STRATHEARN BOYD THOMSON (DEFENDANT) ..... APPELLANT;

AND

LEON LAMBERT AND MARY LAMBERT (PLAINTIFFS) ..... RESPONDENTS.

1937
* Nov. 9.

1938
* Mar. 25.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Libel—Publications—Action for damages against managing editor of newspaper—Previous judgments against others for damages for the same libel—Question as to right to maintain present action—Question whether present defendant and defendants in previous actions were joint tortfeasors—Remedies open in previous action.

Appellant (defendant) was managing editor of a weekly newspaper published in Toronto, Ontario. An issue of its western edition contained a libel on respondents (plaintiffs). The Imperial News Co. Ltd. (hereinafter called the I.N. Co.) was the sole distributor for Manitoba of said western edition, and distributed copies to retail newsdealers, who in turn sold to the public. Respondents sued the I.N. Co. in Manitoba and recovered judgment for damages for the libel. They also sued in Manitoba a number of retail newsdealers, one of which suits went to judgment and the others were settled by payments. Respondents then sued in Ontario the appellant and one L. (the general distributor) for damages for the alleged publication of the libel to the I.N. Co. and to S. (its manager) and other of its employees, in sending in bundles the issue containing the libel to the I.N. Co. At the trial, respondents were non-suited on the ground that the defendants were joint tortfeasors with those against whom judgment had been recovered in Manitoba and therefore respondents were precluded from recovering in the present action; but the Court of Appeal for Ontario ([1937] O.R. 341) held that the publication by defendants to the I.N. Co. and its employees complained of in the present action constituted a separate tort for which defendants were liable and that it was an entirely different cause of action from those sued on in the Manitoba courts, and gave judgment in favour of the present respondents, and directed a new trial, limited to assessment of damages. On appeal to this Court:

Held (Kerwin J. dissenting): The appeal should be allowed and the action dismissed as against appellant.

Per Duff C.J. (who also agreed in substance with the reasoning of Cannon, Crocket and Davis JJ. as applied to the facts of this case): The I.N. Co. received delivery of the newspapers pursuant to its agreement with the publishers and was a party directly concerned in the shipping of the papers to itself, in the receipt of them by its employees, in the distribution to the newsdealers and in the latters' sales to their customers. It was engaged along with the publishers and appellant and L. in a joint commercial enterprise, the publication and distribution and ultimate sale of the newspapers. The aim of the whole enterprise was the purchase of the paper by the public; the shipments to the I.N. Co. were only one step in carrying this out. Publication to it, if there was such, consisted in the incidental publication to

*PRESENT:—Duff C.J. and Cannon, Crocket, Davis and Kerwin JJ.

1938

THOMSON v. LAMBERT.

its servants as the paper passed through their hands on its way to the public through the newsdealers. It was a participant jointly with appellant and others in the shipment to itself, in the distribution to newsdealers and in the sale to the public. This was really, in said action against it, the plaintiffs' case on the pleadings and the questions put in issue in that action. The I.N. Co. was liable, and jointly liable, for every publication ensuing upon its act—the joint act of itself and appellant and others—in causing to be brought the newspaper to itself for distribution. A cause of action arising out of the delivery to the newsdealers in carrying out the business so jointly engaged in could not be substantially separated from the cause of action alleged in the present action, which, therefore, was one in respect of which the I.N. Co. was liable at suit of the plaintiffs. It would be an abuse of substantial justice to permit plaintiffs to proceed against the I.N. Co. in another action in respect of the publication now sued upon; and, since that company was jointly liable with appellant and others for that publication, proceedings against appellant must also fail.

Per Cannon, Crocket and Davis JJ.: There was a complete remedy for respondents in the court in which the action against the I.N. Co. was started. Respondents should not be permitted to go on suing one person after another *ad infinitum* where a complete remedy was available in one action. (*Williams* v. *Hunt,* [1905] 1 K.B. 512, at 514, *Macdougall* v. *Knight,* 25 Q.B.D. 1, at 10, and others cases, cited). The jurisdiction to dismiss such an action as the present one exists as part of the inherent power of the court over its own process.

Per Kerwin J. (dissenting): While appellant was responsible for the publications effected by the defendants in the Manitoba actions, there was no connection between the acts of those defendants and the acts of appellant. The publication set forth in the present action occurred without any of those defendants taking part in it. The pleading here avers a cause of action different from any set forth in the Manitoba actions, and evidence was led by respondents to substantiate the allegation. Therefore the judgments and settlements in Manitoba are not bars to the present action. (*The Koursk,* [1924] P. 140, particularly at 151, 157, 159-160; *Brunsden* v. *Humphrey,* 14 Q.B.D. 141; *Bulmer Rayon Co. Ltd.* v. *Freshwater,* [1933] A.C. 661, cited). The fact that the paper was sent to the I.N. Co. and received by certain of its employees who opened and read it, was sufficient to establish the allegation of publication by appellant to the "I.N. Co. and/or [its] employees." In the circumstances of this case the respondents, residents of Manitoba, should not be held to have been obliged to join appellant, a resident of Ontario, as a defendant in any of the Manitoba actions and add a claim against him based on an entirely different cause of action, at the risk (in failing to do so) of ascertaining, when they bring an action on such separate cause of action in the jurisdiction where appellant resides, that their rights have been lost. This point (last mentioned) was not raised at trial and presumably was not argued before the Court of Appeal.

APPEAL by the defendant Thomson from the judgment of the Court of Appeal for Ontario (1).

(1) [1937] O.R. 341; [1937] 2 D.L.R. 662.

1938

THOMSON v. LAMBERT.

The respondents, who reside in Winnipeg, sued the appellant, as managing editor, and another defendant (Lichtman) as distributor, of a newspaper called *Hush*, published weekly in Toronto, for damages for libel by reason of a certain article contained in an issue of the western edition of said newspaper. The Imperial News Company, Limited, hereinafter mentioned, was the sole distributor for Manitoba of said western edition, and distributed copies to retail newsdealers in Manitoba (and also to some in Saskatchewan and Alberta), who in turn sold to the public. The respondents had sued the Imperial News Company, Limited, in Manitoba and recovered judgment against it for damages for the libel. They also had sued in Manitoba a number of retail newsdealers, one of which suits went to judgment, and others were settled by payments. Respondents then brought the present action in Ontario. They alleged in paragraph 10 of the statement of claim:—

10. The said defendants published the said article directly to the Imperial News Company Limited, which company is a wholesale vendor of newspapers throughout Western Canada, and to the servants and/or employees of the said Imperial News Company Limited * * * The said defendants further delivered the said article to the above mentioned company and persons well knowing and intending that the above mentioned company and persons would and should re-deliver the said article to several hundred retail dealers, and well knowing and intending that such retail dealers would and should publish the said article to their individual customers. The natural and ordinary result of so delivering the said article was the re-delivery and sale of the said article. The said Imperial News Company Limited and/or its servants and/or employees did in fact re-deliver the said article to several hundred retail dealers and the said retail dealers did in fact sell and publish the said article to many thousand individuals * * *

At the trial, before McFarland J. and a jury, the trial Judge at the close of the plaintiffs' case gave effect to the defendants' motion for a non-suit and dismissed the action with costs, on the ground that the defendants in this action were joint tortfeasors with the defendants against whom judgments had been recovered in the Manitoba courts, and were therefore precluded from recovering in the present action.

