THE MARCONI WIRELESS TELEGRAPH COMPANY OF CANADA, LIMITED, PLAINTIFFS;

AND

CANADIAN CAR & FOUNDRY COMPANY, LIMITED, DEFENDANTS.

1918
Nov. 12.

Courts—Co-ordinate jurisdiction—Interlocutory injunction—Infringement of patent—Vexatious litigation—Comity—Convenience of parties.

1. If the Superior Court of the Province of Quebec has dismissed a motion for an interlocutory injunction in a suit instituted by writ and declaration, the Exchequer Court, being a court of co-ordinate jurisdiction, will not entertain a similar motion; the finding of a court of co-ordinate jurisdiction cannot be overlooked.

2. Where no writ and declaration were so instituted, the Exchequer Court will refuse such motion on the ground of comity.

3. In an application for an interlocutory injunction, the Court will cautiously consider the degree of convenience and inconvenience to the parties, and whether the damages resulting from the refusal of the injunction would be irreparable.

Plimpton v. Spiller, (1876), 4 Ch. D. 286, 289, *et seq.,* followed.

4. Comity, as applied to judicial proceedings, means nothing more than the observance of a rule of etiquette or conventional decorum between courts of co-ordinate jurisdiction. It is not a rule of law, because it is not imperative. It is a useful ultra-legal adjunct to the judicial doctrine of *stare decisis.*

ACTION for the infringement of a patent.

Tried before the Honourable Mr. Justice Audette, at Ottawa, November 12, 1918.

E. Lafleur, K.C., and *C. Sinclair,* for plaintiffs.

Peers Davidson, K.C., for defendants.

AUDETTE, J. (November 12, 1918) delivered judgment.

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Reasons for Judgment.

This is an action for the infringement of two Canadian patents of invention, one of which appearing, on its face, to have already expired.

The matter comes now before the Court on two motions, on behalf of the plaintiffs, against the two defendants, respectively, for interlocutory injunctions, until trial, seeking to restrain the defendants from supplying, vending, etc., a certain wireless apparatus protected by a patent of invention, which, *primâ facie,* is good and valid until the question of its validity has been raised and passed upon.

The Superior Court of the Province of Quebec and the Exchequer Court of Canada have, in such matters, concurrent and co-ordinate jurisdiction.

Similar motions and applications to those now made here were made before a judge of the Superior Court, at Montreal, P.Q., and on October 25, 1918, and judgment was thereon rendered dismissing the same with costs.[1]

The question raised in this Court is identical with that decided between the same parties by the Superior Court Judge of the Province of Quebec, upon similar interlocutory applications, and the defendants are brought twice before the Courts in respect of one and the same matter. While I would not rest my decision on the ground that the question is *res judicata* in the strict sense of the term, I would, however, feel bound to exercise that jurisdiction which is inherent in the Court to prevent vexatious litigation which amounts to an abuse of its process. *Stephenson v. Garnett.*[2]

At p. 81 of *Everett & Strode—Law of Estoppel,* (2nd Ed.) we find: "So that, even if the former pro-

[1] 43 D.L.R. 382.
[2] [1898], 1 Q.B. 677, 13 Hals. 334.

"ceeding were interlocutory, yet if the Court de-
"cided an issue between the parties which was with-
"in its jurisdiction, the same cannot be raised in
"subsequent proceedings between the same parties;
"and though the matter may not be, strictly speak-
"ing, *res judicata,* an attempt to raise such an issue
"will be dealt with as frivolous and vexatious, and
"an abuse of the process of the Court."

These motions and application were entertained at Montreal, P.Q., without the issue of any writ or institution of an action, but with, I am informed by counsel, the undertaking to do so.

The Exchequer Court has obviously no jurisdiction to entertain such matters by way of appeal from the Superior Court of the Province. And had the Superior Court suit been duly instituted with writ and declaration, I would, at this stage, without hesitation, have refused to entertain or consider these motions and sent the plaintiffs back, as a matter of propriety, to the forum first chosen by them, when they were at liberty to institute their suit in either Court.

Having gone so far it remains for me to say that Mr. Lafleur, of counsel for the plaintiff, declared at bar that no writ had been issued in the Superior Court at Montreal, and he formally declared, on behalf of the plaintiffs, they did not intend to prosecute any further proceedings at Montreal. To that extent, however, I am free and untrammelled; but, I cannot overlook and ignore the finding of a learned judge upon similar matter in a court of co-ordinate jurisdiction. In Ontario[1] a Judge is by law bound by that decision.

