

BETWEEN

TORONTO TYPE FOUNDRY CO., } PLAINTIFFS;  
 LIMITED . . . . . }

1908  
 Feb. 18.

AND

JAMES T. REID, *et al.* . . . . . DEFENDANTS.*Patents of Invention—Infringement—Defence—Demurrer—Jus tertii.*

As a defence to an action for the infringement of a patent of invention it was pleaded that the patent was the property of certain joint-owners who were not the plaintiffs.

*Held*, that this was in effect pleading a *jus tertii*, and was not a good defence in law to the action.

**ACTION** for the infringement of letters-patent for invention.

Demurrer to an allegation by way of defence that the patent was not the property of the plaintiffs but of third persons not parties to the action.

The grounds of the demurrer are stated in the reasons for judgment.

February 10th, 1908.

*W. Cassels K.C.* and *F. H. Markey* in support of demurrer;

*Glyn Osler, contra.*

SIR THOMAS W. TAYLOR, Judge *pro tempore*, now (February 18th, 1908,) delivered judgment.

The plaintiffs' statement of claim alleges that one Rogers obtained letters patent in Canada, granting him the exclusive right and privilege of constructing, using and selling to others, a certain linotype machine of which he was the inventor. This patent, it is asserted, the defendants are infringing by constructing and using linotype machines which contain the invention covered thereby. The plaintiffs, therefore, seek to have such

alleged infringement restrained, to obtain damages sustained, and for relief in several other respects.

The plaintiffs' title to the patent, as they set it out, is an assignment by Rogers to one Dougall, and a further assignment by Dougall to them; these assignments being both duly registered in the Patent Office at Ottawa.

The defendants by their pleas, allege ignorance of the plaintiffs being an incorporated company, next, admit their own existence as a co-partnership, and then deny every other matter contained in the statement of claim. They also plead that Rogers, Dougall and the plaintiffs, abandoned the alleged invention, whereby it became the property of the public, with the right to use and enjoy it. The plaintiffs' title to the patent is denied, as is also any infringement of it by the defendants. Then follow a number of pleas, which appear to have become almost matters of course in actions like the present. With these, there is a plea, the 13th, which sets up that the patent is the joint property of the Mergenthaler Linotype Co. of New York and John R. Dougall, and any transfer by the latter, as alleged, is illegal, null and void.

To these pleas the plaintiffs have replied, at the same time filing a demurrer to the 13th as bad in law.

The plaintiffs contend that it is not open to the defendants to set up the *jus tertii*, as they do when they allege the ownership of the patent by the Mergenthaler Linotype Co. and John R. Dougall. The cases cited, and on which they rely, *Greenstreet v. Paris* (1); *Bank of Toronto v. Cobourg, &c. Rail. Co.* (2), and *McDougall v. Lindsay Paper Mill Co.* (3), fully sustain their position.

Then, the plaintiffs set out their title; this is denied, so they are put to the proof of it, and must prove it as alleged. When the plaintiffs come to prove their title, the

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(1) 21 Gr. 229.

(2) 10 Ont. R. 376.

(3) 10 Ont. Pr. R. 247.

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defendants, having denied it, can, it seems to me, without this plea, show that the plaintiffs have not the good title they set up, and on which their right of action is founded. If they fail to prove the title they claim to have they cannot succeed in their action.

To allow the plea to stand would open up an issue causing great embarrassment at all events. If the plaintiffs have an assignment from Dougall at all, it cannot, as the plea says, be illegal, null and void.

As far as the plea goes the Mergenthaler Linotype Co. can have only some undisclosed equity or claim, for there is no suggestion even that they have any such registered assignment as seems required by sec. 27 of *The Patent Act*, R.S.C. c. 69.

I therefore allow the plaintiffs' demurrer to the 13th plea, with costs.

This also disposes of the demurrers in the other three cases of the same plaintiffs against Moffet, Robertson, and the Germania Printing & Publishing Co.

Solicitors for the plaintiffs: *Smith, Markey, Montgomery & Skinner.*

Solicitors for defendants: *Lafleur, MacDougall and McFarlane.*