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HIGH COURT OF JUSTICE.

TEETZEL, J. JANUARY 4TH, 1912.

*CARTWRIGHT v. WHARTON.

Copyright—Infringement—Law List—System of Indexing—Lists of Names in Part Copied—Errors Common to both Publications—Effect on Whole of Copying Part—Injunction—Damages.

Action for damages and an injunction for the alleged infringement by the defendant of the plaintiff's copyright, under the Dominion Copyright Act, in "The Canadian Law Lists (Hardy's), 1910."

The plaintiff and defendant had for some years been in partnership, and had published a number of former editions of the said law list, and were joint owners of the copyright. The partnership was dissolved early in August, 1910, and the plaintiff purchased the defendant's interest in the copyright. By the terms of the agreement of dissolution, the defendant was expressly permitted to engage in a rival business; and he immediately began preparations to publish another law list for 1911, which was published in February, 1911, and is called "The Canadian Legal Directory, 1911;" and the plaintiff charged that this publication constituted an infringement of his copyright in the 1910 edition of his law list.

J. H. Moss, K.C., for the plaintiff.
D. T. Symons, K.C., for the defendant.

TEETZEL, J. (after setting out the facts as above):—The particulars of the charge chiefly relied upon are:—

(1) The system of indexing the Toronto agents of Ontario solicitors in use in the plaintiff's publication has been copied in the defendant's publication from the plaintiff's publication.

*To be reported in the Ontario Law Reports.

(2) All that part of the defendant's publication which consists of lists and tables of Courts, Judges, Court and other legal officials, barristers and solicitors, is copied either directly or indirectly from the plaintiff's publication.

As to the first particular, it is not disputed that the defendant in his book has adopted the system used by the plaintiff to indicate the Toronto agent of each solicitor in the Ontario list who has a Toronto agent, which is by placing a number to the right of the name of such solicitor, which corresponds with the number to the left of the name of another solicitor or firm appearing in the list for Toronto; but, while the defendant has adopted this system, he has not used the same numbers as appear in the plaintiff's book.

If the plaintiff's case depended solely upon this charge, I think his action would fail, because, as held by Lindley, L.J., in Hollindrake v. Trusswell, [1894] 3 Ch. 420, at p. 427, copyright does not extend to ideas or schemes or systems or methods, but is confined to their expression; and, if there expression is not copied, the copyright is not infringed. . . .

[Reference to Baker v. Selden, 101 U.S. (11 Otto) 99.]

As to the second particular of charge, a comparison of the two publications discloses a strikingly similar arrangement of the lists of barristers, solicitors, and Court officials. The presence in the defendant's publication of a large number of common errors in spelling and in alphabetical sequence of names in the lists forcibly suggests that the defendant's lists, where these common errors appear, were copied from the plaintiff's lists.

It is laid down in many authorities that the presence of common errors is one of the surest tests of copying: Kelly v. Morris, L.R. 1 Eq. 697; Pike v. Nichols, L.R. 5 Ch. 251; Cox v. Land and Water Co., L.R. 9 Eq. 324; Murray v. Bogue, 1 Drew. 353; . . . Coppinger on Copyright, 4th ed., p. 171.

The plaintiff, however, is not in this case driven to depend solely on the evidence of common errors, because, while the defendant says he got much of his material from other sources—and no doubt he did—he admits that he got much of it from the plaintiff's publication. . . .

I . . . find as a fact that, in the preparation of both the lists of barristers and solicitors throughout the Dominion and of the lists of the Judges and Court officials, the defendant, for the purpose of getting his original information and for the preparation of the lists for the printer, copied from the plaintiff's book substantially all the names found in the plaintiff's book.

I also find that the defendant, as the result of independent efforts and inquiry, collected many additional names and much material and information of value for a law list; and I also find that, while the defendant adopted much of the method of the arrangement of the material, he also adopted many changes in the arrangement which may be claimed as improvements on the plaintiff's methods.

The defendant's summary of the laws of the provinces is the result of independent effort, which, with much other information in his book, has not infringed upon the plaintiff's rights.

I think, however, that, under the authorities, it must be adjudged that the defendant has, in respect of the lists of barristers and solicitors and Judges and Court officials, substantially availed himself of the labour of the plaintiff, and has been guilty of an infringement of the plaintiff's copyright, being his exclusive right, under the law, of printing or otherwise multiplying copies of his original work as contained in his law list of 1910.

There was, of course, nothing to prevent the defendant preparing a rival law list, provided the material collected for the same was the product of his own original effort or was obtained from sources not copyrighted.

It is not necessary for me to decide whether the defendant could have escaped liability in respect of the barristers' and solicitors' lists, if he had got replies from all the persons to whom he sent correction slips, because in very many cases he did not get replies, and in those cases he copied the names as he found them in the plaintiff's lists after revision by the local Court officials. . . .

[Reference to Garland v. Gemmell, 14 S.C.R. 321.]

Nor is it necessary to decide what would have been the consequence if the defendant had got the original information from the Local Registrars as to the Judges and Court officials, if it had chanced to have been the same as appeared in the plaintiff's lists, because the defendant admits that, in two cases at least, he copied the material out of the plaintiff's book and submitted it to the Local Registrars for revision and correction, and thus appropriated to himself the results of the plaintiff's diligence and labour. . . .

[Reference to Lewis v. Fullarton, 2 Beav. 6, 8; Hotten v. Arthur, 1 H. & M. 603; Kelly v. Morris, L.R. 1 Eq. 697; Scott v. Stanford, L.R. 3 Eq. 718; Morris v. Ashbee, L.R. 7 Eq. 34; Morris v. Wright, L.R. 5 Ch. 279.]

Sir Charles Hall, V.-C., in Hogg v. Scott, L.R. 18 Eq. 444, 458, says: "The true principle in all these cases is, that the defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at for the purpose of producing his work—that is, in fact, merely to take away the result of another man's labour, or, in other words, his property."

In my opinion, the evidence here clearly brings this case within that principle; and, although the defendant has in the lists contained in his book inserted a considerable amount of original information which probably does not infringe on the plaintiff's rights, it is not practicable, upon the evidence, to separate it from the pirated matter so as to leave the original material of any value or use for publication. . . .