On appeal by the plaintiffs (the present respondents), the Court of Appeal for Ontario gave judgment in their favour and directed a new trial limited to the assessment of damages (1). The following extracts from the reasons

(1) [1937] O.R. 341; [1937]2 D.L.R. 662.

1938

THOMSON v. LAMBERT.

of Rowell, C.J.O., indicate the ground for the decision of that Court as to the cause of action against the present appellant:—

> An examination of these records [in the actions in Manitoba] shows that in none of the actions was any claim made for publication by the defendants to the Imperial News Company Limited, and therefore the publication complained of in paragraph 10 of the plaintiffs' statement of claim is not the same publication as is complained of in any of the other actions.
>
> Counsel for the defendants contend that the defendants in the case at bar, the Imperial News Company Limited, and the other defendants sued in Manitoba, were all joint tortfeasors, and that as the plaintiffs have chosen to sue certain of these joint tortfeasors and take judgment against them, they cannot now sue the defendants.
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> * * *
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> It is clear that the defendants in this action were joint tortfeasors with the Imperial News Company Limited in respect of the publication complained of in the action against the said company, and the plaintiffs, having sued and recovered judgment against the said company, cannot now claim damages against the defendants in respect of such publication. It is also clear that the defendants were joint tortfeasors with the Imperial News Company Limited and the United Cigar Stores Ltd. in respect of the publication complained of in that action [an action against the United Cigar Stores Ltd., in which the publication complained of was the sale by it of copies of the newspaper to individual customers], and that action having been settled, the plaintiffs cannot now claim damages from the defendants in respect of such publication. This principle applies to all other claims made and disposed of by action, or otherwise settled in the province of Manitoba or elsewhere.
>
> The plaintiffs, however, contend that the publication by the defendants to the Imperial News Company Limited and its employees, complained of in paragraph 10 of the statement of claim in the present action, constitutes a separate tort for which the defendants are liable, and that it is an entirely different cause of action from those sued on in the Manitoba courts.
>
> I am of the opinion that the plaintiffs' contention is correct. Neither the Imperial News Company Limited nor any of the other parties sued in Manitoba is a party to the publication now complained of, and they are not joint tortfeasors with the defendants in respect of such publication. I am, therefore, of the opinion that the learned trial Judge was in error in non-suiting the plaintiffs, and that they are entitled to have the issue raised by paragraph 10 of their statement of claim tried.

Special leave to appeal to the Supreme Court of Canada was granted to the present appellant by the Court of Appeal for Ontario (1).

By the judgment of this Court, now reported, the appeal was allowed and the action dismissed as against the appellant with costs throughout. Kerwin J. dissented.

R. H. Greer K.C. and *J. R. Cartwright K.C.* for the appellant.

J. M. Bullen K.C. and *R. M. Fowler* for the respondents.

(1) [1937] 2 D.L.R. 673.

1938

THOMSON v. LAMBERT.

THE CHIEF JUSTICE.—This appeal arises out of an action for damages for libel against the appellant and his co-defendant Lichtman who are respectively described in the proceedings as the managing editor and the distributor of a newspaper called *Hush* which, it is shewn and admitted by everybody including the appellant, is (and has in Manitoba and elsewhere the reputation of being) a journal whose principal rôle is the publication of items of scandal, frequently *prima facie* libellous,—the appellant himself asseverating that the publication of these items is in the interests of public morality.

The particulars of the libel, which was a peculiarly gross one, do not really concern us. At the material times, the paper was published weekly by the National Publishing Co., Ltd., of which the appellant says, in his examination for discovery that was put in evidence by the respondents, "It is my company." Lichtman was the general distributor,—on what particular footing it does not appear. There is no evidence that he was, in point of law, the agent either of the appellant or of the publishing company.

There were two editions, a western and an eastern edition. The whole of the printing of both editions apparently "went to" Lichtman as general distributor. As the libel appeared only in the western edition we are concerned with that edition alone.

The Imperial News Company at Winnipeg (of whom we shall speak as the Winnipeg distributors) were the sole distributors for Manitoba under an agreement with the publishers.

Lichtman shipped each week part of the issue destined for distribution in Winnipeg and its vicinity (greater Winnipeg) to the Winnipeg distributors direct and the residue for that province he shipped on behalf of the distributors to their retailer customers in the country, that is to say, outside of greater Winnipeg. The distributors settled with Lichtman, and the country retailers who received their shipments from Lichtman direct settled with the distributors, the unsold copies being returned or accounted for. We are solely concerned in this appeal with newspapers shipped by Lichtman to the distributors direct in Winnipeg.

In respect of the same libel, the respondents had brought actions and obtained judgments against the Winnipeg dis-

1938
THOMSON
v.
LAMBERT.
Duff C.J.

tributors and against certain of their customers in Manitoba; and at the trial, a non-suit was granted on the ground that, by reason of these judgments, the respondents were precluded from recovering from the defendants in respect of the publications upon which the present action is based and which were established at the trial.

I have had the advantage of reading and considering the judgment of Mr. Justice Davis and I agree with his conclusion and, in substance, with his reasoning as applied to the facts of this case; but there is a point of view from which the case before us may be regarded which I think it is not unimportant should be explained. From that point of view, it is essential to consider with some care the pleadings in the former action, the facts established in the record now before us, as well as what occurred at the trial and in the Court of Appeal.

Paragraph 10 of the statement of claim is in these words:—

> 10. The said defendants published the said article directly to the Imperial News Company Limited, which company is a wholesale vendor of newspapers throughout Western Canada, and to the servants and/or employees of the said Imperial News Company Limited, namely, among others, R. J. Palmer, R. Halliley, M. McIntyre and W. J. Sinnot. The said defendants further delivered the said article to the above mentioned company and persons well knowing and intending that the above mentioned company and persons would and should re-deliver the said article to several hundred retail dealers, and well knowing and intending that such retail dealers would and should publish the said article to their individual customers. The natural and ordinary result of so delivering the said article was the re-delivery and sale of the said article. The said Imperial News Company Limited and/or its servants and/or employees did in fact re-deliver the said article to several hundred retail dealers and the said retail dealers did in fact sell and publish the said article to many thousand individuals throughout Ontario, Western Canada and British Columbia.

