1917
*Feb. 6.
*Feb. 19.

RICHARD WEBB BURNETT (DEFENDANT)..... } APPELLANT;

AND

THE HUTCHINS CAR ROOFING COMPANY AND ROBERT E. FRAME (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Appeal—Exchequer Court—Patent—Conflicting claims—Amount in controversy.

An appeal lies to the Supreme Court of Canada from the judgment of the Exchequer Court overruling an objection to its jurisdiction.

Per Anglin J.—In exercising the jurisdiction conferred by section 23(a) of the "Exchequer Court Act" the court does not act as the substitute for the arbitrators who are given the same jurisdiction by section 20 of the "Patent Act" but acts in discharge of its ordinary curial functions and its judgment is appealable to the Supreme Court of Canada.

The appeal to the Supreme Court of Canada provided for by section 82 of the "Exchequer Court Act" is not confined to cases where the action is brought to recover a sum of money but extends to those seeking to establish a claim to property or rights.

MOTION to quash an appeal from the judgment of the Exchequer Court in favour of the plaintiffs (respondents).

Conflicting applications for a patent were filed with the Patent Office by the parties. The defendant started proceedings for arbitration under section 20 of "The Patent Act" and the plaintiffs took action in the Exchequer Court.

To the said action defendant pleaded, *inter alia*, want of jurisdiction which plea was overruled and

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

judgment was given on the merits for the plaintiffs. Defendant appealed and plaintiffs moved to quash on the grounds that the exercise of the power conferred on the Court below by section 23(a) was only in substitution of that given to arbitrators by "The Patent Act," and the judgment of the court was final and not susceptible of appeal just as that of the arbitrators would be; that the appeal to the Supreme Court allowed by "The Exchequer Court Act" lies only in cases where a sum of money is demanded; and that it was not shewn that the sum of $500 was in controversy and no leave to appeal had been obtained. As to the last ground the court held that affidavits filed established the value of the patent in dispute at more than $500.

R. C. H. Cassels for the motion.

McMaster K.C. contra.

THE CHIEF JUSTICE.—Two grounds are presented by Mr. Cassels in support of his motion to quash the above appeal for want of jurisdiction. The first one, as I understand it, is that this court has no jurisdiction because the Exchequer Court has exclusive jurisdiction without appeal. Section 20 of "The Patents Act," ch. 69 R.S.C., 1906, in cases of conflicting applications for patents provides that the matter in dispute shall be submitted to arbitration and no provision is made for an appeal. This section of the Act comes from the R.S.C. 1886, ch. 61, sec. 19 The present "Exchequer Court Act" came into force in 1887 (50 & 51 Vict. ch. 16) and by a later amendment in 54 & 55 Vict. ch. 26, jurisdiction is conferred on the court in all cases of conflicting applications for any patent of invention.

The contention of Mr. Cassels is that the Exchequer

1917

BURNETT v. HUTCHINS CAR ROOFING CO.

The Chief Justice.

Court has at most concurrent jurisdiction but without appeal as in the case of an application made under section 20, "Patent Act." He then urges that the court is *curia designata*.

Section 82 of the "Exchequer Court Act," R.S.C. ch. 140, provides for an appeal to the Supreme Court by any party dissatisfied with any final judgment of the Exchequer Court where the amount in controversy exceeds $500. In other words, this provides for a review by the Supreme Court of all decisions of the Exchequer Court whatever may be the grounds of such decisions and I see no distinction between the case where the Exchequer Court assumes jurisdiction where it has none, and the case where the Exchequer Court has erred in its appreciation of any matter of law or fact.

The point has come up before this court where the court below has denied its own jurisdiction and a party dissatisfied with such judgment has appealed to the Supreme Court to reverse this view of the court below and to declare that such lower court had jurisdiction. In the case of *Ste. Cunégonde* v. *Gougeon* (1), an appeal had been taken from the Superior Court to the Court of Queen's Bench, and the plaintiff moved to have this appeal quashed for want of jurisdiction, and his motion was granted. The municipality then appealed to the Supreme Court of Canada whereupon plaintiff moved in this court to have the appeal quashed on the ground that there was no judgment of the Court of Queen's Bench and therefore no appeal lay to the Supreme Court. Sir Henry Strong, who gave the judgment of the Supreme Court, there says that as the Court of Queen's Bench properly refused to entertain jurisdiction, it followed that no appeal

(1) 25 Can. S.C.R. 78.

would lie to the Supreme Court. It is clear therefore that this court quashed the appeal because it was of the opinion that the Court of Queen's Bench was correct in holding that it had no jurisdiction and therefore the merits of the appeal could not be considered by the Supreme Court.

