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DISSENTIENT OPINIONS IN THE PRIVY COUNCIL.

In discussing, a few weeks ago, the question of suppressing dissentient opinions in the Supreme Court, reference was made to the Judicial Committee of the Privy Council as an appellate tribunal which never revealed the fact of a dissent, or the name of a dissentient member. That is the practice, but it is not invariable. It appears that a dissenting Judge may express his opinion if the majority of the Committee do not refuse him permission to do so. As a matter of fact, in two cases of importance of no very remote date, the dissent of members of the Committee was declared. That of the Bishop of London and of Lord Justice Knight Bruce was stated in the celebrated Gorham case, and in the case of "Essays and Reviews" the dissent of the two Archbishops was declared. In other cases of general interest the names of the dissentient Judges have been well known to the bar.

Not long ago a curious incident arose out of a dissent in the Privy Council. In the famous Ridsdale judgment—one of the cases springing from questions of vestments and postures which have agitated the ecclesiastical atmosphere in England—no dissent was declared from the bench. But it was generally known that two or three members of the Committee did not concur in the judgment, and their opinion, though bottled up at the time, exploded some six months afterwards with intensified vehemence. It happened in this way. A clergyman wrote a letter to a newspaper, in which he alleged that the Lord Chief Baron, who sat in the Ridsdale case, had authorized him to state that the judgment of the Privy Council was "an iniquitous one; that it was not a judgment founded upon law, but upon policy." This severe criticism of his colleagues led to a correspondence between the Lord Chief Baron and the Lord Chancellor, published in the *Times* of the 29th October last, in which Sir Fitzroy Kelly practically admitted that he had spoken in terms of disparagement of his colleagues, though he repudiated the use of the term "iniquitous." It appeared that the Chief Baron desired that his dissent should be made public at the time the judgment was delivered, but his request to be allowed to state his view was refused by the majority of the Committee. The result was that his dissent was made known under circumstances which gave it much greater prominence than it would otherwise have attained.

It may be remarked that the press on that occasion did not seem to regard the system of suppression as one to be commended. The *Times*, referring to the fact that the Lord Chancellor had invoked the rule made in 1627, remarked: "We are quite sure that a defence of it for which the Lord Chancellor has to go back to 1627 is not adequate. We wonder whether there is any other country in the world except England in which, upon a question of procedure in a Court of about a quarter of a century's standing, any one would go back two hundred and fifty years. The Order of 1627, as the Lord Chief Baron says, was made when the Privy Council had very different work to do, when its occupation was very different from that of a Judicial Committee, and when it dealt in a very summary manner with ecclesiastical offences. In point of fact, all the world knew of the dissent of the Lord Chief Baron and of one or two of his colleagues immediately after the decision was delivered. It was commonly discussed in Ritualistic journals, and treated as something very mysterious, instead of being one of the most commonplace of occurrences. The Lord Chancellor must find some better authority than the rule of 1627 if he thinks it worth while to make the Judicial Committee an exception to our other Courts."

The excitement of the Lord Chief Baron was due in part to the fact that as counsel, in consultation with eight others, he had given an opinion in opposition to the judgment of the majority of the tribunal, and yet he was deprived of the opportunity of stating that his views had undergone no change. This bears out the opinion we formerly ventured to express, that the total suppression of dissents is unfair to the Judges themselves as well as objectionable in other respects.

SPECULATIVE CONTRACTS.

The U. S. District Court of Wisconsin, in *Clark* v. *Foss et al.*, has given a decision affecting a very numerous class of contracts entered into at the present day. The action was brought by the assignee of C. B. Stevens & Sons to set aside and cancel certain promissory notes made by the bankrupts in favor of the defendants. It was alleged that the notes were void, being given to secure a consideration arising out of certain option contracts for the sale and delivery of grain, which it was claimed were wagering contracts.

The bankrupts were for many years prior to the fall of 1874, when the transactions occurred, merchants and dealers in grain and produce upon the Mississippi river at De-Soto, Wis., and as such, had for several years purchased and shipped wheat and other grain to the defendants, who were commission merchants at Chicago, and members of the Board of Trade, doing business under the name of S. D. Foss & Co., and had, also, from time to time, speculated in grain in the Milwaukee market, and also in the Chicago market, through the defendants acting as their factors and commission men at that place. They were then in good financial circumstances, though with small capital; had a running account, and were in good credit and standing with S. D. Foss & Co. In October, 1874, the bankrupts ordered defendants, at different times, by telegraph, to make sales of grain for them upon the Chicago market for November delivery, amounting in the aggregate to 70,000 bushels of corn, and 5,000 or 10,000 bushels of wheat. The defendants, upon receiving these orders, went upon the market in Chicago and executed them, by making, as was the custom, contracts, generally in writing, and in their own name, with different parties, for the sale of the grain for November delivery, in lots of 5,000, or multiples of 5,000 bushels, and immediately notified bankrupts by telegram and by letter, of what they had done, and their acts were fully approved by the bankrupts. No "margins" were required to be put up by C. B. Stevens & Co, as they had an account with the defendants, and were accounted by them responsible.