At the trial, counsel for the respondents principally relied upon the publication or publications alleged in the first sentence of this paragraph. It was contended that the respondents had proved publication of the libel to the Winnipeg distributors and to certain employees of the distributors and that this was a distinct publication in respect of which their right to recover was not affected by the judgment in the earlier proceedings because neither the Winnipeg distributors nor their employees could be held liable in respect of such publication. This, I repeat, was the main position upon which counsel for the plaintiffs at the trial

rested as sustaining their right to sue, notwithstanding the previous judgments. Over and over again this is emphasized; for example:—

I do not think I can add anything other than to repeat that we are suing for something that could not have been the subject of a claim against the Imperial News Company. You cannot sue the recipient of a libel. We have a distinct publication here from the defendants to the Imperial News Company and that is a distinct publication from the publication from the Imperial News Company to the retailers. As Gatley says, they are separate libels, and give a separate cause of action.

The point is that the publication with which the action is concerned is a publication in respect of which the Imperial News Company could not have been sued. It seems to be clear from the judgments delivered in the Court of Appeal that this was the ground upon which the respondents' appeal to that court was based and upon which, as regards the appellant, the Court proceeded in granting a new trial. The learned Chief Justice of Ontario said:—

The plaintiffs, however, contend that the publication by the defendants to the Imperial News Company, Limited, and its employees, complained of in paragraph 10 of the statement of claim in the present action, constitutes a *separate tort* for which the defendants are liable, and that it is an entirely different cause of action *from those sued on in the Manitoba courts.*

I am of the opinion that the plaintiffs' contention is correct. Neither the Imperial News Company, Limited, nor any of the other parties sued in Manitoba *is a party to the publication now complained of, and they are not joint tortfeasors with the defendants in respect of such publication.* I am, therefore, of the opinion that the learned trial judge was in error in non-suiting the plaintiffs, and that they are entitled to have the issue raised by paragraph 10 of their statement of claim tried.

The learned Chief Justice then proceeds to discuss paragraph 9, but only as affecting the respondents' right to recover as against Lichtman. On this appeal we need not consider that, as Lichtman does not appeal.

In this Court the respondents took a broader ground and contended as follows:—

It is submitted further, that the defendants are liable for the publication of the libel alleged in paragraph 10 of the statement of claim by individual news vendors in Manitoba, Saskatchewan and Alberta, who purchased copies of the issue of *Hush* dated December 17, 1931, from the Imperial News Company Limited, except in so far as such publications were the subject of claim in any actions in Manitoba against individual retail news vendors. The cause of action for such publications is not barred by the Manitoba actions.

No doubt (as respects news vendors in Manitoba) evidence was given in support of this claim at the trial and, no doubt also, it was put forth at the trial as a sort of

1938

THOMSON v. LAMBERT.

Duff C.J.

addendum to the principal claim as already stated. It seems clear that the Court of Appeal did not regard this claim as open to the respondents as a separate claim. The learned Chief Justice of Ontario in his reasons for judgment treats the respondents' case against the appellant as resting solely upon a separate publication to Imperial News Company and their employees.

The respondents further contended in this Court that they are entitled to recover damages against the appellant in respect of publication by Lichtman to vendors having no connection with the Imperial News Company. This will be discussed later. At the trial, there was no suggestion of any right to recover in respect of any cause of action not set forth in paragraph 10 of the statement of claim, which is strictly limited to a claim in respect of newspapers delivered to Imperial News Company; nor does this argument appear to have been advanced in the Court of Appeal, although the learned Chief Justice of Ontario held the respondents were entitled to advance such a claim as against the defendant Lichtman under paragraph 9.

Before proceeding further, it is important to recall the relations between the publishers, the appellant and the Imperial News Company. The appellant was the owner, in the language of business, of the company publishing the newspaper, as well as the managing editor. With the publishers, the Winnipeg distributors had an agreement, in operation since 1930, under which they, as wholesalers, were the sole distributors in Manitoba, of the newspaper. They received weekly shipments from Lichtman, the general distributor, pursuant to this agreement and, in turn, sold to news vendors in greater Winnipeg, while Lichtman, on their behalf, shipped the newspapers direct to vendors in other places in the province. The publishers, the appellant and Lichtman were engaged in a joint commercial enterprise, the publication and distribution and ultimate sale of the newspaper. All their activities were designed for the sale of the newspaper to the public and the condition and aim of the whole enterprise was the purchase of the paper by the public. The shipments to the Winnipeg distributors were only one step in carrying out this business.

The Winnipeg distributors, on the other hand, received delivery of newspapers from Lichtman pursuant to the agreement with the publishers and were parties directly concerned in the shipping of the papers to them, in the receipt of them by their employees, and in the distribution to the news vendors and in the sale of the papers to their customers.

Thomson, as managing editor, and Lichtman, as general distributor, knowing, as they did, the character of the paper, were responsible for the publication of any libel it might contain to the public as well as for any incidental publication of the libel which might occur in the ordinary course in the passage of the newspaper through the regular channels of distribution from the printer to the ultimate purchaser from the news vendor.

As regards the Winnipeg distributors, the plaintiffs in their statement of claim in their action against that company (paragraph 10) allege that

> the defendant [the Imperial News Company] caused to be brought in to the city of Winnipeg many thousands of copies of the said publication, dated and designated "Vol. 4, No. 50, Toronto, December 17th, 1931," and thereupon on the 18th day of December, A.D. 1931, falsely and maliciously and with gross negligence and utterly careless and reckless as to the truth or falsehood of the article hereinafter set forth, published, sold and distributed many thousands of said copies to several scores of retail news vendors in the cities of Winnipeg and St. Boniface, and the municipalities adjacent thereto.

These newspapers, which the Imperial News Company "caused to be brought" to themselves in Winnipeg and which they sold and distributed amongst the retail news vendors of greater Winnipeg, were brought to Winnipeg and distributed pursuant to the arrangement and with the object already mentioned; and pursuant also to an established course of business that had been proceeding for at least a year when the publication occurred which is complained of in this action. The Winnipeg distributors, it is admitted, were fully aware of the character of the paper, that it contained items *prima facie* libellous, and it was not the practice to take any measures to verify the facts stated. They were, in a word, participants jointly with the publishers and with the appellant and Lichtman in the shipments to themselves, in the distribution to the news vendors and in the sale to the public. They were, consequently, responsible for any publication which ensued in

1938

THOMSON v. LAMBERT.