In the case of *Beck* v. *Valin* (1), there was an appeal to this court from a judgment of the Court of Appeal for Ontario, affirming a judgment of the Divisional Court which sustained the refusal of a judge in chambers to issue a writ of mandamus. In that case Mr. Justice Idington says:—

> The right to assert an appeal against a court asserting jurisdiction where it has none, is a very common case and I have not the slightest doubt of the right to appeal on the converse ground of failure to assert jurisdiction.

In *Hull Electric Co.* v. *Clement* (2), a motion was made to affirm the jurisdiction of the Supreme Court to entertain an appeal from the judgment of the King's Bench, which quashed an appeal from the judgment of the Superior Court on the ground that the appeal was incompetent and that it (Court of King's Bench) had no jurisdiction to hear such an appeal. The motion therefore to the Supreme Court raised the question whether this court could review a judgment of the Court of King's Bench where the latter court had held it had no jurisdiction. The court in that case disposed of the appeal by reviewing the propriety of the judgment of the Court of King's Bench in holding it was without jurisdiction. The Chief Justice, concluding his judgment said there:—

> I would follow *City of Ste. Cunégonde* v. *Gougeon*(3), *et al* where it was held that the Court of Queen's Bench having properly declined to exercise jurisdiction, no appeal lies to this court.

(1) 40 Can. S.C.R. 523. (2) 41 Can. S.C R. 419.
(3) 25 Can. S.C.R. 78.

1917

BURNETT v. HUTCHINS CAR ROOFING CO.

The Chief Justice.

In short, my view is that under the general power of appeal given from a lower court to the Supreme Court, if the court below has quashed an appeal to itself on the ground that is has no jurisdiction and the party dissatisfied with this judgment appeals to the Supreme Court, this court, on a motion to quash, may affirm the judgment below by granting the order. If the court below holds it has jurisdiction and proceeds to dispose of the case on its merits, this court has jurisdiction to review on appeal the decision below and if it is of opinion that the court below was without jurisdiction, it can so determine without considering anything with respect to the merits of the case.

I am, therefore, of opinion that there is an appeal from a judgment rendered in a patent case where the court exercises the jurisdiction conferred by section 23. The appeal is given by section 82

> to any party to any action, suit, cause, matter or other judicial proceeding.

These words are broad enough to cover a case of conflicting applications for a patent of invention like this.

The other ground presented by Mr. Cassels is that the amount involved was not shewn to be over $500.00.

The practice is well settled that in patent cases the value of the patent can be established by affidavit and where the appellant neglects to have this shewn in chambers, he may be penalized by way of costs. This was done in the case of *Dreschel* v. *Auer Light Co.*, (1).

I am, therefore, of the opinion that the motion to quash should be refused, but without costs.

DAVIES J.—Two objections were raised on this motion to our jurisdiction to hear this appeal from the

(1) 28 Can. S.C.R. 268.

Exchequer Court and, in my opinion, they must both fail.

The judgment of the Exchequer Court proceeds on the ground that jurisdiction to hear and determine the action was vested in that court. Whether such jurisdiction exists or not can more properly be decided when the merits of the appeal come to be considered. Certainly an appeal lies to this court from any judgment of the Exchequer Court otherwise appealable under the statute which court has either improperly assumed jurisdiction or, improperly, expressly decided that such jurisdiction exists.

On the second point, I am of opinion that section 82 of the "Exchequer Court Act" gives a right of appeal to this court in cases such as the present. The words of the section "sum or value" clearly indicate that an appeal lies as well from a judgment in an action brought to recover a sum of money as from one brought to establish a claim to property or rights. In the latter cases the "value" of such property or rights claimed and in controversy may be established by affidavits and need not necessarily appear in the record.

I would dismiss the motion with costs.

IDINGTON J.—I think the motion to quash the appeal herein should be dismissed with costs.

DUFF J.—This is a motion to quash an appeal from a judgment delivered by the learned judge of the Exchequer Court dismissing an action brought by one of two applicants for a patent. Steps had been taken by one of the applicants to have the controversy determined by resort to the procedure provided by section 20 of the "Patent Act," when

1917

BURNETT v. HUTCHINS CAR ROOFING CO.

Duff J.

an action was brought by the other applicant in the Exchequer Court under section 23a of the "Exchequer Court Act. Among other pleas the defendants (the appellants) denied the jurisdiction of the Exchequer Court to deal with a controversy in respect of which the procedure prescribed by section 20 of the "Patent Act" is available. The application to the learned judge of the Exchequer Court to dismiss the action as brought without jurisdiction was at the suggestion of the learned judge turned into an application for a stay of proceedings and this application was eventually dismissed. At the trial judgment was given in favour of the plaintiff.

The first objection which is now raised is that the jurisdiction of the "Exchequer Court" in cases of conflicting applications for patents is an exclusive jurisdiction; this is to say, that a judgment of the Exchequer Court given in exercise of this jurisdiction is not appealable.

