N. Y. Cent., etc., Co.*, 49 N. Y. 673.—Plaintiff attempted to get on a train standing at a station, not from the station platform, but from the opposite side of the train, where passengers frequently got on and off to the knowledge and without any objection on the part of the defendants' employees. As she stepped on the car, the train started with a violent jerk, throwing her off, and injuring her. Held, that the question of her negligence was for the jury.

Hazman v. *Hoboken, etc., Co.*, 50 N. Y. 53.—Plaintiff, endeavouring to go upon defendants' ferryboat, and obliged, in consequence of the crowd coming off, to stand upon the stringer separating the foot passage from the carriageway, was injured while in that position by the defendants' negligence. It was held to be a question for the jury whether the plaintiff was negligent in occupying such a position.

Eaton v. *Erie Railwry Co.*, 51 N. Y. 544.—A train of cars was standing upon the defendants' track partly on a crossing, and the plaintiff wished to pass with his team, there being room to do so. Some person, not an employee of defendants, whom he asked if he could pass, told him he had better not pass. After waiting a few minutes he attempted to lead his horse across, when the train, without any warning, backed up and injured the horse and wagon. Held, that the question of contributory negligence was for the jury.

Maginnis v. *N. Y. Cent. etc., Co.*, 52 N. Y. 215.—Deceased attempted to cross a street in the evening. A long train, without any lights in the rear, was backing down, but had so nearly stopped that no motion was perceptible, and she then attempted to cross, when without warning the brakes were let off, and the train ran against her. Held, that it was a question for the jury whether she was negligent.

Totten v. *Phipps*, 52 N. Y. 354.—Deceased was lessee of the third floor of defendants' building, the lower portion of which was used and occupied by defendant. In the hall leading from the outer door to the stairs was a hatchway, closed by a trap-door, occupying nearly the whole passage, used and kept open by defendant in the day-time, but usually closed at from 6 to 8 o'clock P. M. Deceased went to the premises at between 8 and 9 o'clock P. M. without a light, and the trap-door being open, fell through it. The court held that whether she was negligent was a question for the jury.

Hackford v. *N. Y. Cent., etc., Co.*, 53 N. Y. 654.—The court held that in an action to recover damages for injuries received at a railroad crossing by a traveller on a highway, if some act or omission, on the part of the person injured, which of itself constitutes negligence, is established by undisputed evidence, it is the duty of the court to nonsuit; but if the fact depends upon the credibility of witnesses, or inferences from the circumstances, about which honest men might differ, it is a proper question for the jury.

Spooner v. *Brooklyn City Railroad Co.*, 54 N. Y. 230.—Plaintiff was a passenger on defendants' sleigh, and the seats being all taken, stood on the side foot-board upon which passengers usually stood when the seats were occupied. While in this position he was injured by a passing vehicle. Held, a proper case for the jury.

Belton v. *Baxter*, 54 N. Y. 245.—Plaintiff, desiring to cross a street in the city of New York, saw a car approaching rapidly, and behind it a cart approaching in the track still more rapidly, and calculating that he could cross before the cart could get up, he attempted to cross in front of the car, and did pass, but was struck by the cart. Held, negligence *per se*. (This was in the Commission of Appeals.)

The case was re-tried and came before the Court of Appeals, in 58 N. Y. 411, and on evidence somewhat different, it was held a proper case for the jury. The only difference was that the plaintiff testified that he watched the cart till he lost sight of it; and he did not suppose it would turn off the track, and come ahead of the car on the other side quickly enough to catch him, as it was evident it did.

Remarks.—This seems a distinction without a difference. In both cases the plaintiff mis-

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

on the highway from using his senses to detect the approach of trains. He has no right to interpret his absence as an assurance of safety.

Remarks.—Another feature of the *Ernst* decision is here disapproved.

