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REASONS WHY THE APPELLATE JURISDICTION OF THE SUPREME COURT IN PATENT CAUSES SHOULD BE RESTORED.

I. While occasionally there may be found a disappointed patent owner, or a defeated patent lawyer, or a federal judge without mechanical perception and little experience in patent practice, who has recently collided with a patent case and is ready, as the result, to denounce our whole patent system as a failure and to favor its utter abolishment, the fact remains, and is generally recognized by the most profound students of our institutions, both at home and abroad, that no one thing has contributed more to the preëminence of this country in the industrial arts and in manufactures than the encouragement given by our Constitution and laws to inventors and to investors in patent property.

This stimulus undoubtedly accounts in large measure for the birth and extraordinary development, in this country, of the telegraph, the sewing machine, the cotton gin, the mowing machine, the harvester binder, the telephone, the systems of electric lighting, the electric railway, the phonograph, the typewriter, and other epoch making inventions of the nineteenth century, all of which have received the protection of patents.

So pervasive, indeed, have patented inventions become that not a single thriving industry can be pointed out that is not actually founded upon, or largely sustained and protected by, patents.

The subject of patents being, then, of such transcendent importance to the material prosperity of the country, it would seem that cases involving the validity of patents should go by appeal to the Supreme Court, as a matter of right, because of that importance.

2. Patents are granted only by the Federal Government and in their enforcement the Federal Courts alone have jurisdiction.

Every patent issued confers upon the patentee the exclusive right to make, use and sell the patented invention "throughout the United States and the Territories thereof." The right being thus of Federal creation and operative and enforceable throughout the entire territorial limits of the United States, it would seem that when the right is drawn in question in any part of those territorial limits an ultimate appeal should be allowed, as a matter of right, to that one great tribunal which, under our judicial system, has alone final and supreme authority over the whole system. Local prejudice and local color (of which I shall later have something to say) may thus be neutralized, and an appeal given to a tribunal whose jurisdiction is co-extensive with the right litigated.

3. The founders of our patent system appreciated the necessity of an appeal to the Supreme Court in patent cases and provided for it by Acts of Congress, which remained in force till the passage of the so-called Evarts Act, in 1891, creating the United States Circuit Courts of Appeals. The latter act brought into being nine Circuit Courts of Appeals, one for each judicial circuit, took away the ancient right of appeal from the Circuit Courts to the Supreme Court in patent causes and gave a final appeal in those causes to the newly constituted Circuit Courts of Appeals. To cut off the appeal to the Supreme Court and create nine separate and independent appellate courts of last resort was bad enough, but the act went further and authorized a thoroughly reprehensible rotative process by which the judges competent to sit in the lower courts whose judgments and decrees were reviewable by a Circuit Court of Appeals, might, at other times, sit in the appellate court, thus giving each judge, in turn, whether a circuit or a district judge, an opportunity to review and revise the decisions of his brother judges, with the inevitable result of destroying that independence, impartiality and freedom from bias that should characterize all appellate tribunals, especially those of last resort.

The evils growing out of the existence of nine appellate courts of last resort, each competent to render a decree final within its comparatively limited jurisdiction, touching the validity of a patent whose operation is conterminous with the whole territory of the United States, are plainly manifest and have already been felt by the owners of patents.

Unconsciously, of course, the appellate court of each circuit takes on a local color. That of one circuit is avowedly opposed to patents and sustains not one in twenty, thereby encouraging in-

fringements and tending to throw the whole patent system into disrepute; that in another is liberally inclined toward patents, going, perhaps, in some instances, to extremes to sustain them, with the result of localizing litigation and congesting business in that particular court. One Circuit Court of Appeals, perhaps in an Eastern Circuit, applies with strictness the rule of comity and follows blindly the determination of a sister Circuit Court of Appeals as to the validity and scope of a given patent; while another, perhaps in a Western Circuit, scorns the idea that it must be controlled by comity and announces frankly its intention and clear duty to decide, on its merits, each case that comes before it, untrammelled by the determination of any other Circuit Court of Appeals.

But, some one will say, does not the remedy by certiorari, provided by the Evarts Act, afford the necessary relief in the instances cited. The answer is, emphatically, no, it does not. That it is within the power of the Supreme Court to bring before it by its writ of certiorari any case pending in any of the Circuit Courts of Appeals, no one will deny; but, so far, it has been very chary of its exercise of this power.

Where two different Circuit Courts of Appeals have come to different conclusions on substantially the same facts, or in respect to some proposition of law, in suits involving the validity of a patent, the Supreme Court has taken jurisdiction by certiorari proceedings, but in no patent case, so the writer is informed, has that court issued the writ where there has been no such diversity of decision, although in numerous instances the writ has been denied.

