1899
June 14.

THE GENERAL ENGINEERING COMPANY OF ONTARIO (LIMITED) ..... PLAINTIFFS;

AND

THE DOMINION COTTON MILLS COMPANY, LIMITED, AND THE AMERICAN STOKER COMPANY ..... DEFENDANTS.

Practice—Motion to re-open trial—Affidavit meeting evidence produced at trial—Grounds for refusal.

An application was made after the hearing and argument of the cause but before judgment, for the defendants to be allowed to file as part of the record certain affidavits to support the defendants' case by additional evidence in respect of a matter upon which evidence had been given by both sides. It was open to the defendants to have moved for leave for such purpose before the hearing was closed, but no leave was asked. It also appeared that the affidavits had been based upon some experiments which had not been made on behalf of the defendants until after the hearing.

Held, that the application must be refused. *Humphrey* v. *The Queen* and *DeKuyper* v. *VanDulken* (Audette's Ex. C. Pr. 276) distinguished.

MOTION for leave to re-open the case after trial and argument but before judgment.

The grounds upon which the motion was based appear in the reasons for judgment.

May 6th, 1899.

F. S. Maclennan, Q.C. for the motion, cited *Humphrey* v. *The Queen* (1); *DeKuyper* v. *VanDulken* (1); *Trumble* v. *Horton* (3).

J. L. Ross, contra.

(1) 2 Audette's Ex. C. R. 276. (2) 3 Ex. C. R. 88.
(3) 22 Ont. A. R. 52.

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THE GENERAL ENGINEERING CO. OF ONTARIO v. THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO.

Reasons for Judgment.

THE JUDGE OF THE EXCHEQUER COURT now (June 14th, 1899) delivered judgment.

This is an application to re-open the trial of this action, so far as may be necessary to file as part of the record the affidavits of Dr. Henry Morton and John Wolfe, with reference to a test and experiment made in the City of Brooklyn, in the State of New York, on the 22nd of April, 1899, of a furnace erected in accordance with the particulars and specifications of the United States Patent No. 310,110 issued to Amasa Worthington, dated 30th December, 1884, filed as defendants' Exhibit "D." in this case. This evidence is intended, no doubt, to meet the view expressed by Professor Nicholson at the trial that the Worthington Stoker made according to the patent mentioned would not work successfully. This case was heard, at Montreal, on the 11th, 12th, 13th and 14th days of April last, and Professor Nicholson was first called on the 11th, and in his evidence, given on that and the succeeding day, expressed the view that has been referred to. He was again called on the 13th and gave expression to the same view. After the trial the defendants appear to have had some experiments made which they no doubt think tend to prove that Professor Nicholson was mistaken, and which they now seek to have submitted to the court. I think, however, that the application, made as it is, after the taking of the evidence has been closed and the case argued, is made too late. If I should re-open the case to permit the defendants to give evidence of this kind, I could not well refuse a like indulgence to the plaintiffs. Such a practice would, I think, be found to be very inconvenient and undesirable.

Reference was made on the argument of the motion to the cases in this court of *Humphrey* v. *The Queen*

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THE GENERAL ENGINEERING CO. OF ONTARIO v. THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO

Reasons for Judgment.

(1), and *DeKuyper* v. *VanDulken* (1). But *Humphrey* v. *The Queen* was a case in which there had been a preliminary judgment and a reference for assessment of damages; besides there could be no final judgment without the case coming again before the court. In the case of *DeKuyper* v. *VanDulken* a motion to re-open was allowed and a commission issued to take evidence upon a point as to which no evidence had been given, and in respect of which it was left optional to both parties to produce evidence. In the present case there is evidence before the court as to whether the Worthington Stoker, made in accordance with the patent above referred to, would work successfully or not, and the re-opening of the case would not be for the purpose of taking evidence upon that point, but to answer evidence already given. That is something, I think, which ought not, under the circumstances of this case, to be permitted,

The application will be refused, and with costs.

Judgment accordingly.

Solicitors for the plaintiffs: *Rowan & Ross.*

Solicitors for the defendants: *Macmaster & Maclennan.*

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(1) Audette's Ex. C. Pr. 276