[Reference to Mawman v. Tegg, 2 Russ. 385, 390, 391.]

I think, therefore, the proper judgment to be entered is, that the defendant's publication known as "The Canada Legal Directory, 1911," is, in respect of the lists of barristers and solicitors and of Judges and Court officials therein contained, an infringement of the plaintiff's copyright in respect of the Canadian Law List, 1910, and that the defendant be restrained from further printing, publishing, or selling the said Canada Legal Directory, 1911, or any reprint or future edition thereof containing any of the said lists, and that it be referred to the Master in Ordinary to ascertain the plaintiff's damages, and that the defendant pay to the plaintiff the costs of action up to and including this judgment. Costs of reference and further directions reserved until after the Master's report.

MIDDLETON, J. JANUARY 5TH, 1912.

MINNESOTA AND ONTARIO POWER CO. v. RAT PORTAGE LUMBER CO.

Interim Injunction—Balance of Convenience—Bonâ Fide Dispute—Water Rights.

Motion by the plaintiffs for an interim injunction restraining the defendants and each of them from interfering with the natural flow of the waters of the Rainy River past the lands and works of the plaintiffs at or near Fort Frances, by damming and storing the waters of certain lakes.

Glyn Osler, for the plaintiffs.

G. H. Watson, K.C., for the defendants the Rainy River Lumber Company and the Shelwin Company.

R. B. Henderson, for the defendants the Rat Portage Lumber Company and the Northern Construction Company.

MIDDLETON, J.:—Further consideration has confirmed my view, expressed upon the argument, that no case has been made which would warrant the granting of an interim injunction. The plaintiffs' rights are by no means clear, and there can be no doubt that the defendants have for years used the water in the manner contemplated. I fear that any injunction will necessarily occasion the defendants greater injury than the plaintiffs will sustain between the present time and the trial. I cannot say that the plaintiffs have shewn that the balance of convenience in in favour of the injunction; and, when the right asserted is denied, and there can be no question as to the *bona fides* of the dispute, the rule is against interference, unless the injury done to the plaintiff is clearly greater, if in the end he should be found to be right, than the injury to the defendant by an injunction, if in the end he is found to be right.

On this motion it would be quite out of place for me to attempt to consider the merits. When once satisfied that there is a real question to be tried, I ought not to interfere with the ordinary course of litigation, save in cases where a *modus vivendi* can be suggested which is on the whole advantageous.

The plaintiffs may amend as they desire; and, if a trial can be had with advantage at an earlier date than that fixed for the Fort Frances sittings, no doubt some arrangement may be made to meet the convenience of the parties.

Costs in the cause.

RIDDELL, J. JANUARY 5TH, 1912.

RE SIMPSON AND VILLAGE OF CALEDONIA.

Municipal Corporation—By-law Requiring Closing of Shops during Certain Hours—Powers of Council—R.S.O. 1897 *ch.* 257, *sec.* 44—*Power to Pass By-law without Petition under sub-sec.* 2—*Effect of Presenting Unnecessary Petitions—Refusal of Court to Interfere with Exercise of Constitutional Functions by Municipal Councils.*

On the 26th October, 1911, the Council of the Village of Caledonia passed a by-law that all shops within the village, be-

longing to certain classes named, should be closed and remain closed between seven o'clock in the afternoon of every business day (excepting Saturdays. etc.), and five of the clock in the forenoon of the next following day. Several petitions were presented to the council for the passage of such by-law; and this motion was made to quash the by-law, on the ground of the insufficiency of these petitions.

J. G. Farmer, K.C., for the applicant.

H. Arrell, for the Corporation of the Village of Caledonia.

RIDDELL, J.:—R.S.O. 1897 ch. 257, sec. 44, is the statute under which the by-law was passed; and it will be seen that sub-sec. 2 gives the local council power to pass such a by-law as this without petition, *i.e.*, to close shops between 7 p.m. and 5 a.m. By sub-sec. 3, it is made obligatory on the council to pass a by-law giving effect to petitions, where such petitions are properly signed, and requiring shops to be closed "at the times and hours mentioned in that behalf in the application." This is quite different from the power given in sub-sec. 2, which is wholly optional with the council—and does not limit or modify that power.

The case of Re Halladay and City of Ottawa, 14 O.L.R. 458, 15 O.L.R. 65, differs from the present. There the by-law ordered the closing at six o'clock; and, consequently, it could not have been made under sub-sec. 2. The Court held that the proper number of persons had not signed the petition; that such a petition properly signed was a prerequisite; and the by-law could not stand.

But here the by-law is one which the council could pass without petition at all. (The by-law does not purport to be in pursuance of petition). I cannot think that the power given by the statute is diminished by the fact that wholly unnecessary petitions have been filed.

While the acts of councils which interfere with the freedom of the subject to trade when and where he will must be closely scrutinised, and found to be justified by legislation in order to be sustained; on the other hand, no attempt should be made by the Court to interfere with the exercise by these legislative bodies of their constitutional functions. We have no more right to interfere with them, when they are within their powers, than with any other legislating body, parliament or legislature.

The motion should be dismissed with costs.

DIVISIONAL COURT. JANUARY 5TH, 1912.

FERGUSON v. EYRE.

Jury Notice—Striking out—Powers of Judge at Trial—New Rule 1322—*Substantive Order by Divisional Court.*

An appeal by the defendant from an order of MEREDITH, C.J.C.P., striking out the defendant's jury notice.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

Harcourt Ferguson for the defendant.

R. McKay, K.C., for the plaintiff.

The judgment of the Court was delivered by MIDDLETON, J.:—In this case we are bound by the decision in Bank of Toronto v. Keystone Fire Insurance Co., 18 P.R. 113. The Chief Justice of the Common Pleas was not "the Judge presiding at the trial," within sec. 110 of the Ontario Judicature Act, and he had no jurisdiction to strike out the jury notice.