About the time or a little before these contracts matured, the defendant performed a part of them on behalf of C. B. Stevens & Sons, by a purchase and actual delivery of the grain, to the parties to whom the sales were made. The evidence showed that as to 20,000 bushels of corn, there was an actual delivery of the grain, and as to 10,000 more, a delivery of warehouse receipts for that amount. As to the balance of the grain contracted to be sold, the defendants went upon the market and purchased it of different parties and had it ready for delivery; and then finding other parties who had similar deals for November purchases and sales, formed rings, or temporary clearing houses, through which, by a system of mutual offsets and cancellations that had grown upon the board, the contracts were settled by an adjustment of differences, saving an actual delivery and change of possession. It happened that there was a considerable rise in the market price of corn during the month of November; and it was found that after these transactions were closed, there had been a loss to C. B. Stevens & Sons, of something over $10,000, which the defendants, having paid in cash for them on the purchase of the grain, debited to their account, according to the previous course of dealing between the parties.

The notes were soon afterwards given by the bankrupts to secure a portion of the sums so advanced by the defendants for them.

Two years afterwards, on November 19, 1876, C. B. Stevens & Sons filed their petition in bankruptcy, and were on the same day adjudged bankrupts. The assignee in bankruptcy brought this suit to set aside the notes, and in substance claimed that C. B. Stevens and Sons, at the time the orders for the sale of grain were made and executed in October, 1874, had no corn to sell, and no expectation of having any, with which to fill these contracts. That these facts were known to both parties, that is to the bankrupts, and to the defendants, and that it was understood between them at the time, that no grain was in fact to be delivered by C. B. Stevens & Sons, but the contracts were to be settled by the payment or receipt of differences, according as the market should rise or fall in the month of November, and that they were thus mere wagers upon the November market, and as such, contrary to law and void, and that the notes and mortgage confessedly given to secure cash advances made by defendants, as the factors of the bankrupts, and with their approval, to pay the losses sustained upon these sales, should be canceled and delivered up.

The question was whether this should be done.

The Court, adopting the following principles as governing the case, sustained the validity of the notes :—

1. That the weight of authority is that you may go behind the writing and show what the real intent and meaning of the parties were, and if it appears that the writing does not express the real intent of the parties, but is merely colorable and used as a cloak to cover a gambling transaction, the Court will not lend its aid to enforce the contract, however fair it may be on its face.

2. CONTRACT FOR FUTURE DELIVERY.—That a contract for the future delivery of personal property, which the seller has not got when the contract is made, nor any means of getting it, is not void for illegality; that the seller is bound by the contract to deliver the goods, and if he fails, must pay damages.

3. SPECULATIVE CONTRACTS.—That such contracts, though entered into for pure purposes of speculation, however censurable when made by those engaged in ordinary mercantile pursuits, and who have creditors depending for the payment of their just claims upon their prudent management in business, are nevertheless not prohibited by law.

4. WHAT NECESSARY TO VITIATE.—That the substance of the contract itself must control. The secret intention of one of the parties uncommunicated to the other party, not to fulfil his contract, is not enough to make the transaction illegal; the intent that it should be a mere betting upon the market without any expectation of actual performance, must be mutual and constitute an integral part of the contract in order to vitiate it.

In the case of *Jones* v. *Shea*, noted in the present issue, p. 163, a point somewhat similar was raised on the part of the defendants, but in the view taken of the case by Mr. Justice Johnson it became unnecessary to determine to what extent speculative transactions will be sustained by the law.

AGENCY—LIABILITY OF PRINCIPAL—EMPLOYER AND WORKMEN.

[Wm. Evans in London Law Times.]

I. The master or employer is not liable unless on his part there is negligence in that in which he has contracted or undertaken with his workmen, either expressly or impliedly: Wilson *v.* Merry, L. Rep., 1 Sc. Ap., 332. He is liable :

1. Where he personally interferes and an accident happens through his negligence: Roberts *v.* Smith, 2 H. & N., 213. See Ormond *v.* Holland, 1 E. B. & E., 102.

2. Where he neglects to select proper and competent workmen or managers: Wilson *v.* Merry, *sup.*

3. Where he fails to supply adequate resources for the work. Ib., provided the workman has not taken the employment with knowledge of the want of such adequate resources, *infra.*

4. The same remark applies where the master knowingly orders his workman or servant to use unsafe tackle: See Williams *v.* Clough, 27 L. J., 325, Ex. See *infra* for other instances of his liability.

II. When a servant enters on an employment he accepts the service with the risks incidental to it, and if he accepts an employment on machinery defective from its construction, or from the want of proper repair, and with the knowledge of the facts enters on the service, the employer is not liable to any injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment. This danger cannot, however, be aggravated by any omission on the part of the employer to keep such machinery in the condition in which, from the terms of the contract, or from the nature of the employment, the workman has a right to expect that it would be kept: Clarke *v.* Holmes, 7 H. & N., 937; Woodley *v.* Metropolitan Railway Company, 36 L. T. Rep. N. S., 420; Barton's Hill Coal Company *v.* Reid, 3 Macq., 282; Dynen *v.* Leach, 26 L. J., 221, Ex., explained in Mellors *v.* Shaw, 1 B. & S., 446.

III. If the danger is concealed from the workman, and an accident happens before he becomes aware of it, or if he is led to expect, or may reasonably expect, that precautions will be adopted by the employer to prevent or lessen the danger, and from that want of such precaution an accident happens to him before he has become aware of their absence, he may hold the employer liable : Ib.

So far as civil consequences are concerned, it is competent for an employer to invite persons to work for them under circumstances of danger caused or aggravated by want of due precautions on the part of the employer. If a man chooses to accept the employment, or to continue in it with a knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned: Ib.

Semble, if he becomes aware of the danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered on his employment, or of the necessary means to prevent mischief, his proper course is to quit the employment. If he continues in it he is in the same position as though he had accepted it with the full knowledge of its danger in the first instance.