Duff C.J.

the ordinary course from their co-operation in this enterprise; in having the papers delivered to themselves as well as in the further distribution of them. They were, of course, (apart from their participation in the enterprise as a whole) in view of their knowledge, responsible for every publication of the libel to their employees as well as to others occurring in the ordinary course after these papers came into their possession. And, of course, since such publication was the direct result of the co-operative acts of the publishers, the appellant and themselves, they were responsible jointly with the appellant.

It is necessary to consider now with a little more particularity the pleadings in the respondents' action against the Imperial News Company. By the statement of claim it is alleged that the defendants in that action have been for several years the sole and exclusive wholesale agent and wholesale vendor for Ontario, Quebec, Manitoba and Western Canada for a publication called *Hush;* and that, as such wholesale agent and vendor, they have distributed and published weekly for over two years hundreds of thousands of copies of *Hush* each week, selling them to a large number of retail news vendors; that the defendants well knew that *Hush* was likely to contain grossly defamatory matter and that it was the duty of the defendants to take great care in verifying the truthfulness of the "personal news and statements" therein contained; that

the defendant caused to be brought in to the city of Winnipeg many thousands of copies of the said publication, dated and designated "Vol. 4, No. 50, Toronto, December 17th, 1931," and thereupon on the 18th day of December, A.D. 1931, falsely and maliciously and with gross negligence and utterly careless and reckless as to the truth or falsehood of the article hereinafter set forth, published, sold and distributed many thousands of said copies to several scores of retail news vendors in the cities of Winnipeg and St. Boniface, and the municipalities adjacent thereto.

* * *

12. The said article was falsely, maliciously, recklessly, carelessly, shamelessly and wantonly published as aforesaid of and concerning the plaintiffs by the defendant, who was callously indifferent and reckless as to whether said article was true or not, and who took no care or caution as to whether said article was true or not.

By their defence the Imperial News Company denied all these allegations (par. 1) and alleged as follows:—

5. In the alternative, and by way of defence to the whole of the plaintiffs' claim, the defendant says that it is a wholesale bookseller and news vendor carrying on business as such on a very extensive scale in the province of Manitoba, and in many other cities throughout the

Dominion of Canada. The defendant's servants in the course of their employment in the defendant's service received the newspaper containing the words complained of in the amended statement of claim from the owners and publishers thereof, the said National Publishing Company Limited, 52 McCaul street, Toronto, as referred to in paragraph 6 of the amended statement of claim and it was thereupon sold by the said defendant *in the ordinary course of the defendant's business* and *without any knowledge of its contents including the libel complained of innocently and without intent to defame. Neither the defendant nor any of its servants or agents knew at the time when they sold the said newspaper that it contained, or was likely to contain, any libel on the plaintiffs, or either of them.* It was not by negligence on the part of the defendant or any of its servants or agents that they did not know that there was any libel in the said newspaper nor did the defendant nor any of its servants or agents know that said newspaper was of such a character that it was likely to contain any libellous matter, nor ought the defendant or any of its servants or agents to have known it, wherefore the defendant says that it never published the said libel.

6. In the alternative, and by way of defence to the whole of the plaintiffs' claim, the defendant says that if it sold any copies of the newspaper containing the libel complained of, which is not admitted but denied, it did so without negligence on the part of itself or any of its servants or agents and in the ordinary course of its business as a wholesale news vendor handling and distributing many hundreds of different newspapers and periodicals. The *defendant did not know and had no ground for suspecting that the newspaper complained of was likely to contain libellous matter.*

Immediately upon receiving notice from the plaintiffs that the said newspaper in question contained the matter complained of the defendant withdrew the said newspaper from sale. Under the circumstances above set out the defendant contends that it did not publish the said libel.

* * *

8. In the further alternative, and by way of defence to the whole of the plaintiffs' claim, the defendant alleges that it was innocent of any knowledge of the libel contained in the newspaper complained of, that there was nothing in the said newspaper or the circumstances under which it came to the defendant or was sold by it which ought to have led the defendant to suppose that it contained the libel and that when the said newspaper was disseminated by the defendant it was not by any negligence on the part of the defendant that it did not know that the said paper contained a libel, wherefore the defendant says that it did not publish the said libel.

The respondents' allegations of fact having been denied by the defendant Imperial News Company, it was not only material, but necessary, in support of those allegations to prove the course of business as between the publishers and the appellant on the one hand and the defendants in that action on the other. In support of the allegation that the defendants had "caused to be brought" the issue of the 17th of December to them at Winnipeg to be distributed by them, it would be material to present to the jury the history of the relations between the Toronto

1938
THOMSON
v.
LAMBERT.
Duff C.J.

people and the Winnipeg people, including the agreement by which the defendants had been for more than a year prior to the publication of the libel the sole and exclusive distributors of the newspaper for Manitoba and the nature of the arrangements, as indicating that the profits of all would depend upon the volume of purchases by the public.

The defence by its allegations, which were put in issue by the respondents, of ignorance of the general character of the paper, of ignorance in particular of the presence of the libel in the issue of December 17th, and of innocence generally, made it not only material for the respondents, as plaintiffs, but most important for their case, to establish the fact proved in the present litigation that actual knowledge of the presence of the libel in that issue had been gained by employees of the Winnipeg distributors, including Sinnott, who was the general manager as well as the statutory attorney, in course of the distribution of the paper. Moreover, it was part of the respondents' case against the defendants that they continued the publication of the libel after the presence of it had come to Sinnott's knowledge. In these circumstances, it is proper to presume that evidence of Sinnott's knowledge was put before the jury in that action. It will be observed also that the respondents' case presented on these pleadings was that the defendants, in their capacity as the Winnipeg distributors, pursuant to the established course of business between them and the publishers of the newspaper, "caused to be brought" to themselves in Winnipeg the copies destined for distribution among the news vendors in Winnipeg, that they did this with full knowledge of the character of the newspaper and that they sold and distributed thousands of copies of it to news vendors. It is perfectly true they allege that the libel was published to the news vendors, but they allege also that, with full knowledge of the character of the paper, the defendants, in their character as the Winnipeg distributors, sold and delivered many thousands of copies to such news vendors; and the defendants, having denied their knowledge of the presence of the libel, and this denial having been put in issue by the plaintiffs, the case, taken as a whole as presented to the jury, was not merely a publication of the libel to the news vendors, it was the sale and delivery to

some scores of news vendors of many thousands of copies of the newspaper with full knowledge of its character and with knowledge of the presence of the libel in it.