Under the Rule passed on the 23rd December last,* since this case was argued, the jury notice would, upon application, be struck out, because the case is clearly one "which ought not to be tried with a jury." We can see no good purpose to be served by putting the parties to the expense of a motion under this Rule; so, while we allow the appeal, we make a substantive order striking out the jury notice, and directing that the action be transferred to the non-jury list.

Costs throughout in the cause.

*1322—(1) Where an application is made to a Judge in Chambers under section 110 of the Ontario Judicature Act, and it appears to him that the action is one which ought to be tried without a jury, he shall direct that the issues shall be tried and the damages assessed without a jury; and, in case the action has been entered for trial, shall direct the action to be transferred to the non-jury list.

(2) The refusal of such an order by the Judge in Chambers shall not interfere with the right of the Judge presiding at the trial to try the action without a jury, nor shall an order made in Chambers striking out a jury notice interfere with the right of the Judge presiding at the trial to direct a trial by jury.

(3) The Judge presiding at a jury sittings or a non-jury sittings in Toronto may, in his discretion, strike out the jury notice and transfer the action for trial to a non-jury sittings; and this power may be exercised notwithstanding that the case is not on the peremptory list before the said Judge.

RIDDELL, J. JANUARY 6TH, 1912.

*THOMSON v. PLAYFAIR.

Contract—Sale of Timber—Interest in Land—Statute of Frauds—Document Signed by Agent of Purchaser—Absence of Authority of Agent—Knowledge of Principal—Non-repudiation—Adoption of Contract—Part Performance—Acts of Possession—Specific Performance—Liability of Agent—Misrepresentation of Authority—Vendor not Misled—Costs—Misconduct.

Action for specific performance by the defendants Playfair and White of an alleged contract to purchase from the plaintiff the timber upon Yeo Island, Manitoulin district, or, in the alternative, for damages from the defendant Byers for misrepresentation of authority to bind his co-defendants.

The plaintiff's brother, Alexander Thomson, made the alleged contract with one Thompson, a foreman employed by the defendants Playfair and White, who were dealers in ties, posts, etc., in buying ties, etc., and the defendant Byers, another foreman employed in shipping for his co-defendants. Thomson gave Byers a receipt for $100, which was paid by a draft on Playfair and White, drawn by Byers explicitly "on account of purchase of Yeo Island." The receipt was on the letter paper of Playfair and White, with their name and business printed at the top, and the words "Wiarton Branch, C. E. Byers, Agent." The receipt read: "Received from Playfair and White the sum of $100, being part payment on purchase of timber on Yeo Island. The purchase-price of said timber to be $5,500. Balance of this amount to be paid within one month." This was signed "Catherine Thomson" (the plaintiff) "per Alex. Thomson." At the same time, a copy was made of this receipt (excepting the signature), and Byers signed it, "Playfair and White, per C. E. Byers." This was marked "Copy of Receipt," and handed to Thomson—Byers telling him that he did not know that he had any right to give him an agreement.

The receipt signed by Thomson was sent by Byers to the firm of Playfair and White, in a letter in which Byers said, "We have closed for the Island, at least we have bound the bargain." This was received by the firm, and an entry of the transaction was made in their books. The draft was honoured. Play-

*To be reported in the Ontario Law Reports.

fair and White said that they looked upon the transaction as a mere option, and not as a purchase—that they, as a matter of business, opened an account with any intended purchase.

The receipt was dated the 22nd May, 1911. On the 31st May the firm wrote Byers that they were pleased that he had secured Yeo Island, and asked him to send an estimate of what he found on it. On the 16th June, Thompson wrote Thomson asking "for another thirty days' option on Yeo Island, as the other parties are not satisfied without seeing more of it." On the 20th June, Thomson wrote to the firm that he considered the contract of sale of lumber on Yeo Island to the firm closed; that he gave no option; that he would wait two weeks for payment of balance. There was more correspondence. Thomson threatened to bring an action. Byers examined the island, and reported favourably to the firm.

This action was begun on the 16th August.

The defendants Playfair and White pleaded a general denial; that Byers had no authority to contract for them; and the Statute of Frauds.

The defendant Byers pleaded that he was only an agent; that Thompson agreed with Thomson to buy the timber on Yeo Island for $5,500—$100 down and $5,400 in one month; and that, on Thompson's instructions, he gave the draft as the firm's agent, and had drawn up "as evidence of sale and purchase of said timber the papers or documents . . . set out in the . . . statement of claim."

The action was tried before Riddell, J., without a jury, at Toronto.

D. Robertson, K.C., for the plaintiff.

R. McKay, K.C., for the defendants Playfair and White.

O. E. Klein, for the defendant Byers.

Riddell, J. (after setting out the facts) :—Thompson acted as a sort of foreman in buying ties, etc., and Byers in shipping them; but I cannot find that either had the right to enter into such a contract as this. . . .

At the trial the defendant Byers changed his story (from that set out in his pleading), and set up an option. I entirely discredit this story, and think that he was telling the truth when he gave instruction for the defence. . . .

The first question is, "Does the Statute of Frauds apply to the sale of such property as is the subject-matter of the present action? . . . What was sold was an interest in land within

the meaning of the Statute of Frauds. . . . I do not think any reasonable doubt can exist since the case in the Court of Appeal of Hoeffler v. Irwin, 8 O.L.R. 740. Webber v. Lee, 9 Q.B.D. 315, is a less strong case. . . .

The fact that the document relied upon is not signed by those attempted to be charged is immaterial, if it be signed by an agent with authority—and it is of no importance that the name of the principal does not appear (at least in a document not under seal). See the cases collected in Standard Realty Co. v. Nicholson, 24 O.L.R. 46.

I have found as a fact that neither Thompson nor Byers had any authority either to buy the timber or to sign a contract for the purchase. . . .

Playfair and White . . . knew that Byers had bought for them, and not simply taken an option. . . . Knowing that their ostensible agent had bought the timber, they did not repudiate the agency or the contract, as they should have done if they did not intend to adopt the contract. I think that they did adopt the contract, whatever it was.

Then they are in the position of having bought the timber, paid $100 on the purchase, and signed a copy of the receipt given them by the agent of the plaintiff.