IV. An employer does not warrant the soundness of materials or machinery used by the workmen, but he is bound to exercise reasonable care in their selection : Wigmore *v.* Jay, 5 Ex. 354.

V. In selecting a manager or workmen the employer is only bound to exercise reasonable care; he does not warrant their competency: Potter *v.* Faulkner, 31 L. J. 30, Q. B.; Tarrant *v.* Webb, 18 C. B., 796.

VI. The ordinary rule with respect to the non-liability of an employer for injuries sustained by a workman, does not apply in cases where the master, being one of several co-proprietors and engaged jointly with the servant in the work, is guilty of the negligence from which the servant suffered : Ashworth *v.* Stanwix, 30 L. J., 183 Q. B.; Mellors *v.* Unwin, 1 B. & S., 437.

The other co-owners are also liable under the circumstances mentioned : Ashworth *v.* Stanwix *sup.*

VII. *Semble*, the rule respecting the non-liability of a master or employer is only one of a class and applies to every establishment, so that no member of an establishment can maintain an action against the master for an injury done to him by another member of that establishment, in respect of which, if he had been a stranger, he might have had a right of action. Thus, a friend of the servant, a son, a relative living in the same house, not in the character of servant, but as a member of the same family, cannot maintain an action any more than a servant could : See per Pollock, C. B., in Abraham *v.* Reynolds, 5 H. & N., 143.

VIII. Persons who volunteer to assist servants or workmen are in the same position as the workmen or servants, so far as concerns their right to recover from the master for any injury resulting from the negligence of such workmen or servants. They can have no greater rights against, nor impose any greater duty upon a master than would have existed had they been hired servants : Degg *v.* Midland Railway Company, 1 H. & C., 733.

When, however, a person assists in a matter in which he has common interest, and when his assistance is solicited by a person of competent authority, he has a remedy against the master of the servants through whose negligence he is injured: Holmes *v.* Northeastern Railway Company, L. Rep. 4 Ex., 254; affirmed 6 Ib., 128; Wright *v.* London and Northwestern Railway Company, L. Rep., 10 Q. B., 298.

Semble, a person ceases to be a volunteer if his assistance was given upon request : See per Cockburn, C. J., in Wright *v.* London and Northwestern Railway Company, *sup.*

IX. A man is not liable to his servant for the acts of the person whom he leaves as his vice-principal in the management of the business : Wilson *v.* Merry, L. Rep. 1 Sc. Ap., 326; Howels *v.* Landore Steel Company, L. Rep. 10 Q. B., 62; nor does the fact that the employer is a corporation make any difference in the defendant's liability for the act of his manager: Morgan *v.* Vale of Neath Railway Company, *sup.*; Howells *v.* Landore Steel Company, *sup.*; nor is it material that the manager is appointed pursuant to an act of Parliament: Howells *v.* Landore Steel Company, *sup.*; nor that the person to whom the negligence was directly imputable, was a servant of superior authority, whose lawful directions the plaintiff was bound to obey: Feltham *v.* England, L. Rep. 2 Q. B., 33; Gallagher *v.* Piper, *sup.*

X. To define with precision the expression fellow-servant and fellow-workman is a matter of no small difficulty. It may, however, be said that the authorities go to the length of the proposition that those only are to be considered as fellow-servants who are employed by the same master and engaged in a common employment: Warburton *v.* Great Western Railway Company, L. Rep. 2 Ex., 30; Vose *v.* Lancashire and Yorkshire Railway Company, 2 H. & N., 728.

But workmen employed by a contractor and workmen employed by a person or company who has employed such contractor, are considered as being in the same common employment and fellow-servants: Murphy *v.* Caralli, 8 Ad. & E., 109; Murray *v.* Currie, L. Rep. 6 C. P., 24; see per Cockburn, C. J., in Woodley *v.* The Metropolitan Railway Company, 36 L. T. Rep. N. S., 419.

The following instances were given in a Scotch case of the absence of such common employment:

1. A dairymaid in bringing milk home from the farm is carelessly driven over by the coachman.

2. A painter or slater is engaged at his work on the top of a high ladder placed against the side of a country house, and is injured by the carelessness of the gardener, who wheels his barrow against the ladder and upsets it.

3. A clerk in a shipping company's office sent on board a ship belonging to the company, with a message to the captain, meets with an injury by falling through a hatchway which the mate has carelessly left unfastened.

4. A plowman at work on land held by a railway company, and adjacent to a railway, is, while in the employment of the company, killed by an engine, which through the default of the engine driver, leaps from the line of rails into the field: McNorton *v.* Caledonian Railway Company, 28 L. T. Rep. N. S., 376.

The following have been held to be fellow-servants, the workmen injured, and the workmen through whose negligence the injury happened, being in the employ of the same master:

1. A laborer travelling by a train by which it was his duty to travel, and the guard through whose negligence the laborer was injured: Tunney *v.* The Midland Railway Company, L. Rep. 1 C. P. 291.

2. The driver and guard of a stage coach; the steerman and rowers of a boat; the men who draw the red hot iron from the forge and those who hammer it into shape; the engineman and the switcher; the man who lets the miners down and winds them up, and the miners: Suggested in Barton's Hill Coal Company *v.* Reid, 3 Macq. H. of L. Cas. 266.

3. A scaffolder and the general manager of the common employer: Gallagher *v.* Piper, 16 C. B. N. S., 669; 33 L. T. Rep. C. P. 329.

