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CIVIL JUDICIAL STATISTICS. The recent publication for Parliament of Part II. of the Judicial Statistics for England and Wales for 1894, entitled Civil and Judicial Statistics, contains many valuable facts as to the amount of litigation in England for the past thirty years. A careful introduction by Dr. Macdonnell reviews the subject-matter contained in the subjoined tables and diagrams. Though he shows that, in proportion to the population, more business is done by the Appellate Courts in England than by the Supreme Court of the United States, he does not furnish us with any statistics as to our state courts, and therefore we have no means of determining the relative litigious propensities of the two nations.

It would be presumptuous in a foreigner to attempt to draw conclusions from these statistics, without an understanding of English judicial conditions, but there are several facts we may note with interest.

In proportion to the population, Dr. Macdonnell shows that litigation in England is slowly, but steadily, decreasing, this fact being

attributable in some measure to the growth of arbitration. The number of appeals, however, has greatly increased, and the general drift of business has been away from the Queen's Bench Division to the County courts. Dr. Macdonnell estimates the plaintiff's chances of recovery as three to one, and in criminal cases the Crown's chances as four to one, in view of which facts it seems very creditable to the honesty of the English people that litigation is steadily on the decline.

The business of the divorce courts has perceptibly increased since 1858; but the most striking fact is, the marked decrease in all courts of the number of jury trials. In the past sixteen years in the Queen's Bench Division, they have decreased from ninety-two to forty-seven per cent. of the cases decided.

Finally, we may note as a mark of the advance of civilization, that crimes of violence are steadily diminishing, and that in their place people are seeking redress by litigation, as evidenced by the contemporaneous increase of suits for personal torts. If litigation is supplanting crime, and amicable arbitration between nations and between individuals is to supplant contentious litigation and internecine war, are we not really making steady progress toward a Utopian society?

FORGED ENDORSEMENTS. A decision by the Court of Appeals of Indian Territory, *Green v. Purcell Nat. Bank*, 37 S. W. 50 (1896), deserves commendation on account of the clear reasoning of the court, and should be specially noticed in view of Mr. Justice Mathew's recent opinion, *London, etc., Bank v. Bank of Liverpool*, 12 B. D. 7 (1896), reaching a contrary conclusion through a misapplication of prior decisions. The Purcell Bank received a check from Green for collection. The drawee bank in New York honored the check, and Green was paid. The payee's name having been forged, the Purcell Bank repaid the drawee bank the amount of the check, without notifying Green of the forgery. About three months later, the bank received another check from Green, collected it and accredited the proceeds to the amount previously paid Green on the forged check. Green thereupon sued for the amount.

The court refused a recovery on the ground that Green had no title to the forged check, hence could claim nothing under it. "In law he was charged with the knowledge of the forgery, the beneficiary of which he became by his own acts. He stood in the forger's shoes, and, however innocent, he may have been in fact, yet in law having received the stolen goods, he acquired no better title than the thief himself would have had."

In the English case plaintiff bank was drawee of a bill; the payee's name was forged, but through ignorance of this fact, the plaintiff paid the bill to defendant. Some months afterward the forgery was discovered, and this suit brought. Mr. Justice Mathew

refused a recovery upon the ground that "when a bill becomes due and is presented for payment the holder ought to know at once whether the bill is going to be paid or not. If the mistake is discovered at once, it may be the money can be recovered back; but if it be not, and the money is paid in good faith, and is received in good faith, and there is an interval of time in which the position of the holder may be altered, the principle seems to apply that money once paid cannot be recovered back." This principle is deduced from cases like *Cocks v. Masterman*, 9 B. & C. 902, and *Price v. Neal*, 3 Burr. 1355, where a forged drawing, instead of a forged endorsement, was before the court.

With deference, it is suggested that this principle is entirely inapplicable to a case where a defendant desires to hold funds obtained upon an instrument to which he had no title. However, it may be justified by commercial necessity in cases where, owing to a forged drawing, no contract existed.