That is the only document signed by them or for them, except indeed the draft for $100 given to the plaintiff; and I am of opinion that it is defective to charge them when the Statute of Frauds is pleaded.

Nor, as at present advised (but I give no decision on this point), do I think that the rule in Rochefoucauld v. Boustead, [1897] 1 Ch. 196, referred to and followed in Kendrick v. Barkey, 9 O.W.R. 356, can be appealed to. It is the simple case of one contracting party setting up the statute to defeat an action on a contract not properly verified as the statute requires—the defendants had received no property, etc., under the contract.

But the action of the defendants' agents going to and landing upon the Island, examining the timber, etc., are acts which are contended to be acts of part performance—of course the part payment is not.

The Act R.S.O. 1897 ch. 32 gives the licensee the right, not only to the timber, but also (sec. 3 (1)), "to take and keep exclusive possession of the lands," and (sec. 3 (3)), "to institute any action against any . . . trespasser." If the defendants Playfair and White had not bought the property from the plaintiff, they had no right to send their agent upon the Island as

they did—their act was a taking possession of the land, and, in my view, an act of part performance: Fry on Specific Performance, sec. 264 sqq.

There will be judgment for plaintiff against these defendants for $5,000, interest thereon from the 22nd June, 1911, and full costs of suit.

As to Byers, the action should not have been brought against him at all. . . .

"Where an agent assumes an authority which he does not possess, and induces another to deal with him upon the faith that he has the authority he assumes, it must be taken that the person making the claim of agency undertook that he was agent, and he is liable personally for the damage that has occurred:" Firbanks Executors v. Humphreys, 18 Q.B.D. 54; Oliver v. Bank of England, [1901] 1 Ch. 652, [1902] 1 Ch. 610, [1903] A.C. 114. And it makes no difference that the claim is made bonâ fide, and there is no fraud. But this is not the case where there is no misrepresentation of fact: Jones v. Hope, 3 Times L.R. 247n.

Here Byers told the plaintiff's agent that he did not know that he had any power to give him a contract; the vendor's agent was not in fact misled, but took the document with Byers's signature for what it was worth. . . .

[Polhill v. Walter, 3 B. & Ald. 114, distinguished.]

The action will be dismissed as against Byers. Had his conduct been throughout as impeccable as in the signing of the document, etc., he should have his costs; but it is impossible not to recognise that he has allowed his desire to shield his employers to modify his views of the transaction in question. He stated substantially the facts to his solicitor, and his solicitor put them in formal shape in the pleadings; but, subsequently Byers completely changed his recollection of the facts—it is possible not corruptly. There will be no costs quoad this claim. . . .

Full credence is to be given to the plaintiff's agent, Thomson.

RIDDELL, J. JANUARY 8TH, 1912.

*CARLISLE v. GRAND TRUNK R.W. CO.

Railway—Injury to Passenger's Luggage Lying in Railway Station—Passenger not Travelling by same Train—Liability of Railway Company—Gratuitous Bailee—Gross Negligence—Warehousemen—Proper System—Injury Due to Accident not Caused by Negligence—Onus—Evidence.

Action by husband and wife for the value of a trunk and contents destroyed in the baggage-room of the defendants at St. Catharines.

The plaintiffs purchased from the New York Central and Hudson River Railroad Company, at New York, on the 23rd December, 1910, through tickets from New York to St. Catharines, Ontario, via the Grand Trunk Railway, and on that day checked the trunk referred to, which reached St. Catharines the following day, the 24th December, at 2.47 p.m. The plaintiffs did not, however, commence their journey from New York until the next day after they had checked the trunk, that is, the 24th; they reached St. Catharines on the 25th December at 10 a.m. The trunk, on arrival at St. Catharines, was placed in the baggage-room there, and on the morning of the 25th December, at about 5 a.m., there was an explosion in the baggage-room (two sections of the defendants' hot water heater or boiler, situated therein, giving way), causing damage to the plaintiffs' trunk and contents. The total value of the trunk and contents was $800, as agreed by the parties.

The tickets contained, printed on their face, a number of conditions, one of which was: "5. Baggage liability is limited to wearing apparel not to exceed $100 in value for a whole ticket and $50 for a half ticket, unless a greater value is declared by the owner and excess charge thereon paid at the time of taking passage."

One of the conditions indorsed on the baggage check was: "Baggage consists of passenger's wearing apparel, and liability is limited to $100 (except a greater or less amount is provided in tariffs) on full fare ticket, unless a greater value is declared by owner at time of checking and payment is made therefor."

There was no pretence that any greater value was declared by the plaintiffs at the time of checking or that any payment was made therefor.

*To be reported in the Ontario Law Reports.

H. H. Collier, K.C., for the plaintiffs.
W. E. Foster, for the defendants.

Riddell, J. (after setting out the facts):—The defendants contend that they held the baggage as bailees, and at the strongest as against them simply as warehousemen, and that they were not negligent, and, therefore, not liable to the plaintiffs, or, if held to be liable, they are liable under the . . . conditions indorsed on the tickets and baggage check, for only $100, and have so pleaded.

While I do not understand the plaintiffs at the trial to have expressly abandoned a claim against the defendants as common carriers, this was not pressed at the trial . . . counsel. . . . conceding that no claim lay against the defendants as common carriers.

Such cases as Penton v. Grand Trunk R.W. Co., 28 U.C.R. 367, and Vineberg v. Grand Trunk R.W. Co., 13 A.R. 93, shew that counsel was wise in making the concession.

It remains to consider whether the defendants are liable otherwise than as common carriers.

Early in the history of railways, it was laid down by the Massachusetts Courts that baggage is supposed to travel by the same train as the passenger, and that, if the passenger fails (without the fault or to the knowledge of the railway company) to travel by the same train, the liability of the railway company is but for gross negligence. . . .

[Reference to Colliers v. Boston and Maine R. Co., 10 Cush. 506; Wilson v. Grand Trunk R.W. Co., 56 Me. 60, 57 Me. 138; Marshall v. Pontiac, etc., R.R. Co., 126 Mich. 45; Wood v. Michigan Central R.R. Co., 98 Me. 98; Graffam v. Boston and Maine R.R. Co., 67 Me. 234; Cutler v. North London R.W. Co., 19 Q.B.D. 64, 67.]