The failure of the remedy by certiorari, the writer makes bold to say, lies in the fact that the writ is grantable only as a matter of favor and not as a matter of right. The court takes jurisdiction or not as it is minded, and given a general indisposition on the part of the majority of judges to determine patent cases, because of their unfamiliarity with the subject, or to determine any particular case, for any reason, it is plain there must be often a practical denial of justice.

All patentees should have the right to be heard by that great court, or none at all.

The failure of the Evarts Act is therefore a reason for the resumption of the Supreme Court's ancient jurisdiction.

4. Another reason why a direct appeal from the Circuit Courts of Appeals to the Supreme Court should be allowed in patent causes is that such an appeal is now allowed in causes respecting a cognate subject—copyrights.

This may surprise those who have not had occasion to specially investigate the matter, but it is nevertheless the fact.

Authors and inventors, copyrights and patent rights, up to the passage of the Evarts Act, appear to have been indissolubly connected. They are recognized in the same constitutional provision and in the acts conferring jurisdiction on the Federal Courts they appear together, on an equal footing.

The Evarts Act, in its 6th Section, provides that "the judgments or decrees of the Circuit Courts of Appeals, shall be final" * * * "in all cases arising under the patent laws, under the revenue laws," etc., making no mention of copyright laws, and then goes on to say, "In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs."

This has the effect of giving an appeal to the Supreme Court, in a copyright case, where the requisite jurisdictional amount is shown to be involved, and the Supreme Court in *Webster v. Daly*, 163 U. S. 155, has so indicated.

The discrimination against patents and in favor of copyrights cannot be justified by the relative importance and value of the two species of property, as patents are vastly the more important and more valuable, and can only be accounted for by the fact that the number of suits arising under the patent laws is vastly greater than that arising under the copyright laws, and to give jurisdiction of appeals in the former class of cases would tend to defeat the primary purpose of the Evarts Act, namely, the relief of the congested condition of the docket of the Supreme Court, a purpose, it may be added, that has been so well served that that court is fast running out of business and will soon have comparatively nothing to do unless it voluntarily takes on jurisdiction amazingly by certiorari proceedings.

5. A further reason why a direct appeal should be allowed to the Supreme Court from the Circuit Courts of Appeals in patent causes is, that such appeals are now allowed from the Court of Appeals of the District of Columbia, and there is no good reason why suitors in the latter court should have exclusive privileges in this respect.

Section 8, of the Act of February 9, 1893, creating the court provides—

"That any final judgment or decree of the said Court of Appeals may be re-examined and affirmed, revised or modified by the Supreme Court of the United States, upon writ of error or appeal * * * in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright."

The allowance of this appeal, coming as it did after the establishment of the Circuit Courts of Appeals, may perhaps be regarded as the first step toward the restoration of the former appellate jurisdiction of the Supreme Court and to that extent is encouraging. It is not easy to account for the special dispensation in any other way. The appeal, it will be observed, is only allowed in cases wherein the *validity of a patent* is involved, and therefore does not include *ex parte* cases appealed from the Commissioner of Patents to the Court of Appeals of the District of Columbia, as they involve only *applications* for patents (*Durham v. Seymour*, Comr., 161 U. S., 235); nor contested interferences, which are also appealable from the Commissioner to that court, as in such cases the validity of a patent is not directly involved, although the contest for priority may be between an applicant and a patentee.

It may be said, in passing, that the effect of giving this direct appeal from the Court of Appeals of the District of Columbia to the Supreme Court, in patent causes, has not been to seriously burden the latter court with business, as up to the present time but one appeal, properly brought under the Act, has been docketed, and that one has not yet been disposed of.

6. A final, and perhaps the weightiest, reason why the Supreme Court's appellate jurisdiction should be restored in patent causes is to be found in the fact that in no other way can that court be kept familiar with the principles of the law of patents, and with their practical application.

At no time in its history has the membership of that court embraced any too many good patent lawyers, well recognized as such, and it is not going too far to say, that most of the judges learn what they know of this special branch of jurisprudence—which Judge Story used to call “the metaphysics of the law”—after their elevation to the bench. Under the present system, however, the opportunities for acquiring the lacking information are growing less and less, and the judges familiar with patent law are becoming fewer and fewer, so that it may soon come to pass, unless a change is speedily made, that the spectacle will be presented of some great “certiorated” patent case, ranking in importance with the *Morse Telegraph* case or the *Bell Telephone* case, and calling for the determination of some most profound questions of patent law, or of science, or of mechanics, or of all of these, being argued to a bench of judges as unprepared to determine it as they are to determine when and where the next transit of Venus may be observed. The frequent use of the function will alone preserve it.

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