

*Crowther v. United Flexible Metallic Tubing Company Ltd.*

IN THE HIGH COURT OF JUSTICE.—CHANCERY DIVISION.

Before Mr. JUSTICE WARRINGTON.

August 4th and 11th, 1905.

CROWTHER v. UNITED FLEXIBLE METALLIC TUBING COMPANY LD.

- 5 *Patent.—Action to restrain threats.—Motion for Interlocutory Injunction.—Circular, whether general warning or threat.—Motion refused.—Patents &c. Act 1883, section 32.*

*A Company, the owners of several Patents, issued a Circular which in its terms was only a general warning against infringement of their Patents.*

- 10 *C. alleged that, having regard to the circumstances under which the Circular was issued, it constituted a threat directed against him in regard to a particular article, admittedly not protected by any of the Patents, which he was selling; and he commenced an action against the Company to restrain any such threats, and moved for an interlocutory injunction.*
- 15 *Held, that the Circular primâ facie contained nothing but a general warning to the public and that on the facts it was not shown that the Circular, properly interpreted, could be taken to be a threat against people using the particular article in which the Plaintiff was dealing. The Motion was refused.*

- 20 *On the 25th of July 1905, Albert Crowther (trading as the Reversible Gas and Iron Company) commenced an action against the United Flexible Metallic Tubing Company Ltd. The writ, as amended, claimed, inter alia, an injunction to restrain the Defendants from threatening the Plaintiff or any other person, by Circular, advertisement, or otherwise, with any legal proceedings or liability in respect of the manufacture, use, sale, or purchase of flexible metallic tubing*
- 25 *alleged to be made or done in infringement of any legal rights of the Defendant Company.*

- The Circular complained of was as follows:—“Flexible metallic tubing. Caution against infringements. The United Flexible Metallic Tubing Com-*
- 30 *pany Ltd. warn the trade and the public generally against buying, dealing in, or using flexible metallic tubing made in infringement of the Company’s Patents. The Company will take all necessary steps to support and vindicate their rights. Infringers render themselves liable to an injunction, damages, and costs and delivery up of the infringing tubing.”*

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The circumstances under which the Circular was issued, and the other litigation between the parties to the action, will be found referred to in the judgment of Mr. Justice WARRINGTON, before whom the Motion came on for hearing.

Rowden K.C. and George Lawrence (instructed by J. M. Sharp, agent for W. V. Tatham, Bradford) appeared for the Plaintiff; Bousfield K.C., Henry Terrell K.C., and L. W. V. Harcourt (instructed by Faithfull and Owen) appeared for the Defendants.

The following cases were cited in argument:—*Challender v. Royle* (4 R.P.C. 363; L.R. 36 C.D. 425) and *Johnson v. Edge* (9 R.P.C. 142; L.R. (1892) 2 Ch. 1).

WARRINGTON J.—This is a Motion for an injunction to restrain the Defendants “from issuing Circulars, advertisements, or notices, or otherwise threatening the Plaintiff or any other person with any legal proceedings or liability in respect of the manufacture, use, sale, or purchase of flexible metallic tubing alleged to be made in infringement of any legal rights of the Defendant Company.” The application is made under Section 32 of the Patents Act of 1883: “Where any person claiming to be the Patentee of an invention, by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale, or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats relate was not in fact an infringement of any legal rights of the person making such threats.” Then there is a proviso which is not material in the present case, though it has been of the greatest importance in others.

Before I go to the authorities let me just say, independently of the authorities, to what that Section appears to be directed. In the first place, the expression used as the foundation of the right of action which is to be conferred is “threatens any other person,” and the concluding words of that part of the section which I have read refer to “alleged manufacture” and so on, “to which the threats related.” It seems to me, therefore, that that Section is what it purports to be—a Section directed against a threat, itself directed against a person making a particular thing.

Now is that in accordance with authority? I think I need go no further for that purpose than read the passage in the Judgment of Lord Justice Bowen in *Challender v. Royle*, which has been referred to. “I think then, that threats would not fall within the section if they were threats or warnings as to something which might be done in the future.” That particular sentence in his Judgment has been criticised by Lord Justice Lindley in a subsequent case as will appear presently, but that is not the part which seems to me to be most material in the present case. He goes on: “Everybody, it seems to me, has still a right to issue a general warning to pirates not to pirate, and to infringers not to infringe, and to warn the public that the patent to which the patentee is entitled, and under which he claims, is one which he intends to enforce. But my language upon this point must not be misunderstood. It does not follow that because a threat is so worded as grammatically to apply only to the future, therefore it may not in any particular case be in substance and in fact applicable to what has been done. Suppose that a manufacturer is making and issuing machines which the patentee considers to be an infringement of his patent, and the patentee issued a threat really directed against the manufacture and sale of those machines, I do not think that he could escape from the section by wording his notice in such terms that according to the letter it was only a general warning to all persons not to infringe his patent.”

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That being the proper interpretation to be given to this Section, I now turn to the Circular. [The learned Judge then read the Circular.] Taking that Circular by itself without reference to any of the surrounding circumstances, I think it cannot be, and is not, disputed that it is grammatically merely a warning, and does not fall within the Section; but the case does not rest there, because it is necessary for me to examine the facts and to see whether on the facts, when so examined, that, which is grammatically only a warning, is in law a threat to a particular person or particular persons.

