BETWEEN:

1913
April 1.

FOWLER & WOLFE MANUFACTURING COMPANY AND THE DOMINION RADIATOR COMPANY, LIMITED.....PLAINTIFFS.

AND

THE GURNEY FOUNDRY COMPANY, LIMITED.....DEFENDANTS.

Dismissal of action for want of prosecution—Rule 131 — Discretion o Judge—Terms upon which motion may be dismissed—Rule 325—Ethics of practice in the Court.

1. The intendment of Rule 131 of the practice of the Court is to leave the dismissal of an action for want of prosecution to the discretion of the Judge; and if, upon the material before him, he thinks the interests of justice would be served by refusing the order on the terms of costs to the defendant in any event, it is open to him to make such a disposition of the motion
2. The ethics of practice in the Court, arising under the provisions of Rule 325, is that the rules should not be administered *strictissimi juris*, but that they should be so applied that no proceeding in the Court shall be defeated by any merely formal objection.

SUMMONS for an order to dismiss an action for want of prosecution.

The nature of the action, and the grounds upon which the application to dismiss was made, are stated in the reasons for judgment.

The application was heard by the Registrar in Chambers* on April 1st, 1913.

A. F. May, in support of the summons, *C. H. Maclaren, contra.*

The REGISTRAR delivered the following judgment:

This is an application on behalf of the defendants, under Rule 131, to dismiss the action for want of prosecution.

*Now the Honourable Mr. Justice Audette.

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The statement of claim, with the usual prayer in a case for the infringement of a patent of invention, was filed on the 22nd February, 1909. The statement in defence was filed on the 23rd June, 1909.

The summons praying for such dismissal of the action was taken out on the 15th March, 1912, and in support of the application there was read the affidavit of E. H. Gurney, the Vice-President of the defendant, who says, *inter alia*, that the last communication between the parties was during the month of October, 1909, about the time the last of the particulars were delivered by the defendants and that they had assumed, by reason of the long delay on the part of the plaintiffs, more than two years, that the action had been abandoned,—alleging further they would be prejudiced by the prosecution of the action because of the death of a person they intended to call as their witness, and because of another person who was to be a witness has since left their employ and is not subject to their control.

To the latter affidavit the plaintiffs reply by the affidavit of R. C. H. Cassels who states their firm had been instructed in the action by Mr. E. H. Hunter, Attorney at Law, of Philadelphia, who acted for the Fowler & Wolfe Mfg. Co., and that his firm had no direct communication with either of the parties. That the statement of claim, although filed on the 22nd February, 1909, was served only on the 13th May, 1909, owing to the fact that negotiations had been going on for a settlement of the matters in question in this action. He further states that subsequent to October, 1909, his firm was instructed that negotiations for a settlement of the matters in question had been re-opened through Mr. Wright, the President of the Dominion Radiator Company, Limited, and that no

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further steps were taken in the action. Early in February, 1912, Mr. Cassels' firm received instructions from Mr. Hunter to proceed and bring the action to trial, and that he accordingly saw Mr. Raymond, of the firm of the defendants' solicitors and informed him of it, asking if his clients were prepared to make certain admissions, failing which he would have to examine Mr. Gurney for discovery. Mr. Raymond stated that he would take the matter up with his clients without delay and would notify Mr. Cassels of of his position in the matter. On two, at least, other subsequent occasions, Mr. Cassels spoke to Mr. Raymond about the matter, and he was informed the matter had been taken up with his (Mr. Raymond's) clients, but that he had not yet received definite instructions. However, on the 16th March, 1912, Mr. Cassels received a letter from Mr Raymond advising him he intended moving to dismiss the action for want of prosecution, and on the same day he received from his Ottawa agents a copy of the summons calling upon the plaintiffs to show cause why an order should not be made.

To the affidavit setting forth the plaintiffs' view an affidavit of E. Gurney is filed stating that the negotiations mentioned in paragraph 5 of Mr. Cassels' affidavit were terminated by his letter of the 9th October, 1909.

There is also an affidavit of Mr. Raymond with respect to the letter he wrote to Mr. Cassels on the 15th March, 1912, on the day the summons was issued.

Upon the perusal of Rule 131, it will be seen that its object is not to lay down any fixed or binding rule upon the judge hearing such an application, but the whole matter is left to his judicial discretion.

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Were the action a vexatious one or for the recovery of a penalty, the discretion of the tribunal should be exercised against the plaintiffs.

The two most important reasons alleged by the defendants are that one of the persons they wished to hear as a witness has since died, and that another person has left their employ and is beyond their control. The disposition of an action for the infringement of a patent of invention as a rule, does not depend so much upon the evidence of the ordinary witness, as upon the opinion evidence of experts, and one expert has no more claim to the credence of the Court than another. With respect to the other witness, who is alleged to have left the defendants' employ, it would appear he would be in a much better position to speak from the very fact that he is under nobody's control and that he could give quite an untrammelled testimony

Can it be said that the defendants would be prejudiced by the delay in proceeding and in now proceeding with the action? This must be answered in the negative.

Were the action now dismissed, the plaintiff could turn around and institute another similar action, as the dismissal of the action under the present circumstances would not be a bar to subsequent proceedings in respect of the same matter.

The application resumes itself into one of costs. Shall it be the costs of the present application or the costs of an action discontinued at this stage? There is nothing more or less in it.

The practice in this Court has ever been to administer justice as between the parties, and not to defeat any proceedings on merely formal objections. (See Rule 325.)

On arriving at a conclusion on this application one cannot overlook the fact that were it not for the

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courteous intimation by the plaintiffs' solicitor that he was to proceed with the case, the defendants would not have been supplied with the weapons they are now using against him, and the plaintiffs could have had the trial proceed in a manner that would have barred the present application.

Upon the consideration of all the circumstances of the matter, the application for dismissal of this action for want of prosecution will be dismissed, but with costs to the defendants in any event.

Upon intimating that this order should be followed by one ordering the plaintiffs to speed the case and give notice of trial, the defendants' solicitors asked that no such order be made because of the temporary absence of Mr. Gurney from the country.