1941
Apr. 10.
Sep. 4.

BETWEEN:

MERCO NORDSTROM VALVE COMPANY AND PEACOCK BROTHERS LIMITED ..... } PLAINTIFFS;

AND

J. F. COMER ..... DEFENDANT.

Practice—Reconsideration of Judgment after pronouncement—Exchequer Court Rules 172 and 174—Motion dismissed.

Held: That the Court is powerless to reconsider a judgment after the date of its pronouncement and its concurrent entry.

MOTION for reconsideration of judgment.

The motion was heard before the Honourable Mr. Justice Maclean, President of the Court, in chambers.

R. S. Smart, K.C. for the motion.

E. G. Gowling contra.

THE PRESIDENT now (September 4, 1941) delivered the following judgment:

This was an action for infringement of a patent which related to improvements in plug valves of the type in which lubrication of the bearing or seating surface of the valve is effected by forcing lubricant under pressure into the contact joint between the plug and the plug seat. The cause was heard by me and in due course I pronounced

judgment therein, holding that there was no infringement of the patent sued upon, and that the said patent was invalid for want of subject-matter.

The plaintiff now moves that the judgment be reconsidered upon the ground that the reasons for judgment were based on a misunderstanding of the evidence and that there was a failure to appreciate the bearing of certain facts disclosed by the evidence relative to the construction, operation and function, of both the patented and the offending valve, particularly the latter, and that this misunderstanding led the Court to erroneous conclusions. This misunderstanding would in any event be applicable only to my finding upon the issue of infringement and could have no reference whatever to my finding upon the issue of the validity of the patent, and that I think would be obvious. Therefore, the suggested misunderstanding of the evidence would only affect my determination of the issue of infringement and not that of the validity of the patent sued upon; so, if the patent is invalid there could be no infringement of the same and, therefore, it would seem to me, assuming the grounds advanced for a reconsideration of the judgment to be well founded, no particularly useful result would be gained by a reconsideration of the isue respecting infringement, prior to the judgment pronounced going to appeal, which I understand may be taken as already definitely determined upon.

I fear I did fall into some error in describing the construction and operation of the offending valve, the nature and extent of which I do not propose discussing, and if the sole issue to be determined had been limited to infringement I would be inclined, if satisfied I had authority to do so, to agree to a reconsideration of my judgment because upon the question of infringement I proceeded to my determination of it largely, if not altogether, upon a conception of the facts and evidence which are now claimed to have been erroneous. A great deal of confusion here arose by designating, at the trial, as a "scratch groove" what might have been more properly designated as a "duct", on the seat of the infringing valve, and there was on the plug of that valve what was appropriately called a "scratch groove", but all that is hardly worth discussing now. And I would point out that the defence

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of non-infringement was put forward on grounds other than those I discussed on this aspect of the case, and the conclusion which I reached thereon may be right though my reasons may be thought insufficient. In any event these other defences on the issue of infringement will be open to the defendant if and when the case goes to appeal. Therefore it seems to me that it will be more satisfactory to allow matters to stand as they now are and thus allow the case to go to appeal.

I was referred to several English and Canadian cases which appear to have decided that until a judgment pronounced has been entered, a judge may reconsider his decision and may withdraw or vary the same. Burbidge J., in the case of *Copeland-Chatterson* v. *Paquette* (1), reconsidered a judgment pronounced by him in a patent case on a motion made on behalf of the plaintiff to vary the same on certain stated grounds—which in the end he refused—but I am not inclined to think that under the practice of this Court he was free to do so, except possibly in the case of clerical mistakes or some such other slight error. In this Court the practice is to enter judgment concurrently with the pronouncement of any judgment by the Court. Rule 174 states that where any judgment is pronounced by the Court or a Judge in Court, " entry of the judgment shall be dated as of the day when such judgment is pronounced." Here, when judgment was pronounced by the Court, judgment was the same day entered in a certain book of record, in the words " judgment dismissing the action with costs ", and the time for the entry of appeal runs from the date when the judgment was given. It seems to me, therefore, that when a judgment is pronounced and entered that is the end of the matter so far as this Court is concerned. If I am right in my interpretation of the Rules of this Court and its practice, then it follows, I think, that I am powerless to entertain a motion to reconsider and vary my judgment, in the manner and to the extent here proposed. And if this view is in conflict with that of Burbidge J., in the case mentioned, then it is desirable that the point be settled by a pronouncement of the Supreme Court of Canada thereon. In fact this point has for some time been a debatable one with practitioners before this Court.

(1) (1906) 10 Ex. C.R. 425

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Perhaps I should mention that Rule 172 provides that the Registrar shall settle the minutes of any judgment or order pronounced by the Court, but that does not, I think, affect the view I have just expressed, namely, that there was an entry of the judgment pronounced in this cause and that I am now powerless to reconsider the same in the manner which the motion suggests.

I think therefore that the motion must be refused. The costs thereof will be costs in the cause.

Order accordingly.