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proceedings have not been put in evidence, it is impossible to hold it proved that the accused's statement was in fact irrelevant. For the foregoing reasons I would set aside the conviction and direct that the fine be refunded.

Conviction set aside.

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ORIGINAL CIVIL.

Before Mr. Justice Starling.

VINAYAKRAO DHUNDIRAJ (*Plaintiff*) *v.* NAROTAM ANANDJI (*Defendant*).* [28th March, 1893.]

Inspection—Discovery—Production—Documents of title—Refusal to produce—Ejectment—Practice.

The plaintiff sued to eject the defendant from certain pieces of land belonging to him, being portions of a passage upon which the defendant had encroached. In his written statement the defendant denied the plaintiff's title and stated that he would rely on certain deeds set forth in a schedule annexed thereto. In his affidavit of documents subsequently filed he objected to produce the deeds for the plaintiff's inspection on the ground that they related solely to his own title to the land in dispute, and did not in any way tend to prove or support the title of the plaintiff thereto.

Held, that the defendant was entitled to refuse production of the deeds. The Court could not go behind the defendant's affidavit of documents.

[582] IN chambers. The plaintiff sued the defendant, alleging that he had encroached upon a certain passage which belonged to the plaintiff by building thereon two *otlas*. He prayed that the defendant might be ordered to give up possession of the two pieces of ground encroached upon, and remove the said *otlas*. In the alternative he prayed that he might be declared entitled to a right of way over the said passage, and that the defendant might be ordered to remove the encroachments.

The defendant denied the plaintiff's title and (*inter alia*) pleaded limitation. In his written statement he stated that he would rely on certain deeds set forth in the schedule annexed.

The defendant subsequently made an affidavit of documents in his possession relating to the matter in question in the suit. He objected in this affidavit to produce these documents for the plaintiff's inspection, on the ground that they related solely to his own title to the land in dispute and did not in any way tend to prove or support the title of the plaintiff thereto.

In the schedule annexed to the affidavit he set forth (*inter alia*) the deeds referred to in his written statement.

The plaintiff took out a summons calling upon the defendant to show cause why he should not give inspection of the said documents.

Kirkpatrick, for the defendant, showed cause.

Lang (Acting Advocate-General), for the plaintiff in support of the summons.

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The following authorities were cited:— *Morris* v. *Edwards* (1); *Lyell* v. *Kennedy* (2); *Roberts* v. *Oppenheim* (3).

JUDGMENT.

STARLING, J.—This is a suit in ejectment brought by the plaintiff against the defendant in respect of two pieces of land in a passage claimed by the plaintiff as his own, on which, it is alleged, the defendant has trespassed, within twelve years before suit brought, by building thereon two *otlas*. There is an alternative prayer that, in the event of the plaintiff not being found [583] to be the owner of the land in question, he may be declared to be entitled to a right of way over the same.

The defendant in his written statement denies the plaintiff's title, and says further that, if the plaintiff or his predecessor in title were entitled to the said two pieces of land, their claim thereto has become barred by limitation. Further, in his written statement the defendant says he will rely in support of his case upon certain deeds set forth in the schedule thereto annexed.

On the 9th day of February, 1890, the defendant made his affidavit of documents, in a schedule whereto he set forth these deeds, but claimed to be entitled to refuse to produce them on the ground that they related exclusively to his own title; thereupon the plaintiff on the 13th March, 1893, took out a summons for inspection of these documents; and the question I have to decide is whether the defendant is entitled to refuse production.

In support of the defendant's contention, I was referred to the cases of *Morris* v. *Edwards* (1), *Lyell* v. *Kennedy* (2), and *Roberts* v. *Oppenheim* (3). The decision in the second case is on a wider point than I have to determine here, and does not seem to me to be applicable. It was, moreover, reversed by the House of Lords in 8 Ap. Ca. 217; I shall, therefore, not further refer to it. In the first case, as reported in 23 Q. B. D., the Judge in chambers and the two Judges of the Division Court were of one opinion, and the three Judges of the Court of appeal of the opposite opinion; consequently I should not have felt myself bound under all circumstances to follow it, but the case was subsequently carried to the House of Lords, and the five Lords who decided the matter affirmed the judgment of the Court of appeal. The case will be found reported in 15 Ap. Ca., 309. The judgment of the House of Lords distinctly lays down that where, in an action of ejectment, either party claims to refuse production of documents on the ground that they relate solely to his own title, and do not in any way tend to prove or support the title of the opposite party, the Court cannot go behind [584] his affidavit to that effect, and enquire whether his statement be true or not, but that he is entitled to the privilege claimed.

