1908
Dec. 24.

THE BERLINER GRAM-O-PHONE COMPANY, LIMITED..... } PLAINTIFFS;

AND

THE COLUMBIA PHONOGRAPH COMPANY..... } DEFENDANTS.

Patent action—Infringement—Points of law—Argument before trial—Refusal—Practice.

The defendants, in an action for infringement of a patent of invention, set up by their statement in defence an adjudication by the Circuit Court of the United States upon the said patent. The plaintiffs replied that such adjudication disclosed no answer in law to their claim, and made an application that the questions of law so raised be argued before the trial of the action upon the grounds of convenience, the saving of time and expense.

Held, that as the defendants might fail to establish the facts as alleged, the court would then be determining the law upon what might turn out to be a merely hypothetical state of facts, and further that the finding of this court upon the question of law might be reviewed by an appellate court while another part of the case was being dealt with elsewhere, a costly and inconvenient practice, the application should, therefore, be refused with costs to the plaintiffs in any event, unless otherwise ordered by the trial judge.

THIS was an application for the hearing of certain questions of law arising on the pleadings before trial.

November 7th, 1908.

The motion now came on for hearing before the Honourable Mr. Justice Riddell, judge *pro hac vice*.

R. C. H. Cassels for the plaintiffs;

N. W. Rowell, K.C., for the defendants.

RIDDELL J., now (December 24th, 1908), delivered judgment.

This is an application by the plaintiffs for an order for the trial of certain questions of law arising on the pleadings under the provisions of Rule 66 of Oct. 8th, 1906.

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The rule reads—"No demurrer, as a separate pleading, shall be allowed, but any party shall be entitled to raise by his pleadings any point of law; and any point so raised, shall be disposed of by the Court or a Judge at or after the trial; provided that by the consent of the parties, or by order of the Court or a Judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial."

This rule is taken from the English Ord., xxv. r. I (1883).

The action in the present case is to restrain the defendants from infringing certain letters-patent of the plaintiffs, and for similar relief. The statement of defence disputes the patent, and sets up an adjudication by the Circuit Court of the United States in favour of the defendants; the reply denies this, and "submits that said paragraph discloses no answer in law to the plaintiff's claim and craves the same benefit on this ground as if it had demurred to said statement of defence."

The application is by the plaintiff that the question of law thus raised may be disposed of separately, and not at the trial of the other parts of the case. The ground alleged is the saving of time and of expense as well as convenience.

It appears that both parties are of substance, and it is not suggested that the defendant, if he should fail in the matter is not quite good for any extra costs that may be incurred by any method of proceeding.

Again, it is to be observed that the fact of the alleged adjudication is not admitted—it may well be that the defendant would fail to establish the fact, and thus the Court is in the position of being asked to determine the law in what may turn out to be a merely hypothetical state of facts—a course always to be deprecated.

Moreover, if the application were acceded to, it might and probably would be the case that an appellate Court would be called upon to deal with one branch of the case

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while another part would be in the course of being dealt with elsewhere, a uselessly costly and inconvenient practice.

The authorities in England upon the corresponding rule there are to be found in Snow's Annual Practice; a number of these are very different from the present case, and I do not find any very like the present. No authority has been cited, and I can find none, which indicates that the order sought should be granted.

The motion will be refused, and the costs will be paid by the plaintiff in any event, unless the trial Judge should otherwise order.

Motion refused.