4. A carpenter employed for the general purposes of the company and the porters: Morgan *v.* Vale of Neath Railway Company, L. Rep. 1 Q. B., 149; affirmed 33 L. T. Rep. Q. B., 260.

5. The guard of a train and plate layers: Waller *v.* The Southeastern Railway Company, 32 L. J., 205, Ex.; 8 L. T., Rep. N. S., 325.

6. A laborer employed to do ballasting and a plate layer: Lovegrove *v.* The London, Brighton and South Coast Railway Company, 33 L. J., 329, C. P.; 16 C. B. N. S., 669.

By the application of the principle that a workman accepts an employment with the risks incidental to it, and the gradual modification of the rule that fellow servants are such as have a common master, the power of a workman or servant to obtain compensation for injuries received by him, is considerably narrowed: See (8) *supra*, and Woodley *v.* The Metropolitan Railway Company (*sup.*), per Cockburn, C. J.

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, March 29, 1878.

TORRANCE, J.

MACKAY v. ROUTH et al.; and THE BANK of MONTREAL et al., Garnishees.

Concurrent Garnishment.

The existence of a previous *saisie-arrêt* in the hands of the defendants as garnishees does not prevent the plaintiff, (defendant in previous suit,) from seizing moneys due to defendants in the hands of other garnishees.

The plaintiff having obtained judgment against the defendants for $4,168.09, issued an attachment after judgment in the hands of divers garnishees. The defendants contested the attachment, alleging that before it issued they had been summoned as garnishees to declare what they owed to the now plaintiff, in a suit wherein he was defendant; that they declared they owed $4,819, and that this writ of attachment was still pending. The defendants prayed, therefore, that the attachment in the present cause be declared null.

The plaintiffs demurred to the contestation on the ground that contestants did not allege that they had been ordered to pay the sum admitted to be due, or that they had deposited it in the hands of the Treasurer of the Province, under 36 Vict. c. 5, and 36 Vict. c. 14.

The Court maintained the plaintiff's answer-in-law and dismissed the contestation, remarking that the existence of a prior attachment at the suit of another plaintiff was no bar to the attachment in the present case.

Counsel for plaintiff cited *Duvernay* and *Dessaulles*, 4 L. C. R., 142.

Ivan Wotherspoon for plaintiff.

L. O. Loranger for defendant.

Montreal, March 30, 1878.

JOHNSON, J.

DUHAMEL et al. v. PAYETTE.

Insolvent Act—Claim not properly inventoried.

Held, where an insolvent who was indebted to "Duhamel, Rainville & Rainville," merely put the name "Duhamel" in his list of debts, without specifying any amount, that he was not discharged from the claim by obtaining his discharge under the Act.

This was an action to recover the amount of an account due to a firm of lawyers by a client. The latter pleaded that he had obtained his discharge as an insolvent, and that the amount sued for was included in the list of his debts to the knowledge of the plaintiffs.

JOHNSON, J. The only question is whether the terms of the 61st section of the Act of 1875 have been complied with. That section discharges from all debts that "are mentioned or set forth in the statement of his affairs exhibited at the first meeting of his creditors, or which are shown in any supplementary list furnished by the insolvent previous to such discharge, and in time to permit the creditors therein mentioned obtaining the same dividend as other creditors upon his estate, or which appear by any claim subsequently furnished to the assignee." The list of creditors with the certificate of the assignee of the 27th November, 1877, contains the name "Duhamel," but without mentioning any amount. The name of the creditors was "Duhamel, Rainville & Rainville." A substantial compliance with the Act will free the debtor no doubt. There is abundant authority for that; but on the other hand there is a case in the Upper Canada Law Journal, *Robson v. Warren*, cited in the note to this section in Edgar & Chrysler's Insolvent Act of 1875, that where the plaintiff was incorrectly named, and gave evidence that he had not been notified of the proceedings in insolvency, the debtor was held not to be discharged. That is not precisely the case here, I think, because, probably, the plaintiffs were aware of the insolvency; but there are numerous other cases reported, and the substances of all of them is that the defendant must clearly bring the case within the conditions of exemption. Now I am far from being satisfied that he has done so. There has never been any claim made by the plaintiffs or by any one of them. The register gives no amount, and no name of the real creditors. The subsequent certificate of the name 'Duhamel' with 'avocat' after it in the list of creditors, is not only at variance with the first certificate, but throws no light as to when the word 'avocat' was put there. The letter about Papineau's claim does not touch this one at all, and is not written by the insolvent, and I should have to strain the law to say that defendant can bar the plaintiffs' claim without more attention on his part to what the law held him to.

Judgment for amount demanded.

Duhamel & Co. for plaintiffs.

De Lorimier & Co. for defendant.

LEPAGE v. WYLIE.

Slander—Aggravation by Unfounded Plea.