There being nothing to take the case out of the general rule, I think the defendants' liability, if any, is that of a gratuitous bailee. Then they are liable only for "gross negligence." What "gross negligence" is has been the subject of much judicial and editorial discussion. . . .

[Reference to Wilson v. Brett, 11 M. & W. 113, 115, 116; Grill v. General Iron Screw Collier Co., L.R. 1 C.P. 600, 612; Doorman v. Jenkins, 2 A. & E. 256, 261; Wyld v. Pickford, 8 M. & W. 443, 460; Batson v. Donovan, 4 B. & Ald. 21, 30; Duff v. Budd, 3 Brod. & B. 177, 182; Story on Bailments, sec. 11; Hinton v. Dibbin, 2 Q.B. 646, 661; Austin v. Manchester Sheffield and Lincolnshire R.W. Co., 10 C.B. 454, 474, 475; Cashill v.

Wright, 6 E. & B. 891, 899; Beal v. South Devon R.W. Co., 5 H. & N. 875, 881, 3 H. & C. 337, 341, 342; Lord v. Midland R.W. Co., L.R. 2 C.P. 339, 344; Giblin v. McMullen, L.R. 2 P.C. 317, 336, 337; Palin v. Reid, 10 A.R. 63, 67; Leggo v. Welland Vale Manufacturing Co., 2 O.L.R. 45, 49.]

The facts of the damage, as I find them, giving such weight to the evidence of the viva voce witnesses as I think, from having seen them at the trial, their evidence should have, are as follow:—

The trunk was placed in the baggage-room of the defendants . . . which was heated by a closed hot water system. The boiler had been bought from a Buffalo concern, the American Radiator Company, and was installed by the defendants' own men some three years before the accident. The relief valve and steam gauge were taken away each summer, including the summer of 1910, and tested—at least, they were taken away for that purpose.

In the system there was a tank at the top of the room which let down water through a three-inch pipe into the boiler—then the water went into a one and a quarter inch pipe, which ran through the whole station, and ultimately back into the three-inch pipe. On the boiler was a gauge, and on the tank a safety valve tested to 30 lbs.

The 24th December had been a very mild day, as was the 25th. The night operator, whose duty it was to look after the furnace from 7 p.m. to 7 a.m., put on fresh fuel at about 12.30 a.m., making a moderate fire; and at about 4.30 a.m. he had slightly checked the fire, then just a moderate fire, by pulling out the damper; there was then between 10 and 15 lbs. of steam in the boiler, and the gauge seemed to be working properly. At about 5 a.m. an explosion occurred. The pipes could not have frozen and had not frozen, but two sections of the boiler burst. This did not set fire to the building, but it damaged the plaintiffs' property.

Some attempt was made at the trial to shew that the closed system is not a proper system; but the evidence was not given in a satisfactory manner, and I am satisfied that the closed system employed by the defendants is a safe system, no less safe than the open system advocated by the witness whose evidence I do not attach value to. It had, moreover, been used for years by the defendants over their system, and was not found dangerous.

It is wholly impossible to find anything like the "gross negligence," for which alone a gratuitous bailee is responsible.

The same result will follow if we consider the defendants bailees for reward—warehousemen. As there was a proper system, properly attended to, according to my finding, the explosion was not due to any negligence on the part of the defendants. . . .

I find as a fact that the cause of the blowing up here was a hidden defect of such a nature as that it could neither be guarded against in the process of construction nor discovered by subsequent examination. And, in my view, even though the defendants are chargeable as warehousemen, they are not liable.

I accede in its entirety to the principle laid down in Pratt v. Waddington, 23 O.L.R. 178, and . . . in Polson v. Laurie, ante 213, that where goods are taken by any one as bailee and lost (and I add "or destroyed") when in his custody, the onus is upon him to shew circumstances negativing negligence on his part. Here the defendants have shewn all the circumstances. "No evidence was kept back, all available witnesses seem to have been examined: there is no suspicion whatever of any bad faith:" per Hagarty, C.J.O., in Palin v. Reid, 10 A.R. 63, at p. 65; and it has been proved that the accident was not due to negligence.

That such a defect, causing an accident, does not render the defendants liable, is established by Readhead v. Midland R.W. Co., L.R. 2 Q.B. 412 (affirmed in L.R. 4 Q.B. 379), and the long line of decisions following it.

The action will be dismissed with costs.

It is unnecessary for me to consider the other points raised.

MIDDLETON, J., IN CHAMBERS. JANUARY 10TH, 1912.

DUVAL v. O'BEIRNE.

Security for Costs—Libel—Newspaper—Defence—Public Benefit —Good Faith—Retractation—Criminal Charge—Triviality or Frivolity—Libel and Slander Act, secs. 7, 8, 12.

Appeal by the plaintiff from an order of the Local Judge at Stratford, requiring the plaintiff to give security for the defendant's costs of an action for libel.

W. D. Gregory, for the plaintiff.
R. C. H. Cassels, for the defendant.

MIDDLETON, J.:—The defendant quite innocently published in his newspaper as a "social item": "Mr. and Mrs. P. Duval (née Mrs. Hetherington) have returned from their honeymoon trip, and have taken up their residence, No. 7 Moderwell street." This item of news reached the newspaper office, and was published in good faith. It now appears that Mr. Duval was a married man, and Mrs. Hetherington is a married woman, and it is said that this item, by its reference to a "honeymoon," implies that Mr. Duval, the plaintiff, has been guilty of the crime of bigamy; and the action is brought on that theory, with an apt innuendo.

The motion for security is based on an affidavit which has not been prepared with the care and precision necessary when the defendant seeks to avail himself of the statutory privilege which has been granted in actions for libel contained in a newspaper. The affidavit must "shew" the various things mentioned in the statute. It is not enough for the defendant to swear that he has a good defence on the merits. He may be quite wrong in his opinion, as he may not know or appreciate the law. He must state the facts; and, upon the facts as stated, the Court will express an opinion whether a defence is shewn: Lancaster v. Ryckman, 15 P.R. 199.