As long ago as 1841 the Supreme Court of New York, per Mr. Justice Cowen, permitted a recovery in *Canal Bank v. Bank of Albany*, 1 Hill, 287, a case not distinguishable, in fact, from the English case.

The principle of the Indian Territory court has been recognized in Pennsylvania: *Chambers v. Union Bank*, 78 Pa. 205 (1875). See also Keener on Quasi Contracts, 154, note.

RAILWAYS; NEGLIGENCE; DUTY TO TRESPASSERS. The dissent of Magruder, C. J., in the late case of *Wabash R. R. Co. v. Jones*, (45 N. E. 50) Supreme Court of Illinois, while taken on a point of pleading, marks an attempt to escape the consequences of the Illinois rule on the subject of duty to trespassers on railroads.

The material facts were that a child was injured, while walking on the track, in a manner and for a purpose pursued by many of the community and sanctioned by a usage of twenty-five years. The railroad company sought to escape liability for its servant's alleged want of care, on the ground that plaintiff was a trespasser. To this view the majority of the court inclined.

The jurisdictions adopting the Illinois view hold that the railroad never has any duty toward persons found on its tracks other than the duty to avoid wilful injury, unless those persons have been positively invited by the railroad company to go upon its tracks. They draw a sharp "distinction between cases where there is a mere naked license or permission to enter upon or pass over an estate and cases where the owner or occupant holds out any enticement, allurements or inducement to persons to enter upon or pass over his property:" *Ry. v. Bodemer*, 139 Ills. 596 (1892). The view which is found in the majority of American jurisdictions is clearly expressed by Boggs, P. J., in the decision of this same case in the appellate court: 123 Ills. 125 (1893). "We do not think that this evidence was admitted for the purpose, as is supposed, of

establishing a legal right in the plaintiff to be upon the track ; its admission was proper for another purpose. . . . If the evidence . . . tended to show that persons were likely to be upon the track at the time when and at the place where the appellee was injured, and that the company had notice thereof and had reason to anticipate the presence of persons there, though trespassers, then . . . the evidence was competent."

This theory does not require the railroad constantly to exercise vigilance, in order to ascertain whether the track is free ; the company is not required to anticipate the presence of any unauthorized persons upon its tracks, in the absence of knowledge or notice. "The degree of care required in the operation of trains is proportioned to the danger likely to result therefrom : " *Texas & P. R. Co. v. Watkins*, 26 S. W. 760 (1894).

This is the rule followed in New York, Pennsylvania, Missouri, *Powell v. R. Co.*, 59 Mo. Ap. 626 (1894) ; Wisconsin, *Johnson v. R.*, 86 Wis. 63, 56 N. W. 161 (1893), and most of the western States. The Massachusetts view is somewhat uncertain. In *Chenery v. Fitchburg, etc., R.*, 160 Mass. 211, it was held that the existence of a license by acquiescence to cross at a private way was a question for the jury. The Illinois rule prevails in Alabama and a few other States.

The first case in Illinois laying down the rule now followed in that State was *R. v. Godfrey*, 71 Ills. 500 (1874). This case (which did not go quite the length of the principal case, since the decision was based partly on the contributory negligence of the plaintiff) seems to have been decided largely on the authority of the Pennsylvania cases of *R. v. Hummel*, 44 Pa. 375, and *Gillis v. R.*, 59 Pa. 129. In *R. v. Hummel*, Strong, J., employed what is now generally regarded as a mistaken analogy in the following language :

"There is as perfect a duty to guard against accidental injury to a night intruder into one's bed-chamber as there is to look out for trespassers upon a railroad where the public has no right to be." The Supreme Court of Nebraska, *R. v. Wymore*, 40 Neb. 645, 58 N. W. 1120 (1894), refused to follow this ruling.