JOHNSON, J. The plaintiff is the widow of the late Mr. John Brothers, who died on the 8th of January, 1877, and on the 4th of August ensuing she gave birth to a child. The defendant is charged with having, on two occasions in July, said that her husband was not the father of the child, and is summoned here in an action of damages for slander in so saying. He pleads that the allegations of the action are false, and adds, very unjustifiably, as it turns out, that the sole object of the action is to extort money, and that the plaintiff repeatedly tried to get a loan of money from him before she brought her action, and meeting with a refusal, threatened to sue, and actually brought a groundless action. The proof is direct and positive by two witnesses—Sexton and Doolan. Now, this appears, I must say, to me, a very serious business. The plaintiff is proved to be a most respectable person. The defendant himself, when called as witness, admits it. It was attempted to show that the damages ought to be small, on the ground that she was not a person of susceptible feelings. The proof showed that she kept a boarding house and saloon frequented by captains of Upper Canada steamers; and she is, happily for her, a brave, outspoken woman, fitted to fight the battle of life in her bereaved position. But it would be a grievous wrong to her to infer that the evidence points to any impropriety of life of a nature to blunt her feelings. I understand the witnesses to speak in a sense exactly the reverse of this. Well, the defendant meets Sexton, and afterwards Doolan, and says this thing, I must say not only with brutal plainness, but adds: "Some say it is Creelman's; some say it is mine." Now, it struck me that though this was very coarse, it might not have been intended as malignant, and I asked that question of the witnesses, and they said there was nothing jocular about it at all; and it is simply impossible to tell this woman, under the circumstances, when she comes here for justice, that she is to submit to such an outrage—whether originated or only repeated makes no sort of difference. Therefore, she is, in the very nature of things, entitled to damages, and substantial damages, for the defendant has not contented himself with simply denying the thing, nor with admitting and apologizing for it; but he has wantonly added what he has been utterly unable to prove, viz., that her object was extortion.

Judgment for plaintiff $200, with costs of action as instituted.

Lefebvre & Co. for plaintiff.

Doutre & Co. for defendant.

LATOUR v. CAMPBELL.

Costs—Distraction—Art. 482 *C.C. P.*

JOHNSON, J. Judgment was rendered in this case in April, 1875, condemning John Parker to pay $20 damages, for which he and his co-defendant Campbell had confessed judgment; but as to Campbell himself there had been a discontinuance filed by the plaintiff, and the judment granted *acte* of it merely, without dismissing the action as to him, and gave the costs of contestation subsequent to the confession against the plaintiff. Campbell afterwards issued execution against the plaintiff for his costs, and was met by a judgment which the plaintiff held against him for a larger amount. Thereupon Campbell, or rather his attorneys, inscribe the case now for final judgment upon the discontinuance, and ask for *distraction* of costs in their favor. The court holds that the defendant at present inscribing and moving for *distraction* is wrong in both of those proceedings. By article 482 C. P. the attorney has not an incontestable right to *distraction* of his costs, unless he moves for it on or before the day on which judgment is given. After that if he wants it, the opposite party must have notice. Here the notice has been given, and the plaintiff produces the judgment against Campbell. This is surely a good answer to the pretension that he ought to be made to pay anything due by him to Campbell of less amount. Then as to the inscription. There is no necessity for inscribing at all. By Art. 450 the discontinuance of which *acte* was granted in the judgment was a discontinuance in the express terms of the law, that is, on payment of costs, and *acte* was given of that, and it was executory, and in fact was executed. After acquiescing in that judgment in this manner, it is clearly too late to come in and change the right of the plaintiff under his judgment against Campbell. Both the motion and the inscription are therefore dismissed with costs.

JONES v. SHEA et al.

Advances for Speculative Purposes.

JOHNSON, J. The plaintiff's action is to recover $111.46. He was employed by the defendants to negotiate divers purchases of pork in the Chicago market through a firm there. The defendants plead that all their dealings with the plaintiff were gambling transactions on margin—no property passing—speculations not on merchandize, but on the price of merchandize; at least, that is what I gather from the plea, and the argument made in support of it; but it must be confessed that the language of the plea itself is rather singular. It says that "the only transactions which the defendants ever had with the plaintiff in pork speculations were made in the usual gambling way," and that "the defendants furnished margins, and the pork was to be held till they were eaten up," meaning presumably the margins and not the pork. This is not an action between the parties to a gambling transaction at all. It is an action by an agent to recover advances made in a course of business proved to have been usual between the parties previously. The Chicago brokers looked to the plaintiff for their pay, and he produces and proves their receipt, and proves moreover, by a witness named Vipond, that the defendant Shea promised to pay the account. I am not going to discuss the subject of what are, or what are not gambling transactions. There is nothing precise before me, either in the pleadings or in argument, to show that, as between the so-called purchasers and vendors here, there was anything illegal, and even if there was, there is nothing whatever to reach the third party, the plaintiff, whose money was used by the defendants; and going even a step farther, and assuming that the plaintiff's advances were for gambling purposes, the parties probably may be surprised to hear that a person advancing money for the purpose of betting at cards may recover it from the one to whom he advanced it, and that transactions made illegal by our law are only transactions in our own country, and not transactions in a foreign country; but I decline to give any opinion upon these important questions. If the defendants attach importance to them, they should be properly raised and properly argued. I have other things to do besides furnishing factums in appeal to parties who come before me, not to state or to elaborate by exposition and authority what they may contend for as the law, but come as it were fishing for law, in the hope of hooking something that may serve elsewhere.

Judgment for plaintiff for amount claimed.

Robertson & Co. for plaintiff.

Curran & Co. for defendant.

—It is stated that the cost of the new Palace of Justice in Brussels, which will be a splendid building, will amount to 35,000,000f. The original estimate was 8,000,000f.

CURRENT EVENTS.

ENGLAND.