Paragraph 10 of the statement of claim in this action alleges publication to the distributors and their servants, but the libel could only be published to the distributors in the strict sense by being brought to the knowledge of somebody whose knowledge was theirs. No doubt Sinnott, who was the attorney for the Company in Manitoba, stood in such a relation to the distributors that his knowledge was their knowledge and in that sense there was publication to the distributors; but the wrongful act was publication to Sinnott; and in respect of that the publishers and the appellant became joint tortfeasors for the reasons which sufficiently appear from what has already been said.

If publication to Sinnott constituted in any relevant sense publication to the Imperial News Company, there are not two separate publications. They are one and the same fact and, in respect of publication to Sinnott, the distributors were responsible for all the damages. If the respondents cannot maintain an action for the publication to Sinnott they are not helped, I think, by describing the same fact as publication to the Imperial News Company.

The parties must be taken to have contemplated the ordinary course of business. The bundles received by the Winnipeg distributors in Winnipeg would be opened and, to employ the phrase used by the witnesses, "parcelled out" for distribution to the retail news vendors. In course of this operation, the contents of the paper would naturally become known to servants of the company and for that, and for all other similar incidental publications, as well as for the ultimate publication to the public, all parties were jointly responsible. If the whole consignment to the Winnipeg distributors had been destroyed before any copy saw the light of day, there would, of course, have been no publication in respect of that consignment; but the proper conclusion from the facts proved is that the papers were distributed and reached the public in the ordinary course as expected and intended. I am unable, therefore, with respect, to agree with the Court of Appeal that the cause of action alleged in paragraph 10 is not one in respect of which the Imperial News Company

1938

THOMSON v. LAMBERT.

Duff C.J.

were liable at the suit of the respondent. They were liable for every publication ensuing upon their act, which was the joint act of themselves and the publishers and the appellant in bringing the newspapers to themselves at Winnipeg, and jointly liable; and this applies to every act of delivery and publication alleged in paragraph 10.

Paragraph 10, in addition to the allegation of publication of the libel to the Imperial News Company and their servants, alleges delivery of it to them with knowledge and intention that it would be redelivered to retail news vendors and by them published to their customers and that it was so published. As already observed, the Chief Justice of Ontario, in his reasons delivered on behalf of the majority of the Court, implies that a separate and distinct cause of action founded on these allegations is not open to the respondents; and it should be stated that the evidence is that a consignment of the issue of December 17th containing the article was "caused to be brought" to them at Winnipeg by the Imperial News Company, as the exclusive distributors in Winnipeg, pursuant to previous arrangements with the publishers, the appellant and an established course of business; and that, pursuant to those arrangements and that course of business, this consignment was distributed to the news vendor customers and by them sold to the public; unsold copies being returned. Publication to the Imperial News Company, if there was such, consisted in the incidental publication to the servants of that company as the paper passed through their hands on its way to the public through the news vendors. That is the case established at the trial and no refinement of pleading can give it a different character. I agree with the majority of the Court of Appeal that no separate cause of action is available in respect of any publications resulting from the sale and delivery of the newspapers by the Imperial News Company to the news vendors for the reasons I am about to mention.

The respondents' case in their action against the Imperial News Company having been such as has already been stated, and the Imperial News Company having been jointly responsible with the appellant and the publishers for bringing into Winnipeg and having in their possession there thousands of copies of the issue of Decem-

ber 17th containing the libel complained of and for distribution and delivery of those copies with knowledge of the general character of the publication and of the presence of the libel to their customers, the news vendors, the facts which must be presumed to have been established in that case (since they were not only material to the plaintiffs' case but necessary to enable the plaintiffs to succeed in the issues presented upon the pleadings) constituted a sufficient foundation for recovery by the respondents of damages in respect of all publications which followed in the normal course as the direct or ordinarily incidental result of all those acts which they did in co-operation with the publishers and with the appellant. In these circumstances, I cannot think the respondents would have been permitted to proceed with a second action against the Imperial News Company to recover damages for the publication alleged in paragraph 10 although that paragraph, as we have seen, alleges publication and delivery in respect of which that company would have been jointly liable with the publishers and the appellant.

The parties were jointly concerned in a common enterprise, beginning with the bringing of the newspapers to Winnipeg and ending with the sale of them to the public. All these publications were involved in the execution of the business in which they were jointly engaged. I do not think that a cause of action arising out of the delivery of the papers to the news vendors in carrying out that business can be substantially separated from the cause of action alleged in paragraph 10.

The analogy between the delivery of a consignment of newspapers to the Imperial News Company for distribution among news vendors, or of a parcel of newspapers to a news vendor, and the delivery of an article by an author to an editor, is a wholly false one. The editor exercises an independent judgment determined by the character of the article. We are here in the presence of a wholly different situation, where a consignment of newspapers is dealt with as a commercial commodity and not otherwise. The analogy might be closer if a case could be adduced in which there was an arrangement between a writer of scurrilous articles and a publisher by which the publisher became the sole and exclusive publisher and

1938

THOMSON v. LAMBERT.

Duff C.J.

distributor of such articles; but we have been referred to no such case.

It would, in my opinion, be an abuse of substantial justice to permit the respondents to proceed against the Imperial News Company in another action in respect of the publication now sued upon. And since the Imperial News Company were jointly liable with the publishers and the appellant for these publications, it follows, I think, that proceedings against the appellant must also fail.

As to the contention that the respondents are entitled to recover as against the appellant under paragraph 9 as amended in accordance with the judgment of the Court of Appeal. First of all, it seems to me clear that the learned Chief Justice of Ontario had no intention of authorizing an amendment except for the purpose of enabling the respondents to advance a claim against the defendant Lichtman, with whom we are not concerned on this appeal. Second, the amendment is only incidental to the judgment ordering a new trial on the ground that, at the trial and under the pleadings as they stood, the plaintiffs had established a cause of action against the defendants. As that judgment is to be reversed as respects the appellant, the ancillary order cannot affect him. The Court of Appeal had no intention of ordering a new trial solely for the purpose of enabling the plaintiffs to recover on a fresh cause of action.

The Court of Appeal acted upon a rule of practice, the effect of which appears to be that, when a defendant obtains in the case of a trial with a jury a judgment which is in effect a judgment of nonsuit, the defendant must abide by the evidence given as if it were the only evidence available. Under that rule I should have thought the plaintiff must be similarly bound, and, on the new trial for the assessment of damages alone, I cannot quite understand how under such a rule the plaintiff could justly be permitted to advance a wholly new cause of action not put forward at the first trial and not open to him on the pleadings. The limitation, I should have thought, must bind both the plaintiff and defendant.