[1] R.S.O. 1914, ch. 56, sec. 32.

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Must the motions be refused out of considerations of comity? A careful examination of the subject will show that the word "comity", as applied to judicial proceedings, means nothing more than the observance of a rule of etiquette or conventional decorum between courts of co-ordinate jurisdiction. It is not a rule of law, because its obligation is not imperative; and the most that can be said of it in a practical way, is that it is a useful ultra-legal adjunct to the judicial doctrine of *stare decisis*. Nothing, however, need be added to the admirable definition of the term by Mr. Justice Brown in the patent case of *Mast, Foos & Co. v. Stover Mfg. Co.*,[1] where it was claimed that comity demanded that the Court below should have followed the decision of another Court of co-ordinate jurisdiction on the same patent. He says: "Comity persuades, but it does not "command. It declares not how a case *shall* "be decided, but how it may with *propriety* be de- "cided. It recognizes the fact that the primary duty "of every Court is to dispose of cases according to "the law and the facts; in a word, to decide them "right. In doing so the Judge is bound to determine "them according to his own convictions. If he be "clear in those convictions he should follow them. "It is only in cases where, in his own mind, there "may be a doubt as to the soundness of his views "that comity comes in play, and suggests a uni- "formity of ruling to avoid confusion, until a higher "Court has settled the law. It demands of no one "that he shall abdicate his individual judgment, "but only that deference shall be paid to the "judgments of the co-ordinate tribunals. Clearly it "applies only to questions which have been actually

[1] (1900), 177 U.S. 485 at p. 488.

"decided and which arose under the same facts."

Now seeing that a similar motion has been refused by a Judge of a provincial Court of co-ordinate jurisdiction, considerations of comity or propriety would induce me to stay my hand on this motion even if there were not other and more cogent reasons present in the material before me for declining to make an order for an interim injunction.

In such matters, does not the fundamental principle of law rest upon the question of, first, irreparable damage; 2nd, balance of convenience, and 3rd, the maintenance, if possible, of the *status quo*, as between the parties until the hearing upon the merits?

In a case of this nature the Court has first to consider whether the damages resulting from the refusal of the injunction would be irreparable, and upon this point it has been asserted, without contradiction, that the defendants are quite solvent and well able to satisfy any pecuniary damages that might ultimately be adjudicated against them. And it is further contended by counsel on behalf of the plaintiffs that besides this pecuniary damage there is also that class of damage which would result from the dissemination of these alleged infringing machines all over the world, an advertisement amounting to an encouragement to further infringements. But this class of damage is too remote and cannot be classed with what is termed, in such matters, as irreparable damage. Moreover, it appears from the argument before me, that the apparatus now being installed by the defendant company upon the twelve vessels which are being built for the Republic of France are similar to those installed and used on the French and American vessels, and that

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that is the very reason why they are now so installed on these twelve vessels with the view of maintaining uniformity in the two fleets. There could be no justification to interfere peremptorily with such undertakings.

Moreover, as said in the leading case of *Plimpton v. Spiller*,[1] in such case the Court will cautiously consider the degree of convenience and inconvenience to the parties by granting or not granting the injunction. And as there pointed out, on the authority of the judgment of Lord Cottenham, in *Neilson v. Thompson*,[2] there are cases in which very much greater mischief would be caused the defendant by the granting of an injunction, if it should ultimately turn out that it ought not to have been granted, than you would cause the plaintiff by postponing the injunction when there was ground for its being granted.

If the injunction were granted in the present case the defendants would be unable to deliver, completed and ready for use, the balance of the twelve vessels under construction, and these vessels would be tied up in the ice, at Fort William, for the winter. The practical effect of such injunction would be to stop a going trade and adopt a course which might result in very great difficulty in finally assessing compensation. If in the present case the defendants should ultimately prove to be right and an injunction were to issue to-day, the damages would be most serious. And it is worthy of mention that all vessels delivered and which, as was mentioned at the argument, were at Montreal at the time of the application made

[1] 4 Ch. D. 286, 289, *et seq.*
[2] (1841), 1 Webs. P. R. 278.

there, would have been foreign vessels protected by sec. 53 of the *Patent Act*.

Under the circumstances I have come to the conclusion that the plaintiffs have not made out a case for interlocutory injunction and the two motions are dismissed. The costs of and incidental to these motions will be, as is usual in such cases, costs in the cause.

Motion dismissed.

Solicitors for plaintiffs: *Greenshields, Greenshields & Co.*

Solicitors for defendants: *Davidson, Wainwright & Co.*