A Question of Negligence.—A curious question of negligence arose in the case of *Firth v. Bowling Iron Co.*, decided on the 2nd ult. by the Common Pleas Division of the English High Court of Justice. The action was for the loss of a cow which had died from eating a piece of wire fencing. Plaintiff and defendants were adjoining occupiers of land, and the defendants had fenced off the land occupied by them with a fence composed of iron rope. From exposure to the weather the strands of wire rusted and separated into pieces, some of which fell to the ground and lay hidden in the grass of the plaintiff's adjoining pasture. In 1867, two heifers belonging to the plaintiff had died in consequence of taking up pieces of wire while grazing in the plaintiff's said pasture. The court *held* that the action was maintainable; for that the defendants, by maintaining this fence, the nature of which was known to them, were liable for the injury caused to the plaintiff, which was the natural result of the decay of the wire.

UNITED STATES.

Infringement of Trade Marks.—The New York Supreme Court, in the recent case of *Enoch Morgan Sons' Co.* v. *Schwachhofer*, has rendered a decision on an interesting point of the law respecting trade marks, particularly imitations of labels for the purpose of imposing on the public. The subject is one of increasing importance, and as the judgment refers to the principal decided cases, it will be of value to members of the profession who may have to examine similar questions. We copy the report below:

Enoch Morgan Sons' Co. v. Schwachhofer.

Plaintiff had for many years made and sold a soap named by him "Sapolio." Each cake sold was inclosed in two wrappers, a tin-foil and a blue one, the wrappers containing the name of the soap and certain printed words and cuts. Defendant offered for sale a soap he called "Saphia." Each cake was inclosed in a tin-foil and a blue wrapper, containing printed words and figures differing entirely from those on plaintiff's wrappers, but having a general resemblance and calculated to deceive the public into a belief that the soap was that manufactured by plaintiff. *Held*, that plaintiff was entitled to an injunction restraining defendant from vending his soap in the tin-foil and blue wrapper.

For the accomplishment of a fraud in such cases as this, two circumstances are required: First, to mislead the public, and, next, for defendant to preserve his own individuality.

Action to restrain defendants from infringing plaintiff's trade-marks. Plaintiff had for many years previous to the commencement of the action manufactured a soap designed for cleaning and polishing, which was named "Sapolio." It had extensively advertised this preparation, and it became known in the market and by numerous consumers under the name mentioned. The soap was sold in cakes of a convenient size. Each cake was inclosed in two wrappers, one a square sheet of paper covered with tin-foil, and the other a strip of paper about an inch and a half wide, which was blue on the outside. Each wrapper contained the name "Sapolio," and cuts and printing referring to the article and its use. The devices on the wrappers were registered as trade-marks. Defendant, after plaintiff's article became well known, began the manufacture of a similar article, which he named "Saphia Transparent." He offered it for sale in cakes similar in size to those made by plaintiff, inclosed in two wrappers (tin-foil and blue) of the same size and shape of plaintiff's, but containing different cuts and printed words. The general appearance of the packages made by defendant and plaintiff was the same, and the general public would be easily led into purchasing one for the other. Such other facts as are material will appear in the opinion.

Lawrence, J. It is quite difficult in actions of this character, to precisely draw the line between those cases in which the plaintiff is entitled to relief and those in which relief should be denied. The decisions are conflicting, and many of them irreconcilable, but in this case, after fully considering the evidence, I am of the opinion that the plaintiffs are entitled to a portion at least of the relief which the complaint demands.

Upon principle no man should be allowed to sell his goods as the goods of another, nor should he be permitted so to dress his goods as to enable him to induce purchasers to believe that they are the goods of another. In the consideration of this case, I shall lay out of view the United States statute in relation to trade-marks, because that provides that "nothing in this chapter shall lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade mark might have had, if the provisions of this chapter had not been enacted."

I do not therefore regard the plaintiffs as being compelled, in order to obtain the relief they seek in this action, to show that there has been an imitation of the trade-mark, which the plaintiffs have filed in the patent office.

It would seem that the true rule is laid down in the case of *Edelston* v. *Vick*, 23 English Law and Equity Reports, pp. 51 and 53, where Vice-Chancellor Wood, adopting the language of Lord Langdale in *Groft* v. *Day*, 7 Beaven, pp. 84 and 87, says: "That what is proper to be done in cases of this kind depends *on the circumstances of each case.* * * * * That for the accomplishment of a fraud in each case, two circumstances are required, *first to mislead the public, and next to preserve his own individuality.* Commenting further upon the language of Lord Langdale in *Groft* v. *Day*, the vice-chancellor proceeds: "Now in that case of *Groft* v. *Day*, there was, as Lord Langdale said, many distinctions between the two labels, and in this case before me just as in that of *Groft* v. *Day*, any one who takes upon himself to study the two labels, will find even more marks of distinction than were noticed in argument. *But in this case as in that, there is the same general resemblance in color. Here there is the same combination of colors, pink and green.* There is the same heading, "Her Majesty's Letters Patent" and "Solid Headed Pins" and the name D. F. Taylor, with the words "exclusively manufactured" upon the two labels, which are of precisely the same size, and the scrolls in the same form, "and exclusive patentee" in an exactly similar curved line, nor does it rest only with the general resemblance of the outer wrappers: The *papers in which the defendant's pins are stuck bear also a very great similarity; they are as like as can be to the papers in which the plaintiff's pins* are stuck."

