

THE TORONTO TYPE FOUNDRY }
 COMPANY AND THE CANADIAN- } APPELLANTS;
 AMERICAN LINOTYPE CORPOR- }
 ATION (DEFENDANTS) }

1905
 *Oct. 17.
 —

AND

THE MERGENTHALER LINOTYPE }
 COMPANY (PLAINTIFFS) } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Infringement of patent of invention—Exchequer Court Act, ss. 51 and 52—Order postponing hearing of demurrer—Judgment—Leave to appeal.

Unless an order upon a demurrer be a decision upon the issues raised therein, leave to appeal to the Supreme Court of Canada cannot be granted under the provisions of the fifty-first and fifty-second sections of the Exchequer Court Act, as amended by 2 Edw. VII. ch. 8.

APPLICATION for leave to appeal from an order of the judge of the Exchequer Court of Canada postponing the decision of the issues raised upon a demurrer to the plaintiffs' statement of claim until the trial of the cause.

The action was brought in the Exchequer Court of Canada in respect of alleged infringements of certain letters patent of invention. The defendants demurred to the plaintiffs' statement of claim, and, upon hearing arguments upon the demurrer, on the 18th of September, 1905, the judge of the Exchequer Court adjudged that the said demurrer should be disposed of at the trial of the action. The defendants' motion was

*PRESENT:—Mr. Justice MacLennan, in Chambers.

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for leave to appeal from the said order under the provisions of the fifty-second section of the Exchequer Court Act, as amended by the Acts 54 & 55 Vict. ch. 26, there being no evidence that the amount involved exceeded five hundred dollars.

Orde and Markey for the motion.
Aylen K.C. contra.

MACLENNAN J.—The motion is made by the defendants for leave to appeal from an order of Mr. Justice Burbidge, in the Exchequer Court of Canada, directing that a demurrer of the defendants to the statement of claim should be disposed of at the trial of the action and that the costs of the demurrer should follow the event.

Mr. Aylen, opposing the motion, admitted that the amount in controversy exceeded five hundred dollars, but objected that the order complained of was not a judgment within the meaning of sections 51 and 52 of chapter 16 of 50 & 51 Vict., as amended by 54 & 55 Vict. ch. 26, and 2 Edw. VII. ch. 8, sec. 2, and, therefore, was not appealable, even with leave, and he urged the objection as a complete answer to the motion.

I think the objection is well taken. The enactment, as amended, reads thus:

Any party to any action * * * who is dissatisfied with any final judgment, or with any judgment upon any demurrer, given therein by the Exchequer Court,

may, on taking certain prescribed steps, appeal against such judgment to this court. One of the essential steps, in a case like the present, is obtaining leave of a judge of this court.

The order in question is not a judgment upon the demurrer. It is merely a postponement of judgment

until the trial. The learned judge has expressed no final opinion on the issues raised by the demurrer. They are still undetermined, and, therefore, there has been no judgment upon the demurrer within the meaning of the statute.

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If the defendants' contentions were to prevail, then an order of the learned judge postponing the argument for a day, or a week, would also be appealable. I think the judgment meant by the statute is a judgment upon the issues raised by the demurrer. It would be very anomalous that there could be no appeal against any other judgment, unless it were final, and yet, that there could be an appeal from an order, in the case of a demurrer, which had decided nothing whatever.

The motion should be refused with costs.

Motion refused with costs.

Solicitors for the appellants: *Smith, Markey, Montgomery & Skinner.*

Solicitors for the respondents: *Lafleur, Macdougall & Macfarlane.*

NOTE.—The appellants, having taken proceedings for an appeal, *de plano*, under section 51 of the Exchequer Court Act, the respondents, on 23rd Oct., 1905, moved to quash the appeal for the same reasons as are stated in the foregoing judgment. The appeal was quashed with costs on 24th Oct., 1904.

Macdougall for the motion.

Markey contra.