The facts are these:—The Defendants are large manufacturers of metallic tubing of various kinds. They had until recently a Patent applying to flexible metallic tubing used in connection with gas fittings. They had also numbers of Patents referring to various forms of metallic tubing, and in particular to tubing so constructed as to resist an extremely high pressure. For some years past, while their Patent for low pressure metallic tubing—that used for gas apparatus—was still running, the Plaintiff has been a customer of the Defendants for this metallic tubing, the Patent for which has now expired, and was their customer on favourable terms. He dealt with these goods in the trade, and a good many of his customers were also customers of the Defendants. In April of this year the arrangement under which he obtained specially favourable terms came to an end, and from that time he ceased to sell this particular tubing of the Defendants. He then commenced to sell metallic tubing of the same kind manufactured elsewhere. Meanwhile, some time in April of the present year, it came to the knowledge of the Defendants that inquiries were being made from persons in Germany in reference to high pressure tubing similar to that manufactured under the subsisting Patents of the Defendants, and the Defendants obtained a sample of high pressure tubing made in Germany, about which I will say no more than this, that it is stated in their affidavits that in the opinion of the deponents it is an infringement of their Patents, and, if sold in England, would expose the seller to an action for infringement. Thereupon they consulted their solicitor, and the Circular in question in the present case was settled in consultation with him on the 16th of May. Some time thereafter, but when precisely is not proved, the Circular, which is in the form of a printed pink paper slip, was sent out with all their catalogues and price lists and was attached to invoices of their goods, and in particular, amongst others, it was attached to invoices relating only to goods such as those now sold by the Plaintiff, and therefore the goods which are not, it is admitted, an infringement of any Patent of the Defendants.

There is one other circumstance to which I must draw attention, because it has been referred to in the arguments. In the course of the present year, and subsequently to the 16th of May, the present Defendants commenced an action against the present Plaintiff alleging that he had slandered their goods by stating that their goods were made in Germany and not in England. The result of that action was that the then Defendant, the present Plaintiff, while stating that he had not made any such statement and that he had not slandered their goods, offered a perpetual undertaking. That undertaking was accepted, and there were no costs on either side. The present Defendants, the Plaintiffs in that action, thereupon published and circulated to their customers a report of what had taken place in Court, which, in my opinion, as I expressed last week, was an unfair use to make of the undertaking which had been given by the then Defendant, the present Plaintiff; because I thought, from the circumstances under which the report was circulated, that it treated the undertaking as if it had been a decision of the question in the action. However, I say no more about that. It is only material because it shows that there had been some litigation between the parties. I think I have now mentioned all the material facts.

On these facts, can I come to the conclusion, sitting here as a Jury, that this document, which is, as I have said, *prima facie*, nothing but a general warning

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to the public, is really a threat? In my opinion I cannot. I have been referred to the case of *Johnson v. Edge* as an authority which ought to induce me to come to a different conclusion, but when I come to examine *Johnson v. Edge*, and I remember that the question I have to decide is one of fact and not of law, then I think that ceases to be an authority which in any way assists me, except, of course, so far as it lays down the principles which ought to be put by myself sitting as a Judge, to myself, sitting as a Jury. The facts in that case were very different. There the defendant was a person who claimed a Patent for the mode in which blue was put up. He had litigation in reference to that matter with one *Harrison*, and he issued a Circular in these terms:—"Notice to grocers and others.—Information of extensive violation of Mr. *William Edge's* patent rights has been received. All parties are warned not to infringe these rights." That was sent out with every parcel of goods sent out by the defendant. The plaintiff, *Johnson*, proceeded himself to put up blue in packets which resembled the defendant's packets, and the conclusion of fact to which Lord Justice *Lindley* came, founding it partly on the commencement of the Circular stating that there had been infringement, and partly on the fact that *Johnson* was actually sending out packets which were like the defendant's packets, was, that in the particular case it would be understood that, after *Johnson* had begun to send out his packets resembling the defendant's, the Circular was addressed to him. In this case I have nothing of the kind. I do not say that some people might not so interpret it, but there is nothing whatever here which would lead me to suppose that, when properly interpreted, it could be, on this Circular, taken that the present Defendants are threatening people who use that particular form of tubing in which the Plaintiff deals, and which it is admitted is not within any Patent which they have.

I am very glad indeed that we have had this discussion this morning because perhaps I hastily expressed a *prima facie* view last week. But I am very glad for another reason, because I think the result of the discussion will probably be to disabuse the minds of anybody who may have been misled by the Defendants' Circular into thinking that it threatens the Plaintiff, and so to minimise, if it does not entirely destroy, the prejudicial effect which, on the evidence, I cannot help thinking, to some extent at all events, has resulted from the issue of that Circular. In the result I think the only thing I can do is to say that, in my opinion, the Motion fails, and therefore I must refuse it, and make the costs of the Motion the Defendants' costs in the action.

*Bousfield* K.C.—The action is two-fold. We might lose on the other part. Will your Lordship say the Defendants' costs of this issue?

WARRINGTON *J.*—Yes, the Defendants' costs of this issue.