Then, after stating that he agrees that there must be an intent to deceive the public, the vice-chancellor holds that the defendants, both in the outer and inner wrapper, made a palpable imitation, with the intent to deceive the public, and he accordingly restrained them. I have referred to this case at length because it seems to me to be peculiarly in point, but there are several authorities in our own courts which uphold the same doctrine. In *Williams* v. *Spence*, 25 How. Pr. Rep. 307, Monell, J., says: "The only question to be determined therefore in this case is whether the labels, devices and handbills used by the defendants, as set forth in the complaint, are calculated to, and do, deceive the public into the belief that the soap that they are selling is the soap made and sold by the plaintiffs. * * * The oral evidence, that the labels, devices and hand-bills used by the defendants are calculated to deceive the public also preponderates, and an inspection of the respective labels, devices and hand-bills satisfies me that the public would be readily deceived and purchase the defendant's soap under the belief that they were purchasing plaintiff's."

In *Lea* v. *Wolf*, 13 Abbott (N. S.), 391, Mr. Justice Ingraham says: "*The color of the paper, the words used, and the general appearance of the words when used, show an evident design to give a representation of those used by the plaintiffs.* It is impossible to adopt any conclusion other than that the intent was to lead purchasers, from the general appearance of the article, to suppose that it was the original Worcestershire sauce which they were buying." See also *Cook* v. *Starkweather*, 18 Abbott (N. S.), 292. And in *Lockwood* v. *Bostwick*, 2 Daly, 521, it was held, "that a party will be restrained by injunction from using a label as a trade-mark, resembling an existing one in size, form, color, words and symbols, though in many respects different, *if it is apparent that the design of the imitation was to depart from the other sufficiently to constitute a difference when compared, and yet not so much so that the difference would be detected by an ordinary purchaser unless his attention was particularly called to it, and he had a very perfect recollection of the other trade-mark.*" And in *Kinney* v. *Busch*, 16 Am. L. Reg. (N. S.) 597, Mr. Justice Van Brunt says: "A careful inspection of the labels in question shows beyond a doubt that those of the defendant were adopted in order to deceive the public into supposing when they purchased the cigarettes of the defendant's manufacture they were purchasing those of the plaintiffs. I am satisfied from the evidence in this case that the intention of the defendant has been from the first to make an article as nearly as possible resembling that manufactured by the plaintiffs, and to put it off upon the public as the same article."

I am also satisfied that it was the intention of the defendant, in adopting the blue and tin-foil wrappers, and in printing on them the directions for use in language so closely resembling that employed by the plaintiffs, to impose upon the public and to lead purchasers to believe that in purchasing the defendant's article they were in fact obtaining the sapolio of the plaintiffs. In this connection the wonderful similarity of the color of the inside of the tin-foil wrapper, used by the defendant, with that used by the plaintiff, should not be forgotten. The whole case, to my mind, shows an intention on the part of the defendant to avail himself of the reputation which the plaintiffs had acquired in the market for their sapolio, by their enterprise and ability and by the large expenditures which they had made in bringing the sapolio to the attention of the public.

It appears that the plaintiffs have been for many years engaged in manufacturing sapolio, that the article has acquired a great reputation, and that the plaintiffs have expended very large sums of money in advertising. The evidence shows that the defendant, after analyzing a cake of sapolio, and ascertaining how it was made, set about making an article similar in character, color and appearance to that of the plaintiffs. This he may possibly have a right to do, but when the court finds that the defendant, after having possessed himself of the secret of the manufacture of the plaintiffs, has in addition coined a name much resembling sapolio, in appearance, and which he admits is a fancy name, having no particular derivation or signification, and has then proceeded to encase his cakes of saphia in wrappers also closely resembling the plaintiffs', both in their external and internal appearance, as to color, size, and partially as to inscription and directions for use, the court has in my judgment the power to interfere, and should exercise its power. It is claimed that the plaintiffs cannot have an exclusive right to use tin foil or ultra marine blue colored paper, in putting up their article, as such paper is much used for ordinary commercial purposes. This is true, but the cases cited show that the courts will interfere where it is apparent that there is an imitation of the plaintiff's label, whether as to color, shape or inscription, which imitation is calculated and intended to deceive the general public. The evidence satisfies me that the blue wrapper as used by the defendant is calculated to deceive purchasers, and I think that it is very clearly proven that the ordinary purchaser *is deceived* by the similarity of the dresses in which the soaps are put upon the market.

A critical and careful examination of the two packages will undoubtedly reveal distinctions and differences between the labels, and the devices thereon are different; but there is such a general resemblance, that, to borrow the language of the vice-chancellor in *Edleston* v. *Vick, supra,* "the court or jury would be bound to presume that it was not a fortuitous concurrence of events which has produced this similarity; it would be irrational not to rest convinced that this remarkable coincidence of appearance, external and internal, *is the result of design.*"

In the case of *Abbott* v. *Bakers and Confectioners Tea Association,* Weekly Notes, 1872, p. 31, an injunction has been issued *restraining the defendants from issuing wrappers which were in imitation of those of the plaintiffs.* On appeal the Lord Chancellor said, "that though *no one particular mark* was exactly imitated, the combination was very similar, and likely to deceive; that it was true that there was no proof that any one had been deceived, or that the plaintiffs had incurred any loss, but where the similarity is obvious, that was not of importance." The appeal was therefore dismissed. See case reported below. Weekly Notes, 1871, p. 207. This last case seems to be decisive of the question now under consideration. See, also, *Lockwood* v. *Bostwick,* 2 Daly, 521; *Godillot* v. *Hazard,* 49 How. 10.

I am, therefore, of the opinion that the plaintiffs are entitled to an injunction restraining the defendant from vending saphia in the blue packages in which it is now sold. By this I do not mean to be understood as holding that the defendant has not the right to manufacture and also to sell saphia, nor to restrain him from the use of that name, or of the figure or device upon the label; but I do intend that he shall abstain from dressing his goods in wrappers so closely resembling the plaintiffs', as to enable him to deceive the public and to perpetrate a fraud; and that he shall not sell saphia as and for sapolio. In other words, he must sell under his own colors and not under those of the plaintiffs.