This expression of Mr. Justice Strong was, nevertheless, quoted with approval by Sharswood, J., in *Gillis v. R.* (*supra*), and the latter judge on the authority of *R. v. Hummel* (*supra*) dissented in *Kay v. P. R. Co.*, 65 Pa. 269 (1879). It was held, in this case, distinguishing and virtually overruling *R. v. Hummel*, (at least so far as it was made use of in the Illinois cases), that if a railroad company allowed the neighboring population to use its tracks as a way, the presumption of a clear track could not arise as in other parts of the road, and that greater precaution was necessary under these circumstances than elsewhere. To the same effect is *Taylor v. Canal Co.*, 113 Pa. 162 (1886).

The Illinois courts continue to cite *R. v. Hummel* (*supra*) and *Gissel v. R.* (*supra*), as though they embodied the Pennsylvania law on the subject.

The Supreme Court of Washington, in a case almost on all fours with the present one, *Roth v. Union Depot Co.*, 13 Wash. 525 (1896), have gone into a most elaborate and exhaustive survey of the authorities, and have reached a conclusion contrary to that of the Illinois court. It is interesting to observe that Hoyt, C. J., dissents, on the ground that he can see no difference between the duty of a railroad to trespassers, and that of any other land holder.

This analogy is surely a false one. Certainly a railway *does* owe some duty of caution toward persons whose presence on the track it has reason to anticipate. Common justice and humanity demand that a railroad use a greater degree of care in a crowded country where it knows that trespassers are likely to be, than in lonely and unfrequented places. To this demand the great majority of authorities respond, and the Supreme Court of Illinois, when it frees the railroad in such cases from liability for all negligence except such gross want of care as will amount to wilfulness, announces a rule of law which few jurisdictions approve.

INTERFERENCE WITH TRADE MARKS—WHEN INJUNCTION WILL BE GRANTED. In the case of *Lafeau et al. v. Weeks*, Pa. Adv. Rep. 27, Nov. 1896, 177 Pa. 412, complainant filed a bill praying that the defendant be restrained from fraudulently making use of a certain trade mark, which complainant alleges is an infringement upon his own, which is registered and thus described in the Patent Office: "Our trade mark consists of the letters P. C. W. These letters have generally been arranged as shown in the accompanying fac-simile, in which they appear as script, printed in a horizontal line upon a background of any suitable color; but other forms of letters may be employed, or they may be differently arranged, without materially altering the character of our trade mark, the essential features of which are the letters P. C. W."

Complainant had been engaged for a long number of years in manufacturing candies and his goods had obtained a high reputation, when the defendant entered the business and registered a trade mark consisting of the letters W. H. W., to be printed in script, in white, on a dark ground. It appeared that in both cases the letters were the initials of the founder of the business.

In addition to these facts, the master found that the defendant had been a manufacturer and commission merchant in the candy trade. That in the latter capacity he had handled the plaintiff's goods till within a short time before the bringing of this suit, when he had commenced manufacturing on a larger scale and given up dealings with the plaintiff. That at this time he had ceased to use the markings formerly employed by him upon his boxes, and had adopted in all respects those of the plaintiffs. The latter had printed the letters P. C. W., in script, in white, on a red background, upon a label which was pasted on the boxes. The defendant pasted similar labels with the letters W. H. W. upon

similar boxes. The plaintiff had invented names for different varieties of his goods, which defendant also copied, printing them upon the ends of the boxes in a like style with that in use by plaintiff. The arrangement of the candies was also imitated, as was their size, shape, and color. The defendant, upon being notified that he was infringing the plaintiffs rights and causing deception, refused to change his methods.