If clause 4 of the affidavit is to be taken as shewing the nature of the defence, it is not sufficient. It reads: "The alleged libel was published in good faith. The same was sent to my office as a 'personal,' for publication as an item of news, and the publication took place without any knowledge by me of the facts; and on the 30th day of November I inserted in the newspaper in which the alleged libel was published a full apology therefor, and a full and fair retractation thereof, and this was so published in as conspicuous a place and type as was the alleged libel."

If this is intended as a plea under sec. 7 of the Libel and Slander Act, 9 Edw. VII. ch. 40, it is not a defence at all, but a plea in mitigation of damages. But sec. 7 requires, not merely an apology, but that there should be no actual malice or gross negligence. Probably there was no actual malice; and this may sufficiently appear; but nothing is suggested to shew that there was not gross negligence. Nothing is said as to what, if any, inquiry was made from the person who handed in this item, or of any precaution being taken to prevent the insertion of false items that might be sent for publication by any malicious individual.

If it is intended to rely on sec. 8 (2), as may be surmised

from the use of the words of sub-sec. (*a*), "that the alleged libel was published in good faith," and the mention of the publication of a retractation, as required by sub-sec. (*e*), then it may perhaps be inferred that enough is said to answer sub-sec. (*d*), "that the publication took place in mistake or misapprehension of the facts;" but this is not by any means clear. Further, I am not satisfied that sub-sec. (*b*) is in any way met. How is it shewn that there was reasonable ground to believe that this publication was for the public benefit? I cannot think that this item of merely personal gossip is the kind of thing contemplated by the statute.

Then, does this libel "involve a criminal charge?" The words without the innuendo do not. The innuendo cannot be said to be improperly pleaded, and the innuendo shews that the words may well be capable of a meaning which does involve a criminal charge. This, in the opinion of the majority of the Divisional Court in Paladino v. Gustin, 15 P.R. 553, is enough.

The same principle is also clearly stated in Smyth v. Stephenson, 17 P.R. 374, at p. 376, by Meredith, C.J., and by Falconbridge, C.J., in Kelly v. Ross, 1 O.W.N. 48.

I find sec. 12 very difficult to construe. Sub-section (1) requires a defence to be shewn. Section 7 does not create a defence; it allows a plea in mitigation of damages. Section 8 (2) limits the recovery to actual damages if certain facts "appear on the trial." This does not create a defence. Yet, when a criminal charge is involved under sec. 12 (2), the existence of these circumstances, which reduce the damages only, is made to give a right to security—though it is clear that the right under sub-sec. (2) is intended to be narrower than under sub-sec. (1). It may be that this indicates that the facts that reduce the damages under sec. 8 were thought by the legislators to constitute a defence within that section.

I have not now to determine this question, because I do not think the case is brought within sec. 8, either in its entirety or eliminating clause (*c*), under 12 (2).

For the reasons given in Kelly v. Ross, supra, the action is not trivial or frivolous. It must be a very exceptional case that can be either, when crime is charged.

I think the appeal should be allowed and the motion should be dismissed with costs to the plaintiff in any event.

MIDDLETON, J., IN CHAMBERS. JANUARY 10TH, 1912.

PATTERSON v. NEILL.

Discovery—Examination of Defendant—Scope of Discovery—Relevancy only to Consequential Relief—Absence of Oppression or Hardship—Appeal from Master's Order—Discretion.

Appeal by the plaintiff from an order of the Master in Chambers dismissing the plaintiff's motion for an order requiring the defendant Mills to attend for re-examination for discovery and to answer certain questions which he refused, upon the advice of counsel, to answer when examined.

The Master was of opinion that the discovery sought was not relevant to the main issue, but only applicable to the consequential relief sought, and was, therefore, properly withheld.

A. R. Clute, for the plaintiff.
C. M. Garvey, for the defendant Mills.

MIDDLETON, J.:—The questions argued on this motion are of importance; and, while the general rule is free from difficulty, its application to particular cases is not by any means easy.

At one time in the Court of Chancery discovery was granted in the widest possible way. For the purpose of discovery, the allegations in the bill were assumed to be true, and discovery upon that footing followed as a matter of right. What is now Con. Rule 472 was passed to remedy a situation found to be intolerable; and this Rule gives the right to withhold discovery until after any issue or question of right shall have been determined. This power is quite distinct from the right to direct one question or issue to be tried before the others, and may be exercised when there has been an order under Con. Rule 531, or where, from the nature of the case, it is clear that the issue as to which discovery is sought is one which will not be dealt with at the hearing. Where there is a clear preliminary issue to be determined, discovery ought not to be allowed of matters which only become material if the issue is found in the plaintiff's favour, if the granting of such discovery at an early stage can be deemed to be oppressive. When the discovery, even though it may be regarded as consequential, is not oppressive, the discretion given by this Rule ought not to be used to withhold the information sought.

The Chancery practice was justified by three reasons of substance and weight: (1) that the postponement might cause the loss of the information altogether, by reason of death or inevitable accident; (2) that the obtaining of the information before that might enable a plaintiff to obtain an immediate final adjudication of his rights without a reference; (3) that the plaintiff ought to know the true state of accounts, etc., as this will enable him to see exactly what is really involved in the litigation, and will enable him to act in the light of this knowledge. See cases collected in Bray on Discovery, p. 28. These reasons have not lost their weight, and must be considered when the provisions of this Rule are invoked.

Bedell v. Ryckman, 5 O.L.R. 670, is an instance of the class of cases in which discovery as to accounts should be withheld; it differs widely from this case, but is valuable as an exposition of the principle and a summary of the cases.

Here a scrutiny of the pleadings shews that there is really no defence. A good counterclaim is set up; and, if what is stated can be proved, the defendants may well be entitled to be allowed against any sum for which they may be accountable the sums which they have been compelled to pay and the loss they have sustained.

I cannot see any preliminary issue to try, nor can I see that the discovery sought imposes any hardship on the defendants in any way. Beyond this, the reasons for the Chancery rule seem to me cogent.