Judgment accordingly.

CLERICAL BANKRUPTS. — Clergymen in the United States are entitled to take advantage of the Bankrupt Act, and the last issue of the *Chicago Legal News* refers to the fact that R. W. Patterson, "the veteran Presbyterian Minister of Chicago," has just filed a petition in bankruptcy. Our contemporary remarks: "It seems hard for a man who has devoted so many years to labor in the Lord's vineyard as Dr. Patterson has, to have to go through the bankrupt court in his old age." Before expressing sympathy with the venerable pastor, one would like to know how the debts were incurred. One would like to be sure that the Doctor has not brought himself into his unpleasant situation by "selling short," or by the bursting of a "corner."

GENERAL NOTES.

—A curious judgment was recently delivered by a sessions judge in one of the Bengal districts. Four persons were brought before him on a charge of murder, and were duly convicted; but in passing sentence the judge apparently found himself in a difficulty. "There is no doubt," said he, "that all four are guilty of murder, and are therefore liable to be hanged; but I do not think it is necessary for four lives to be taken for one, but that one case of capital punishment will be enough for example!" Although, in addition to this, he said further on that "all four seem to have been equally active," yet he concluded by sentencing the apparently oldest and strongest of the prisoners to death, and the other three to imprisonment for life. It is needless to say that on an appeal to the High Court the sentence was not confirmed. Yet such is the reading of the law by some of the Indian Judges—*Albany Law Journal.*

EVERY DOG HAS HIS DAY.—In the Croyden, England, County Court, in a case entitled *Saunders* v. *Evans,* the English idea of giving every one a chance was well illustrated. Plaintiff sought to recover damages for the loss of a lamb, which had been killed by defendant's dog. "In answer to his honor, the plaintiff said he could not prove that the defendant was aware that the dog was in the habit of biting other animals." "His honor thereupon remarked that by the law of England a dog was allowed his first bite. Assuming that the lamb did die through an attack made by the defendant's dog, plaintiff was not entitled to recover unless he could say that the defendant was aware that the dog had previously misconducted himself in a similar way. He, therefore, nonsuited the plaintiff, and advised the defendant to take better care of his dog in future." It is suggested by a correspondent of the *Solicitors' Journal*, that there is a statutory provision covering the case. In that case the Court may have erred, but it is to be assumed that he stated the common law correctly.

Trial by Jury in Russia.—While some older countries have been debating the advantages of consinuing the time-honored institution of trial by jury, Russia has been trying the experiment for the first time. It is barely ten years since it was introduced, and according to a correspondent of the *Times* it leads often to curious results. A prisoner after making a clean breast of it and confessing his guilt in Court, sometimes finds the jury differ with him, and a verdict of "not guilty" is returned. This arises in part, says the correspondent, from the rough-and-ready way in which a jury, especially if composed of peasants, will look at the prisoner and the whole circumstances, irrespective of evidence. A notorious offender should be punished—a decent citizen should be acquitted, they think. They listen but little to the advocate's eloquence, and fail to comprehend the need of him. "What difference is there between paying an advocate and bribing a judge?" they argue. Then again, the Russian criminal law fixes minutely the punishment for each item of the category of crime, and scarcely leaves any latitude to the judge for extenuating circumstances and the like. Now Russian juries have their own methods of looking at the various kinds of wrong-doing, and what the code defines as very sinful indeed and deserving of transportation to Siberia, or penal servitude with hard labor, may appear to the enlightened twelve a very minor offence, or no offence at all—a thing they would, under certain circumstances do themselves. In many of these trials the jury will weigh its own plain common sense and kindly feeling for a fellow-creature against the clearest evidence, and will find the prisoner "not guilty." In all cases of assault, cruelty or dishonest dealing in matters commercial, the mind of a jury of Russian peasants inclines towards mercy. The position of women is so low in Russia that "husband's rights" are alone recognized, and these include the privilege of enforcing his will by chastisement if necessary; and no jury will convict unless the assault has been one of a serious kind indeed. Juries of all classes are, however, very severe in cases of "crimes against the Deity," as they are called. In conclusion, it must be borne in mind that the Ministry at St. Petersburg has all but unlimited powers and the so-called "independence of the judges" exists only in name.

NOTICES OF PUBLICATIONS.

Benjamin on Sales.—A second edition of the "Treatise on the Law of Sale of Personal Property," by Mr. J. P. Benjamin, Q. C., has appeared in New York, the United States editor being Mr. J. C. Perkins. In this edition about five hundred new cases are added, English as well as American. A contemporary remarks with regard to the author: "Mr. Benjamin is one of the products of the Southern States, which the profession and the country generally could not well afford to lose. At the close of the war, after more than thirty years of practice at the bar, service in the United States Senate from Louisiana and in the Cabinet of the Confederate States, he went to England, where his ability was at once recognized. Three years after, he was made Queen's Counsel, and in 1872 received a patent of precedence under the Great Seal. In 1868 he published his treatise on the Sale of Personal Property, which is a most valuable contribution to the literature of the law, as a full and accurate collection of cases, and a masterly deduction of principles. In 1873, the second English edition was published."

To Correspondents.—The opinion of English counsel in the case of *Brassard* v. *O'Farrell* will appear in our next issue.