Salter v. *Utica, etc., Railroad Co.*, 59 N. Y, 631.—Held, that where the severity of the weather requires a traveller upon the highway to protect himself from it, as for example by ear laps and tippet, if the means adopted impair his ability to detect danger, and he be injured at a railroad crossing, he is not absolved from the charge of negligence; but unless it is certain that the means used had that effect, it is a question for the jury.

Thurber v. *Harlem, etc., Co.*, 60 N. Y. 326.—A boy 9 years old, with two other lads, on his way to school, attempted to cross a horse railway, and was injured by a car. The other two passed safely, and he passed one horse and was hurt by the other. Held, a case for the jury.

The court held that the degree of care required from an infant of tender years, the omission of which constitutes negligence, is entirely different from that required of an adult. It is to be measured in each case by the maturity and capacity of the individual, the law exacting a degree of care proportionate to that. An error of judgment does not condemn the act as rash, or even negligent. It is for the jury to say whether a person of ordinary prudence and discretion might not, under the circumstances, have formed and acted under the same judgment.

Carr v. *N. Y. Cent. Co.*, 60 N. Y. 633.—The evidence showed due care on the plaintiff's part in looking in one direction and waiting till a train had passed; whether he exercised due diligence in looking the other way, was doubtful; yet it was held a proper case for the jury.

Ponlin v. *Broadway, etc., Co.*, 61 N. Y. 621.—Plaintiff was leaving a street car, and as she put one foot to the ground, her hoop-skirt caught on a projecting nail in the platform; the conductor started the car at this instant, and she was thrown down and injured. Held, that she was not, as matter of law, negligent in wearing a hoop-skirt; that it was not, as matter of law, unnecessary; and that a lady, thus attired, is not, as matter of law, bound to be extra careful in managing *her* "train."

CURRENT EVENTS.

UNITED STATES.

Damages Against a City for Icy Sidewalks.—In *Dooley* v. *City of Meriden*, 44 Conn. 117, the action was brought against a city for injury received by slipping on an icy sidewalk, which the city had neglected to keep free from ice. For about thirty-five feet along the sidewalk in question there was ice upon the sidewalk, and had been for about a week before the injury complained of happened. The sidewalks on each side of this one were free from ice, but no attempt had been made to clear this one, although after the ice was formed the weather was so mild that this could have been done by the most easy methods. The court held that the city was liable for the injury. In *McLaughlin* v. *City of Corry*, 77 Penn. St. 109; 18 Am. Rep. 432, it is held that while a municipality cannot prevent the general slipperiness of its streets, caused by snow and ice during the winter, it can prevent accumulations of snow and ice in the shape of ridges and hills. It is, therefore, liable for personal injury from such accumulations, happening to one without fault of his own, and if the obstruction is one of such long continuance as to be generally observable, the city would be charged with constructive notice thereof. In *Collins* v. *City of Council Bluffs*, 32 Iowa, 324; 7 Am. Rep. 200, the plaintiff was injured while passing along a street in the defendant city by a fall, caused by an accumulation of snow and ice on the sidewalk, and it was held that defendant was liable. See the elaborate note to the last-mentioned case in 7 Am. Rep. 206, where the various authorities are collected and compared. The leading case upon the subject is *Providence* v. *Clapp*, 17 How. (U. S.) 161. Here it was held that it is the duty of a city under a statute requiring it to keep its highways safe and convenient, after a fall of snow, to use ordinary care and diligence to restore the sidewalk to a reasonably safe and convenient state.