From these facts the master drew the following conclusions, viz. :
 " That the defendant's trade mark and label bear such similarity of appearance to those of the plaintiffs as to be likely to deceive persons of ordinary intelligence, measured by the general standard of the mass of people dealing in and buying such goods and using reasonable care and caution." . . . " That cases of actual deception in this respect have taken place." . . . And " that the design on the part of the defendant in adopting and using the present trade mark and label, and the use of the boxes and packages and names in question was and is to deceive buyers and purchasers of the defendant's goods, and to enable them to sell their manufactures on the strength of the popularity of the goods of the plaintiffs." That though " the initials P. C. W. do not constitute a valid technical trade mark in the sense of preventing their use by defendants, *without intent to deceive*, of the initial letters W. H. W., which is the form adopted, and which, in connection with the similar style of the packages, names, and label, bear a close resemblance to the initials P. C. W.—yet that under the facts of this case, as hereinbefore found, the defendants have no legal right to the use of the initials W. H. W. in the form and upon the style of label adopted by them, and that such use constitutes a fraud upon the plaintiffs, against which they are entitled to relief." And the master therefore recommended that an injunction be granted restraining the defendant from printing the initials W. H. W. in script, in white, in a horizontal line, upon a red background, which injunction the court issued.

On review by the Supreme Court, it was held that the decree had gone beyond the plaintiff's claim. That the defendant had a right to use his own initials, and that the plaintiff could not claim an exclusive right to the use of any particular lines, colors, or methods of packing his goods, as such things are in their nature common to all men. That it was, therefore, apparent that plaintiff had no valid trade mark, and his only complaint being that his trade mark had been infringed, his claim was fully answered, and the lower court erred in giving relief in such a case. " If," said the court, " the defendants are really attempting to sell their own confectionery by representing it to the public as the production of the plaintiff, this, and not an infringement of the trade mark, should be charged in the bill as the ground of relief."

From this decision three judges dissented, Mitchell J. delivering the opinion and basing it upon the short ground that this was a clear case of fraudulent intent on the part of the defendant to

represent his own goods as those of the plaintiff and that equity should, and usually did, grant relief without reference to the strict doctrine of trade marks.

The general rule seems to be well settled that the letters of the alphabet are common property, and cannot be exclusively appropriated by any one so as to prevent their use in a usual and legitimate way by others; and that one may use his own name, though it be identical with that of another engaged in the same line of business, and though such use does, in fact, inflict loss upon that other, SUBJECT, NEVERTHELESS, in both instances, to the qualification that neither the letters nor the name are so used as to practice a fraud upon the rival manufacturer or to deceive the public. Their use must be strictly confined to the purpose of indicating the origin, character, quality or ownership of the goods, and the weight of authority seems to require that one shall exercise great caution to prevent injury to him who has first used the name and established its reputation. In such cases the intent to deceive became the criterion, and this being present, the courts will enjoin the use of the name.

In this case the plaintiff has declared for an infringement of his trade mark, and under this has proved that defendant is fraudulently selling his goods as those of the plaintiff, to the deception of the public, and his, the plaintiff's, injury. The answer of the court is, that plaintiff has not the exclusive right to the trade mark, which he has alleged. Now it would seem that as between two persons having the same name, *that* one who has established its reputation in the business *has* a prima facie right to its exclusive use as a trade mark. The later comer may indeed show that he also has the right, but his claim is refuted by proof of his bad faith. It is too well settled to require the citation of authority, that where such bad faith in the use of one's name is shown he may be restrained, but the question raised by this decision is, as to whether the injunction will be granted on the ground of infringement of trade mark, or whether the bill must be based on the injury which is being wrought by the defendant's deceit; and the court have taken the latter view.

Since the *raison d'etre* of trade marks is so to characterize one man's goods, that they shall not be mistaken for those of another, and to prevent the fraudulent representation by the latter that his goods are those of the former, it would seem that when a plaintiff has shown that the very wrong has occurred to prevent which trade marks were created and protected by the courts, that it is a somewhat technical rule, and, (as suggested by Mr. Justice Mitchell), one not supported by authority, which decides that recovery cannot be had because the bill charges an interference with the trade mark, and not an interference with the right which the complainant has sought to protect by the use of the trade mark.

The master found that the defendant had and was perpetrating a fraud upon the plaintiff, who thereupon was entitled to relief, and

granting that what plaintiff called his trade mark was not valid in all particulars, it at least sufficed to indicate the nature of the right claimed and the scope of the wrong which was being done; and the spirit of the complaint thus being shown, it would not have been without the equitable jurisdiction of the court to do justice between the parties.