The case of *Roberts* v. *Oppenheim* further shows that the privilege is not affected by the fact that the documents for which it is claimed are referred to in the pleadings, and that the only result of such reference is that, if the party referring to them fails to produce them for inspection to the other side on notice, he cannot use them in evidence at the trial, unless he satisfies the Court that the documents relate only to his own title, or that he had some other sufficient causes for not complying with the notice— s. 131, Civil Procedure Code (XIV of 1882).

Under these circumstances, I must hold that I cannot in this case go behind the defendant's affidavit of documents, and that I must allow the

(1) 23 Q.B.D. 287. (2) 20 Ch. D. 484. (3) 26 Ch. D. 724.

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claim of the defendant to refuse production. Consequently this summons must be dismissed with costs.

Attorneys for the plaintiff:—Messrs. *Roughton and Byrne.*

Attorneys for the defendant:—Messrs. *Payne, Gilbert and Sayani.*

17 B. 584.

ORIGINAL CIVIL.

Before Sir Charles Sargent Kt., Chief Justice, and Mr. Justice Starling.

BADISCHE ANILINE AND SODA FABRIK (*Original Plaintiffs*), *Appellants v.* MANECKJI SHAPURJI KATRAK (*Original Defendant*), *Respondent.**

[24th March, 1893.]

Trade mark—Infringement—Label—Details different, but general similarity likely to deceive—Injunction.

The plaintiffs sued the defendant for an infringement of their label used on tins of aniline dye which they imported into Bombay. The label covered the top of the tin, and bore upon it the picture of an elephant in the centre of a curved band: the rest of the label being a combination in green, red and gold; representations, for the most part, of coins, medals and tracing. The defendant was the agent in Bombay of Cassella & Co., of Frankfort. Prior to 1892, Cassella & Co. had imported aniline dye into Bombay in tins bearing a label, the chief feature of which was an elephant. Of that label, however, the plaintiffs did not complain. But in January 1892 Cassella & Co. adopted a new label, also bearing the picture of an elephant, different in some respects from the picture on the plaintiffs' label and with new surroundings, to none of which, taken separately, did the plaintiffs [585] object, but they complained that in its general effect this new label was so similar to their trade mark as to amount to a colourable imitation thereof, and to be likely to deceive purchasers.

Held, that the plaintiffs were entitled to an injunction against the defendant.

Per SARGENT, C.J.—The question in a case of this description is not what would be the effect on brokers or even dealers in Bombay, but how the label would be likely to strike incautious or unwary purchasers, such as are to be found more particularly in the Mofussil. After a careful examination I cannot feel any doubt that the attention of such purchasers would be arrested by the general effect of the label, and that, notwithstanding such differences as undoubtedly exist in respect to the colour and size of the elephant and in some other respects, would regard the labels as symbolical of the plaintiffs' goods.

The remarks of Lord Selborne in *Johnston* v. *Orr Ewing* (1) relied on.

Per STARLING, J.—It is quite possible for a label no part of which is a copy of another label to be a colourable imitation of that other label, and to be so like it in general appearance as to be likely to deceive purchasers.

[F., 1 Bom. L.R. 291 (294); 15 Ind. Cas. 116 (118)=1912, P.L.R. Supp. No. 5=166 P.W.R. 1912; 15 M.L.J. 45; R., 25 B. 433 (468)=3 Bom. L. R. 1; 55 P. R. 1902=98 P. L.R. 1902.]

SUIT for the infringement of a trade mark.

The plaint stated that the plaintiffs were manufacturers of aniline dye and had for some years imported large quantities of their dyes into Bombay in tins bearing a label (marked Ex. A) which had been in the exclusive use of the plaintiffs, and which they claimed to be their trade mark. The label covered the top of the tin and had upon it the picture of an elephant as the central figure surrounded by certain printed words: the rest of the label being a combination in green, red and gold; representations, for the most part, of coins, medals and tracing. The

* Suit No. 342 of 1892; Appeal No. 779.

(1) 7 Ap. Ca. 219.