I hesitate much before interfering with the exercise of discretion by an experienced Master, but I have had a conference with him, and he tells me that he had not apprehended the situation as it has been now developed.

For these reasons, I think the appeal should be allowed and the motion granted, and an order should be made for examination on the lines suggested. Costs to the plaintiff in any event.

MIDDLETON, J., IN CHAMBERS. JANUARY 11TH, 1912.

NORTHERN CROWN BANK v. NATIONAL MATZO AND BISCUIT CO.

Settlement of Action—Issue as to—Preliminary Trial—Foreign Commission.

Motion by the defendant Garfunkel for an order directing a preliminary trial of an issue as to whether there has been a

settlement or not, and whether the same should be given effect to in bar of the action.

W. J. McWhinney, K.C., for the defendant Garfunkel.
F. Arnoldi, K.C., for the plaintiffs.

Middleton, J.:—The circumstances in this case are very unusual, and, I think, justify the very exceptional order sought.

The issue as to the settlement is quite distinct, and is one as to which an appeal is not likely, and the burden and expense of a commission to Syria are serious, quite apart from the delay.

At the hearing of the motion I suggested a course that still commends itself to me. The defendant was ready to agree to this; and, if the plaintiffs now assent, an order can be made in accordance with this suggestion.

I think the action should go to trial, and the issue as to settlement should be first dealt with; and, if this does not end the action, the remaining issues should then be tried, reserving to the defendant the right to have a commission to take the evidence of Weinstock before judgment is pronounced—if, in the light of the facts as they develope at the hearing, his evidence appears to be material. I suggest this because there are three contingencies which may make his evidence unnecessary: a finding in the defendant's favour on the issue as to the settlement; a finding in his favour on the legal question as to the form of the document; or the evidence may so shape itself that Weinstock cannot help by his testimony.

Whichever order is taken, costs will be in the cause.

I may say that I have discussed the matter with the Chief Justice of the King's Bench, and he agrees with what is proposed.

Middleton, J. January 11th, 1912.

Re WOEFFLE.

Will—Construction—Bequest "to the Party at whose House I Die"—Occupant or Owner.

Motion by the executors of the will of Martin Woeffle for an order, under Con. Rule 938, determining a question as to the construction of the will arising in the administration of the estate.

By the clause of the will of which the interpretation was sought, the testator made a bequest "to the party at whose house I die."

J. D. Bissett, for the executors.

H. S. White, for the testator's son-in-law.

H. H. Davis, for the owner of the house in which the testator died.

MIDDLETON, J.:—This case is well covered by Stubbs v. Sargon, 2 Keen 255, affirmed 3 My. & Cr. 507. There the testatrix gave certain property to be divided "amongst her partners who should be in co-partnership with her at the time of her decease or to whom she might have disposed of her business in such shares and proportions as her trustees should think fit." It was said that this was void, because of "the undefined character of the persons who were to take under it, as well as the indefinite nature of their interest." The devise was upheld because "the persons were so described with reference to some extrinsic fact as that the subject of the devised (sic) could be ascertained by extrinsic evidence at the time when the devise was to take effect." "It was nothing more than the common case of a gift to a class of persons who should fill a particular character, to be ascertained by some act or event extrinsic to the will indeed. . . Thus a gift to the persons who should be the testator's servants at the time of her decease would be perfectly good, though it would probably depend in a great degree upon the acts of the testator who should fill that character." See the report of this case, 6 L.J.N.S. Ch. 255.

Applying this principle to the facts shewn, I have no doubt that the son-in-law, as head of the household where the testator was living at his death, takes. This was his "house" in the sense in which the testator used the term. He was referring to the house as an abode and place of residence, and in no way to the ownership.

Declare accordingly. Costs out of the estate.

DIVISIONAL COURT. JANUARY 11TH, 1912.

*NOBLE v. NOBLE.

Limitation of Actions—Possession of Land for Statutory Period —Limitations Act, 10 *Edw. VII. ch.* 34, *sec.* 23*—Tenancy at Will—Payment of Taxes—Mortgage—Registered Discharge —New Starting-point for Statute.*

Appeal by the plaintiff from the judgment of MULOCK, C.J. Ex.D., ante 146, dismissing the action.

*To be reported in the Ontario Law Reports.

The appeal was heard by BOYD, C., RIDDELL and SUTHERLAND, JJ.

W. S. Brewster, K.C., for the plaintiff.

M. K. Cowan, K.C., for the defendant.

The judgment of the Court was delivered by BOYD, C.:—The legal effect of the Statute of Limitations, where one is let into possession of land as in this case, is, that he becomes a tenant at will, and the right of entry to the owner accrues at the expiration of one year thereafter. The continuation of the possession is regarded as a tenancy at sufferance, unless evidence be given that a fresh tenancy has been created. A new tenancy at will is to be implied from acts and conduct of the parties which ought to satisfy a jury (or the Court) that there is such an agreement. . . .

[Reference to Farmer v. Hall, [1899] 1 Q.B. 999; Doe d. Bennett v. Turner, 7 M. & W. 235; Doe d. Groves v. Groves, 10 Q.B. 486; Foster v. Emerson, 5 Gr. 143, 152; Turner v. Bennett, 9 M. & W. 644, 645, 646.]

In the present case, during the whole period of the son's occupation, and after his death, the lot has been assessed to the plaintiff as freeholder and to the son as tenant, and the taxes have been uniformly paid by the father. This appears to me to present an act in pais respecting the property which manifests the very truth that the father was from year to year recognised as the owner and the son as the occupier or tenant; and this with the express assent and acceptance of the son.