The Gift of a Check.—In *Simmons* v. *Cincinnati Savings Society*, 31 Ohio St. 457, the mother of plaintiff, who was lying sick at plaintiff's house, desired to give plaintiff about three hundred dollars which she had on deposit with defendant. To effect this object, she

signed and delivered to plaintiff a check on defendant for the amount of the deposit. Before the check was presented the mother died. The court held that until the check was paid or accepted the gift of the money it represented was incomplete, and that the death of the maker operated as a revocation. In *Jones* v. *Lock*, L. R., 1 Ch. 25, a father put a check into the hands of his son nine months old, and said he gave that to the child for himself. Afterward he said it was his purpose to give the amount of the check to the child. After his death the check was found among his papers and it was held that there had been neither a gift nor a valid declaration of trust. It is stated in 1 Pars. on Cont. 237, to be the prevailing rule that the donor's own note or his own check or draft, not accepted or paid before his death, does not pass by gift *causa mortis*. But it has been held the delivery by a dying husband of the book of a savings bank, showing deposits by a deceased wife, with a verbal gift thereof, passed to the donee the moneys so deposited. *Tillinghast* v. *Wheaton*, 8 R. I. 536; 5 Am. Rep. 621. See, also, to the same effect, *Camp's Appeal*, 36 Conn. 88; 4 Am. Rep. 39. Bank notes may be the subject of a valid *donatio causa mortis* (*Hill* v. *Chapman*, 2 Bro. Bh. 612) and probably the written promises of others than the donor may be so, although it is said that the rule on this subject can hardly be considered settled. See *Miller* v. *Miller*, 3 P. Wms. 356; *Bradley* v. *Hunt*, 5 G. &. J. 54; *Parish* v. *Stone*, 14 Pick. 207; *Bank of Republic* v. *Millard*, 10 Wall. 152; *Second Nat. Bank* v. *Williams*, 13 Mich. 282; *Hewitt* v. *Kaye* L. R., 6 Eq. 198. In *Grymes* v. *Hone*, 49 N. Y. 17; 10 Am. Rep. 313, it was held that an assignment of shares in a bank would vest the same in the donee, although the shares were not transferred on the books of the bank before donor's decease.

ENGLAND.

PARTNER ENGAGING IN OTHER BUSINESS.—In *Dean* v. *MacDowell*, 38 L. T. Rep. (N. S.) 862, the English Court of Appeal held that if profits have been made in any other business by a partner in violation of a covenant not to engage in any other business, the profits will not be decreed to belong to the partnership unless they have arisen, (1) from employment of the partnership property, or (2) from transactions in rivalry with the firm, or (3) from some advantage obtained by the partner by virtue of his being a member of the firm. In all other cases of breach by a partner of a covenant not to engage in any other business, the only remedy of the aggrieved co-partners is by an action for an injunction or a dissolution of the partnership; or, after the expiration of the partnership, by action for damages. In this case, the plaintiffs and the defendant entered into business as salt merchants and brokers, and by the articles of partnership mutually covenanted not to engage alone or with any other person, directly or indirectly, in any trade or business, except upon the account and for the benefit of the partnership. Two years before the expiration of the partnership, by lapse of time, the defendant purchased the business of a firm of salt manufacturers, and kept the matter secret from the plaintiffs, putting his son into the business so purchased till the expiration of the partnership, when the defendant openly entered into the business of salt manufacturing, which was carried on in the name of the firm from which he had purchased it. The salt manufactured by the latter firm continued to be sold on commission by the plaintiffs' firm till the expiration of the partnership, from which time the defendant sold the salt himself, without employing a broker. The plaintiffs did not discover this trading by the defendant till after the expiration of the partnership, whereupon they filed a bill to make the defendant account to the partnership for the profits made by him in the other business during the partnership. The court held that the plaintiffs had no right to an account of the profits. The case is distinguished from that of *Somerville* v. *Mackay*, 16 Vesey 382, and other like cases, where it is held that if any partner has withdrawn or used the partnership funds or credit in his own private trade or private speculation, he will be held accountable, not only for the interest of the funds so withdrawn or credit misapplied, but also for the profits which he has made thereby. See, also, *Stoughton* v. *Lynch*, 1 Johns. Ch. 467, and 2 id. 210; *Brown* v. *Litton*, 1 P. Wms. 140; *Crawshay* v. *Collins*, 15 Ves. 218.