However that may be, I desire to say that I express no opinion on the question whether such a rule of practice could properly prevail against a statutory enactment re-

quiring (in the absence of consent to the contrary) actions for libel to be tried by a jury. The observations of Lord Esher in *Attorney-General* v. *Emerson* (1) are not without pertinency.

As to whether this question could be debated in this Court, the rule was laid down by the Court thirty years ago in *Lamb* v. *Kincaid* (2) in these words:—

> A court of appeal * * * should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.

The distinction is a familiar one between failure to take a point and failure to adduce all the arguments in support of a point when taken, even when it is only foreshadowed. Among the authorities in which this distinction is noticed, the judgment of Lord Bramwell in *Borrowman* v. *Free* (3), cited in *Lamb* v. *Kincaid* (2), may be referred to.

I have treated the question of the effect of the evidence in determining the existence or non-existence of a cause of action as a question of fact for the Court of Appeal under the rule there followed; as the Court of Appeal itself did.

The judgment of Cannon, Crocket and Davis JJ. was delivered by

DAVIS J.—The appellant was the managing editor of *Hush,* a weekly newspaper published in Toronto by a joint stock company, The National Publishing Company, Limited, in two editions, one for Ontario and eastern Canada and the other for Manitoba and western Canada. The western edition of December 17th, 1931, contained a false defamatory statement of the respondents (husband and wife) who resided at St. Boniface, in the province of Manitoba. It was a case of mistaken identity, but, none the less, a reckless and cruel libel against two perfectly innocent persons.

Liability for libel does not depend on the intention of the defamer; but on the fact of defamation.

(1) (1889) 24 Q.B.D. 56, at 58. (2) (1907) 38 Can. S.C.R. 516, at 539.
(3) 48 L.J. Q.B. 65, at 68.

1938

THOMSON v. LAMBERT.

Davis J.

as said by Russell, L.J., (as he then was) in *Cassidy* v. *Daily Mirror Newspapers Ltd.* (1).

Samuel Lichtman of Toronto, who was one of the defendants in this action, was the general distributor of the western edition and the Imperial News Company, Limited, of Winnipeg, was the sole distributor for Manitoba and also distributed copies to retail news dealers in Saskatchewan and Alberta. That company distributed about 11,000 copies of the issue of December 17th, 1931, to some 350 or 400 retail news dealers who in turn sold to the public.

The respondents commenced an action in the Manitoba courts against the Imperial News Company, Limited, for damages for the libel and carried the action down to judgment. While the evidence in that case is not before us or the addresses to the jury or the Judge's charge, it is not unreasonable to assume that the case was developed at the trial at least as widely as set up in the pleadings, which were filed as an exhibit in this action. The following extracts are taken from the statement of claim in that action:

3. * * * The plaintiff, Leon Lambert, * * * is widely known and has a large circle of friends and acquaintances throughout Manitoba, British Columbia. Alberta and Ontario, and is particularly well known in the city of Winnipeg, which adjoins the said city of St. Boniface, and in the said city of St. Boniface.

4. * * * The plaintiff, Mary Lambert, has a large number of friends and acquaintances throughout Western Canada and is also well known in the city of Toronto, in the province of Ontario, where a number of her relatives reside.

6. The defendant is and has been for several years the sole and exclusive wholesale agent and wholesale vendor for Ontario, Quebec, Manitoba and Western Canada for a publication called *Hush*, * * * issued every Thursday by the National Publishing Company, Limited, 52 McCaul street, Toronto. As such wholesale agents and vendors the defendant distributes and publishes and has distributed and published weekly, for over two years, hundreds of thousands of copies of said *Hush* each week, selling them to a large number of retail news vendors throughout all the principal cities of Canada, particularly in Montreal, Toronto, Winnipeg and Vancouver.

10. Under the conditions and circumstances set forth in paragraphs 5 to 9, both inclusive, next preceding, the defendant caused to be brought in to the city of Winnipeg many thousands of copies of the said publication, dated and designated "Vol. 4, No. 50, Toronto, December 17th, 1931," and thereupon on the 18th day of December, A.D. 1931, falsely and maliciously and with gross negligence and utterly careless and reckless as to the truth or falsehood of the article hereinafter set forth, published, sold and distributed many thousands of said copies to several

(1) [1929] 2 K.B. 331, at 354.

scores of retail news vendors in the cities of Winnipeg and St. Boniface, and the municipalities adjacent thereto, the names of many of which retail news vendors the plaintiffs are ready, willing and able to furnish to the defendant on request, three of said retail news vendors being United Cigar Stores Ltd., Western News Agency Limited and Service Drug Store.

24. In consequence of the said article and the words and language thereof and the publication thereof by the defendant as aforesaid the plaintiffs and each of them have been greatly injured in character and reputation and have been brought into public scandal, hatred, contempt, ridicule and odium.

25. Each of the plaintiffs therefore by reason of the matters set forth claims damages to the extent of $10,000.

The jury found for the respondents and awarded to each of them $1,500 damages. These amounts, together with costs taxed and allowed at $508.05, were duly paid.

Shortly after the institution of that action, the respondents commenced a second action in Manitoba against United Cigar Stores, Limited, in respect of the sales of the paper in the several stores of that company. The claim was set out in somewhat similar language to that in the first action. This case was settled by payment by the defendant to the respondents of $2,000 damages and costs of $700.

A third action was instituted in Manitoba by the respondents against the Roberts Drug Store, Limited, and Arthur John Roberts in respect of the sales of the paper in their stores. This action was taken to trial and the respondents obtained a judgment for $100 and $50 respectively, but, because of a larger payment into court with the defence and the disposition of costs, no actual recovery resulted.

The respondents commenced ten or twelve further actions in Manitoba against different store proprietors or news agencies and subsequently made settlements and gave releases on payment of sums running from $25 to $200 each, apparently depending on what the traffic would bear. When the husband respondent was asked how many actions he had brought altogether, he said:—

twelve or thirteen, something like that. * * * I can't tell exactly, there is so many. * * * I can't tell to-day. It was my lawyer, I didn't bother with it.

The respondents then came into Ontario and brought to trial in May, 1936, this action which they had commenced in Ontario by a writ issued in March, 1932. The basis of this action was what was regarded as a sort of residuum

1938

THOMSON v. LAMBERT.

