

1898

*Mar. 8.

*Mar. 14.

HERMAN DRESCHER AND MARY } APPELLANTS ;
 VAIL MELICK (DEFENDANTS)..... }

AND

THE AUER INCANDESCENT }
 LIGHT MANUFACTURING } RESPONDENTS.
 COMPANY (PLAINTIFFS)..... }

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Appeal—Jurisdiction—Amount in controversy—Affidavits—Conflicting as to amount—The Exchequer Court Acts—50 & 51 V. c. 16, ss. 51-53 (D.)—54 & 55 V. c. 26, s. 8 [D.]—The Patent Act—R. S. C. c. 61, s. 36.

On a motion to quash an appeal where the respondents filed affidavits stating that the amount in controversy was less than the amount fixed by the statute as necessary to give jurisdiction to the appellate court, and affidavits were also filed by the appellants, showing that the amount in controversy was sufficient to give jurisdiction under the statute, the motion to quash was dismissed, but the appellants were ordered to pay the costs, as the jurisdiction of the court to hear the appeal did not appear until the filing of the appellants' affidavits in answer to the motion.

MOTION to quash an appeal from the judgment of the Exchequer Court of Canada (1), which declared that the appellants had infringed certain valid and subsisting Letters Patent of Invention, the property of the respondents, and ordered the appellants to discontinue the manufacture and trade in certain incandescent devices and to deliver up all lights and devices in their possession, to render accounts and to pay over the gains and profits to be ascertained, with costs.

The plaintiffs brought action in the Exchequer Court of Canada for an injunction restraining the defendants

* PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

from the importation, manufacture, use and sale of certain incandescent lights and devices covered by Letters Patent of Invention of the Dominion of Canada, issued to the Welsbach Incandescent Gas Light Company, on the 1st September, 1894, and from infringement of the plaintiffs' rights in respect of said letters patent, and for other appropriate relief under the circumstances. By the judgment of the Exchequer Court, the letters patent in question were declared valid and subsisting and to have been infringed by the defendants, and the court by injunction restrained the defendants as prayed during the continuance of the letters patent, and further ordered them forthwith to deliver up to the plaintiffs all lights or incandescent devices and material in their possession, and that accounts should be taken of the gains and profits made by the defendants under the infringement complained of. and to pay the same to the plaintiffs when ascertained upon a reference directed to the registrar of that court.

The defendants gave notice of appeal against the judgment to the Supreme Court of Canada and the respondents moved to quash on the grounds that there was no actual amount of money in controversy and that no order had been obtained from a judge of the Supreme Court of Canada allowing the appeal to be taken as required by 50 & 51 Vict. ch. 16, sec. 52. On the hearing of the motion affidavits were filed on behalf of both parties in which estimates were made of the amount of gains and profits likely to be ascertained upon the reference as resulting from the infringement adjudged by the Exchequer Court and the value of the lights, devices and material ordered to be delivered up by the judgment appealed from, those filed on behalf of the respondent, stating the amount as under \$500, while the appellants showed by their

1898

DRESCHEL
v.
THE AUER
INCANDES-
CENT LIGHT
MANUFAC-
RING Co.

1898

DRESCHER

v.
THE AUER
INCANDES-
CENT LIGHT
MANUFAC-
RING CO.

affidavits that the amount thus in controversy would exceed \$500.

Duclos, for the respondent in support of the motion, cited the statutes of Canada, 50 & 51 Vict. ch. 16, secs. 51-53, as amended by 54 & 55 Vict. ch. 26, sec. 8, and referred to the authorities mentioned in *Audette*, Exchequer Court Practice, pp. 114-116.

Sinclair for the appellant contra. The affidavits filed against the motion should be received as shewing the amount to be over \$500 and therefore there is an appeal as of right under the statute (1). As to establishing value by affidavits in cases such as this, see the remarks of Mr. Justice Strong at page 338 in *Joyce v Hart* (2). The Patent Act gives an appeal in every case (3), and in any event there is no necessity of getting a judge's order until after the appeal has been taken.

The judgment of the court was delivered by :

TASCHEREAU J.—The judgment appealed from affects a patent of invention. The respondents move to quash the appeal for want of jurisdiction, upon the ground that as the actual amount in controversy does not exceed \$500, under sections 51 and 52 of the Exchequer Court Act, the appeal could not be taken unless allowed by an order obtained from a judge of this court, which has not been done. The judgment appealed from declares that the appellants have infringed respondents' letters patent, and condemns them to deliver up to the respondents certain articles of an undetermined value, and refers the case to the registrar to take an account of the gains and profits made by the infringement. The respondents filed with their motion to quash, an affidavit that the total

(1) 50 & 51 V. c. 16, s. 52.

(2) 1 Can. S. C. R. 321.

(3) R. S. C. c. 61, s. 36.

amount in controversy in the case is less than \$500. The appellants, in answer to that motion, filed two affidavits that the value in controversy exceeds \$500. Under these circumstances the motion to quash must be dismissed, but the appellants must pay the costs. The case was not an appealable one, as of right, unless it appeared that the value in controversy exceeded \$500. That did not appear until the appellants filed their affidavits in answer to respondents' motion. As the record stood when the motion was made, it was well founded.

Motion dismissed, with costs against the appellants, taxed at \$25.

Motion refused with costs against the appellants.

Solicitors for the appellants: *Foster, Martin & Girouard.*

Solicitors for the respondents: *Atwater, Duclos & Mackie.*

1898
 DRESCHEL
 v.
 THE AUER
 INCANDES-
 CENT LIGHT
 MANUFAC-
 RING Co.
 Taschereau J.