The judgment in appeal proceeds upon the authority of Keffer v. Keffer, 27 C.P. 257, in which one of the Judges discredits the authority of a very carefully considered decision of a very strong Court in Foster v. Emerson, 5 Gr. 143. But this latter case is far from being overruled, and it is much more in point in its circumstances to this case than in Keffer v. Keffer. . . In Foster v. Emerson, as in this case, to give effect to the statute would be to frustrate the clear intention of the owner to hold it in his own hands as the proprietor. The utmost that can be said is, that Noble bought the lot for his son, but kept the deed of it, and the defendant (the son's wife) understood that he did so because he did not want Frank (the son and her husband) to do away with the house, on account of his drinking. The father paid wages to the son for work done in the father's business, and allowed him to live rent free on the land—the father paying the taxes and supplying materials for any repairs and outlay needed in the house. The father paid frequent visits to

the place. The father, after the son's death, leased the place without objection, or rather with the assent of the wife, and let her have the rent. This was done after the expiration of the statutory ten years, and this, though done after the ten years' limit, was inconsistent with her husband being the owner, and reflects light on the real nature of the son's occupation, for the reasons fully given by Blake, C., and Esten, V.-C., in Foster v. Emerson, 5 Gr. at pp. 148 and 154.

Upon another ground, also, I think the judgment in appeal cannot stand. The father purchased the lot on the 20th February, 1895, and gave a mortgage in fee for part of the purchase-money on the same day. The son went into possession in April, 1895, taking subject to the mortgage. Payments were made during the series of years by the father to the mortgagee, till the mortgagor was paid off and the discharge registered in February, 1908. Had the son acquired a title under the statute as against the father, yet, according to Henderson v. Henderson, 23 A.R. 577, the execution and registration of the discharge gave a new starting-point for the statute. And the same point was decided by the Court of Appeal in Ludbrook v. Ludbrook, [1901] 2 K.B. 96, where Romer, L.J., says: "If the mortgage be an existing one, and was executed before the commencement of the possession of the person claiming to have acquired a title by such possession under the Statute of Limitations, then the statute undoubtedly applies in favour of the mortgagee, though the person in possession may have acquired a good title as against the mortgagor and those claiming under the mortgagor." The mortgage in this case being paid off by the mortgagor, the effect is, not to discharge the mortgage as against the assumed statutory owner, but to reconvey to the mortgagor his original title in fee, with the right to possession as from the date of the repayment: Lawlor v. Lawlor, 10 S.C.R. 194.

The judgment should be reversed; but I assume that no costs are asked, as the plaintiff stated during the argument that he was willing to allow the widow to get the balance of the price of the land, which the plaintiff has sold, after deducting the amount paid on the mortgage.

LUM YET v. HUGILL—MASTER IN CHAMBERS—JAN. 10.

Particulars—Statement of Claim—Negligence—Motor Vehicles Act.]—This action was brought to recover damages for the death of the plaintiff's son, who was admittedly killed by the de-

fendant's motor-car. The plaintiff by the statement of claim alleged negligence on the part of the defendant; and the defendant moved, before pleading, for particulars of the alleged negligence. The Master said that the plaintiff need only set out in his statement of claim the material facts on which he relies, and which, if not disapproved or otherwise sufficiently answered, would entitle him to judgment. The provisions of 6 Edw. VII. ch. 46, sec. 18 (O.), throws upon the defendant, in such a case as the present, the onus of disproving negligence on his part. See Verral v. Dominion Automobile Co., ante 108, 24 O.L.R. 551. The plaintiff can, therefore, rely on the doctrine of res ipsa loquitur, and is not bound in any way to account for the fatal injury to his son. See Smith v. Reid, 17 O.L.R. 265. It was probably unnecessary to allege negligence; and, though this was done, particulars need not be given. See Con. Rule 279. Motion dismissed; costs in the cause. J. A. Macintosh, for the defendant. E. F. Raney, for the plaintiff.

WARFIELD V. BUGG—FALCONBRIDGE, C.J.K.B.—JAN. 10.

Contract—Interest in Company-shares—Evidence — Onus.] —The plaintiff, an engineer, claimed an interest in 100,000 shares of the capital stock of the People's Railway Company, under an alleged agreement between him and the defendant Bugg. The learned Chief Justice said that the plaintiff had failed to discharge the burthen of proof; and, this finding was made without reference to demeanour of witnesses, as to which there was nothing to choose. The agreement set up by the plaintiff was one of manifest impropriety, of doubtful legality, and, in the opinion of the Chief Justice, quite unenforceable. Action dismissed. R. S. Robertson, for the plaintiff. J. A. Scellen, for the defendants.

WARFIELD V. PEOPLE'S R.W. CO.—FALCONBRIDGE, C.J.K.B.—JAN. 10.

Contract — Remuneration for Services — Company-shares Received—Counterclaim.] Action to recover $3,099.80 and interest for services as engineer of the defendants. The learned Chief Justice said that the decision in the previous case practically disposed of this one, even if the plaintiff should succeed in establishing that these defendants ever hired him or otherwise

became in law bound to pay him, because he must give credit for the $3,000 stock received by him. The defendants held an assignment from the Central Securities Company; but the Chief Justice did not give effect to their claim of a balance in their favour. The action and the counterclaim should both be dismissed. In view of the relations of the parties and their peculiar methods of dealing, no costs were given to any one. R. S. Robertson, for the plaintiff. J. A. Scellen, for the defendants.

MANNHEIMER v. FORMAN—DIVISIONAL COURT—JAN. 10.

Sale of Goods—Action for Price—Defence—Counterclaim—Appeal—Costs.]—Appeal by the defendant from the judgment of the County Court of the County of York, in favour of the plaintiff, for the recovery of $102.10, in an action for a balance of the price of goods sold. The defendant set up that the goods received were not according to contract, and counterclaimed for $200 damages. The appeal was heard by BOYD, C., RIDDELL and SUTHERLAND, JJ. The Court dismissed the appeal with costs. RIDDELL, J., dissented as to costs, saying that, while he thought that the defendant had not been well treated, he could not see that he had made out a case for the allowance of his appeal—and the appeal should be dismissed; but, under all the circumstances, there should be no costs of the appeal. S. G. McKay, K.C., for the defendant. G. M. Clark, for the plaintiff.

CORRECTION.

In Rex v. Pfister, ante 440, lines 15, 16, and 17 should read:—"The prisoner did not ask for an interpreter nor for an adjournment at any stage of the case, nor did he ask for the assistance of counsel until after the evidence was in," etc.