Davis J.

from the litigation in the West, treating the sending of the western edition (of the particular date in question) in bundles by the publishing company, or its distributor, Lichtman, from Toronto to the said Imperial News Company, Limited, in Winnipeg, as a separate and independent cause of action in respect of which an additional amount of damages could be recovered over and above the recoveries that had been made in the several western actions. There is no evidence that anyone within Ontario saw the article. The basis of the claim, as put in the respondents' factum, is that the article was published

> to the Imperial News Company Limited of Winnipeg and to William James Sinnott, the manager of that company, and to various employees of that company including one Richard Halliley.

The action was originally brought against the publishing company as well as against the appellant Thomson and Samuel Lichtman. For some reason the action, before the delivery of the statement of claim, was formally discontinued by the respondents against the publishing company. At the trial the respondents were non-suited upon the ground that the defendants Thomson and Lichtman had been joint tortfeasors with the parties who had been sued in Manitoba. Upon appeal, the Court of Appeal for Ontario gave judgment against the two defendants Thomson and Lichtman and directed a new trial limited to the assessment of damages. Lichtman did not appeal, but Thomson did.

I would allow the appeal of Thomson upon the ground that there was a complete remedy for the respondents in the court in which the first action was started. Collins, M.R. (with whom Stirling, L.J., concurred) in *Williams* v. *Hunt* (1), said:—

> Where proceedings have been started, it is an abuse of the process of the court to divide the remedy where there is a complete remedy in the court in which the suit was first started.

It may be observed that in a very recent case in England, *Marchant* v. *Ford and others* (2), the plaintiff brought an action for libel against the defendant Ford, the author of a novel which the plaintiff alleged was a libel upon him, and in the same action he joined as defendants the printers and the publishers of the novel and also the printers of an illustrated advertising wrapper in which the book was sold.

(1) [1905] 1 K.B. 512 at 514. (2) [1936] 2 All E.R. 1510.

In *Barber* v. *Pidgen* (1), it was said that each publication of the same slander constituted a separate cause of action, but that was said in relation to the argument that the jury's verdict was not a valid one because separate damages were not awarded in respect of each publication complained of in the statement of claim; but, the jury having been asked, without objection, to give one verdict in respect of all the occasions on which the defamatory words were spoken, the defendants were disentitled to take the point that the jury should have been asked for a separate award of damages in respect of each publication.

No one would deny the respondents their remedy to repair the injury done to their rights of reputation by the publication of false and defamatory statements concerning them. But, as Maugham, L.J., (as he then was) recently said in the Court of Appeal in *Ley* v. *Hamilton* (2):—

> It would, indeed, be an ill day for the public and the courts if a libel action came to be looked upon in the light of a gold-digging operation.

The respondents should not be permitted to go on suing one person after another *ad infinitum* where a complete remedy was available in one action. The law is well employed when it puts an end to just such actions as this.

Fry, L.J., in *Macdougall* v. *Knight* (3) said:—

> The injustice of allowing a litigant to select one portion of a libel as the ground for one action and another as the ground for a second action, and so on indefinitely, is obvious. The whole publication would be before the jury in each case, and it would be quite impossible for the jury in each case to separate the damages due to the particular part of the libel relied on in that case from the damages arising from other parts of the libel. I think, therefore, that a plea of *res judicata* would succeed, and that we are bound to stay the action. Suppose, however, this to be otherwise, still, in such a case, I do not hesitate to say that such successive actions in respect of the same libel would be an abuse of the process of the court, and so, *quâcunque viâ*, the application should succeed, and the action be stayed.

In the United States the law appears to be the same, that successive actions for the same libel would be an abuse of the process of the court. *Galligan* v. *Sun Printing & Publishing Ass'n.* (4).

In *Brunsden* v. *Humphrey* (5), Lord Justice Bowen referred to what Lord Coke had said in a note to *Ferrer's* case (6):

(1) [1937] 1 K.B. 664.
(2) (1934) 151 L.T. Rep. 360, at 374.
(3) (1890) 25 Q.B.D. 1, at 10.
(4) (1898) 54 N.Y. Supp. 471.
(5) (1884) 14 Q.B.D. 141.
(6) 6 Coke, 9a.

1938

THOMSON v. LAMBERT.

Davis J.

It has been well said, *interest republicae ut sit finis litium*, otherwise great oppression might be done under colour and pretence of law. The jurisdiction to dismiss such an action as this exists as part of the inherent power of the court over its own process.

It is contended that, as the question of libel or no libel is for a jury, the court cannot, except by consent of the parties, determine that question. But the defamatory matter complained of in this action is the same article in the same issue of the same newspaper that formed the basis of the Manitoba actions. The question of libel or no libel went to the jury in at least the first of those actions, that against Imperial News Company, Limited, above mentioned. But there was never any real question that there had not been a libel; it was sought to be excused upon the ground of a mistaken identity and a retraction.

The appeal should be allowed and the judgment at the trial dismissing the action against the appellant should be restored, with costs to the appellant throughout.

KERWIN J. (dissenting).—At the trial of this action for damages for libel brought by the respondents against Thomson as editor and Lichtman as distributor of a weekly newspaper known as *Hush*, a motion for nonsuit was made at the close of the plaintiffs' case by counsel for each defendant and was granted.

The Court of Appeal for Ontario allowed the plaintiffs' appeal and ordered a new trial, confined to the question of damages against the defendants, with liberty to the plaintiffs to amend paragraph 9 of their statement of claim, which paragraph contained an averment against Lichtman only. The defendant, Thomson, now appeals to this Court.

The libel complained of appeared in the issue of *Hush* dated December 17th, 1931, and the respondents secured judgments or settlements in certain actions in the courts of Manitoba for damages for libel based upon the same article in the same issue. The appellant contends that he was a joint tortfeasor with the defendants in the Manitoba actions, and it was upon this ground that the nonsuit was granted.

In the first action brought by the respondents in Manitoba, the defendant was Imperial News Company, Limited, and the publication complained of consisted of the sale and distribution of the newspaper by the defendant to various retail news dealers in Winnipeg and adjoining territory. Judgment was entered for each respondent for $1,500 damages and costs, which were paid. In the second action, the respondents sued United Cigar Stores, Limited, and the publication there alleged was the sale by the defendant to members of the public. The action was settled by the payment of $2,000 and $700 costs, and a release was given to the defendant. The defendant in the third action in Manitoba was Roberts Drug Stores, Limited, and the publication alleged was the sale of the newspaper by the defendant to members of the public. It appears that because the defendant had paid into court more than the amount of damages awarded, the defendant's costs were set off against the damages. Various other actions were commenced by the respondents against other retail vendors, and these actions were settled or abandoned.