I do not find it necessary for the purposes of the present motion to consider whether or not in respect of some matters the judgment of the learned judge of the Exchequer Court in an action such as that out of which this appeal arises is final in the sense of being non-appealable; that is a question which may be much more conveniently dealt with when the appeal comes on for hearing on the merits. It is sufficient to say in regard to the matter I am now considering that the appellants having denied the jurisdiction of the Exchequer Court to entertain the action and the learned judge of the Exchequer Court having by entertaining the action and giving judgment affirmed judicially that such jurisdiction exists, his decision as a decision on the point of jurisdiction or no jurisdiction is appealable to this court provided the other conditions

of appealability indicated by secs. 82 and 83 are present. *In re Padstow Total Loss and Collision Assur. Assoc.* (1); *Cornwall* v. *Ottawa and New York Railway Co.* (2).

The next objection is that the condition laid down in sec. 82 in the words "action, * * * matter or other judicial proceeding in which the actual amount in controversy exceeds $500 is not fulfilled because, first, the action raises no question with regard to any pecuniary demand by either plaintiff or defendant, and, secondly, it is not satisfactorily shewn that the value of the thing in controversy, the right to receive a patent, reaches the sum of $500.

As to the second of these grounds, it is unnecessary to say more than that the affidavits filed taken together with the agreement which is in evidence in the cause are sufficient to dispose of it.

As to the first ground the words "amount in controversy exceeds $500" do undoubtedly point to a controversy in relation to a pecuniary demand or in relation to a sum of money as being the kind of controversy contemplated by sec. 82, s.s. 1. I am satisfied, however, that this is not the necessary meaning of these words. The first of the meanings attributable to the word "amount" in the Oxford dictionary is "The sum total to which anything mounts up or reaches" and to construe these words one must ask the question: "Amount of what?" Amount exceeding $500 of course does pointedly indicate that the answer to the question must be amount of money. But the words are not altogether intractable; "exceeding $500" may be read as exceeding $500 in value, in other words, the phrase undoubtedly is susceptible of being

(1) 20 Ch.D., 137. (2) 52 Can. S.C.R. 466.

1917

BURNETT v. HUTCHINS CAR ROOFING CO.

Duff J.

paraphrased thus: "in which the sum total of the thing in controversy exceeds the value of $500." That, I say, is a possible construction; and I am far from satisfied that if I had to pass upon this section standing alone this construction ought not to be preferred to that advanced on behalf of the respondent in order to avoid the quite absurd result that the Legislature, in conferring jurisdiction on the Exchequer Court with respect to various matters enumerated in sections 19 to 24, provided that it is only in respect of matters mentioned in sec. 83 that an appeal lies to this court as of right. There is no doubt that the exceptional class of cases intended to be described by the clause "actual amount * * or value of $500" is co-extensive with the class of cases described in the words of sec. 82,

in which the actual amount in controversy exceeds $500,

and by this legislative interpretation supplied by sec. 83 all doubt and difficulty are removed.

Since writing the above I have considered the point and have concluded that there is no solid reason for holding that a judgment pronounced in an action brought under sec. 23a is excluded from the operation of sec. 82.

The motion to quash should be dismissed with costs.

ANGLIN J.—I am of the opinion that in exercising the jurisdiction conferred by sec. 23(a) of the "Exchequer Court Act" the Exchequer Court acts not a mere *locum tenens* or substitute for the arbitrators under sec. 20 of the "Patent Act," but in the discharge of its ordinary curial functions and that a proceeding under sec. 23(a) is a judicial proceeding in which its

judgment is appealable to this court under ss. 82 *et seq.* of the Exchequer Court Act. Mr. Cassels's forceful argument failed to raise any doubt in my mind on this point.

I am equally clearly of the opinion that the fact that the learned judge of the Exchequer Court affirmed his own jurisdiction to deal with the matter in controversy, which was challenged, far from casting doubt on the appealability of his judgment only serves to make it more certain.

As to the value of the matter in controversy the affidavits and the agreement in evidence sufficiently establish that it exceeds the requisite $500.

A construction of section 83 which would confine the right of appeal to proceedings in which there is an actual pecuniary demand before the court, thus excluding most important cases in which the right asserted or the matter in controversy, though not presented in the form of a claim to recover money, far exceeds in value $500 would, in my opinion, be too narrow and would frustrate the purpose of Parliament. Section 83 is not happily phrased. "Amount in controversy" is, no doubt, an ill-chosen expression calculated to lend colour to the contention of the respondent. But the use of the words by which it is followed, "sum or value," makes it reasonably certain that it is not intended to restrict the right of appeal to cases in which the controversy is as to the right to recover a sum of money. If so, the addition of the words "or value" would be meaningless.

I would dismiss the motion.

Motion dismissed with costs.