In the present litigation, the respondents, by their statement of claim, allege publication by appellant to "Imperial News Company Limited * * * and to the servants and/or employees of the said Imperial News Company Limited"; and that is the only publication alleged against appellant. The distinction in fact between a publication *by* Imperial News Company, Limited, or retail news vendors and a publication by the appellant *to* Imperial News Company, Limited, and the servants and/or employees of that company, is obvious, but it is argued that that distinction cannot avail in an action based on a libel in a newspaper. In such a case, appellant contends, there can be in law but one publication, since, so far as the appearance of the libel in the newspaper is concerned, the writer of it, the editor, the printer, the distributor, and the retail vendors are all engaged in the common purpose of producing an article and distributing it to the public.

The fallacy in that argument is that it overlooks the foundation of the action for damages for libel. The material part of the cause of action is not the writing but the publication of the libel, and for the definition of

1938

THOMSON v. LAMBERT.

Kerwin J.

"publication" the words of Lord Esher in *Pullman et al.* v. *Hill and Co.* (1) have always been relied on:—

> The making known the defamatory matter after it has been written to some person other than the person of whom it is written.

If one suppose a case where two people collaborate to write a libelous statement and go together, and deliver it, to a third person,—that might be taken to be the combined, the joint action, of the two so as to give the libelled party an action for one publication only. But there may be distinct publications of the same libel by two individuals and for each publication the aggrieved party has a separate cause of action against each individual. The question then remains, was the appellant a joint tortfeasor with the defendants in the Manitoba actions?

The difficulty of defining the expression "joint tortfeasors" is shown in the judgments in *The Koursk* (2). That was an admiralty case, but the common law as to what constituted a joint tortfeasor was considered, and the prior decisions wherein the point is referred to are set out and examined and they need not here be repeated. At page 151 Lord Justice Bankes states the result to be:—

> That in order to constitute a joint tort there must be some connection between the act of the one alleged tortfeasor and that of the other.

At page 157 Lord Justice Scrutton concludes:—

> To make the tort, you want a wrongful act causing damage; and to make the tort the same cause of action, both elements must be the same.

And at pages 159-160 Lord Justice Sargant puts it thus:—

> There must be a concurrence in the act or acts causing damage, not merely a coincidence of separate acts which by their conjoined effect cause damage.

Applying these principles to the present case, it is evident that with reference to this newspaper the appellant was responsible for the publications effected by the defendants in the Manitoba actions, but there was no connection between the acts of those defendants and the acts of the appellant. The publication set forth in this action occurred without any of those defendants taking part in it. The pleading here avers a cause of action different from any set forth in the proceedings in the Manitoba courts, and evidence was led by the respondents to substantiate the allegation. This being so, the judgments and settlements in Manitoba are not bars to the present action.

(1) [1891] 1 Q.B. 524, at 527. (2) [1924] P. 140.

Brunsden v. *Humphrey* (1); *Bulmer Rayon Company Limited* v. *Freshwater* (2).

It was objected that there can be no publication to Imperial News Company Limited, a corporation, but no difficulty is raised, in my opinion, by this objection, as the evidence discloses publication to employees of the corporation and it is merely a convenient method of alleging publication, when a letter is addressed to a corporation or, as in the case at bar, a newspaper is sent to it, and opened and read by its employees. Nor is there any substance in the contention that, what was proved being a publication in Manitoba, it is necessarily a publication *by* the company to its own employees. The receipt of the paper by the company is proved by the receipt of it by the company's employees. There was no evidence, it is true, of any publication to Palmer and MacIntyre, two of the company's employees mentioned in paragraph 10 of the statement of claim, but evidence was given of the reading of the article complained of by, and hence the publication to, the other two employees mentioned, and that is all we are concerned with.

The only remaining point raised was that any publication proved occurred in Manitoba, and it was argued that there was no evidence that such a publication would be wrongful according to the laws of that province. It was long ago settled that in the absence of proof to the contrary, general foreign law is presumed to be the same as the common law of England. *Smith* v. *Gould* (3), and that principle has been applied in many cases in this Court.

If these conclusions were concurred in by the other members of the Court, they would be sufficient to confirm the order of the Court of Appeal setting aside the nonsuit as regards the appellant and directing a new trial, and it would then be necessary to consider the appellant's contention that the new trial should not be restricted, so far as he is concerned, to an assessment of damages. In view of the fact that I am alone in my views as to the main question, I refrain from investigating the subsidiary one.

However, I desire to express, with deference, my dissent from the opinion that, in the circumstances of this case,

(1) (1884) 14 Q.B.D. 141. (2) [1933] A.C. 661.
(3) (1842) 4 Moo. P.C. 21, at 26.

1938
THOMSON v. LAMBERT.
Kerwin J.

the respondents, residents of Manitoba, were obliged to join the appellant, a resident of Ontario, as a defendant in any of the Manitoba actions and add a claim against him based on an entirely different cause of action, at the risk (in failing to do so) of ascertaining when they bring an action on such separate cause of action in the jurisdiction where the appellant does reside, that their rights have been lost. We have not had the advantage of the views of the Courts below on the point. A perusal of the record shows that it was not raised before the trial judge and from the fact that it is not mentioned in the judgments in the Court of Appeal, I presume that it was not argued there.

Appeal allowed with costs.

Solicitors for the appellant: *Smith, Rae, Greer & Cartwright.*

Solicitors for the respondents: *McMaster, Montgomery, Fleury & Co.*

1937
*Oct. 6, 7.
1938
*April 26.

THE GOVERNOR AND COMPANY OF ADVENTURERS OF ENGLAND TRADING INTO HUDSON'S BAY (DEFENDANT) ..... APPELLANT;

AND

CONRAD LESLIE WYRZYKOWSKI, AN INFANT UNDER THE AGE OF 21 YEARS, SUING BY HIS FATHER AND NEXT FRIEND, CASIMIR T. WYRZYKOWSKI, AND THE SAID CASIMIR T. WYRZYKOWSKI (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Evidence—Injury to young child on escalator in defendant's store—Claim for damages—Alleged negligence in construction and maintenance of escalator—Questions for jury—Application of Elevator and Hoist Act, Man., 1919, c. 31—Admissibility in evidence of Government permits and Government inspector's report—Evidence Act, Man., 1933, c. 11, s. 31—Manitoba Factories Act, R.S.M., 1913, c. 70 (as amended), ss. 5 (a), 50A—Misdirection in charge to jury.

The action was for damages by reason of injuries suffered by the infant plaintiff, a boy four years of age, while descending (along with his mother and infant brother) in an escalator in defendant's depart-

*PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

1938

HUDSON'S BAY COMPANY v. WYRZYKOWSKI.

Hudson J.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Guy, Chappell, DuVal & McCrea.*

Solicitors for the respondents: *Aikins, Loftus & Company.*