HYMAN M. RIPSTEIN (PLAINTIFF).... APPELLANT;

AND

TROWER & SONS LIMITED (DEFENDANT) ..... RESPONDENT;

AND

THOMAS S. GILLESPIE AND THOMAS REDPATH (DEFENDANTS).

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*Oct. 31.
*Feb. 3.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Contract—Jurisdiction—Declinatory exception—Agreement with foreign company for sale of its goods in Canada—Business carried on in the province of Quebec with head-office located therein—Net commission on sales to be divided between foreign company and parties residing in the province—Action for accounting of such commissions taken by one party against foreign company—Whether provincial courts competent to hear the issue—Whether whole cause of action arise in the province—Article 94, 108 C.C.P.

The appellant brought an action in the district of Montreal, province of Quebec, against the respondent, an incorporated body described in the writ of summons as having its head-office and principal place of business in the city of London, England, and also against the two other defendants, both residing in the city of Montreal. The action was instituted for an accounting of all commissions received directly or indirectly by or on behalf of the above-mentioned company in connection with orders for merchandise sent by or on behalf of persons, firms or corporations in Canada or in the United States, in pursuance of an agreement herein described; in default of which the appellant asked that each defendant be condemned to pay him the sum of $225,000 as *reliquat de compte*. The respondent and the other defendants moved, by way of declinatory exception, that the action be dismissed on the ground that the Superior Court of the district of Montreal was not competent to hear the issue with regard to them. An agreement had originally been entered into between a certain partnership, carrying on business as wine and spirit merchants in the city of London, England, under the style of Trower and Sons, called "the Firm", and the appellant Ripstein and the defendant Gillespie, both of the city of Montreal. The Firm was to open, at their own expense, for the sale of their goods, an office in Montreal, called "Canadian office" and to appoint the defendant Redpath as its manager, Gillespie and Ripstein undertaking to use their best endeavours to introduce customers in Canada and the United States. The commission on all orders obtained by the Firm from these customers, whether obtained direct by the Firm or through Gillespie and Ripstein, were to be credited to the Canadian office. The Firm was to send credit notes from the London office to the Canadian office, showing the amount of commission to be allowed to the Canadian office, such commission being the difference between the cost price of the goods shipped by the Firm to Canada and the price at

*PRESENT:—Rinfret, Crocket, Davis, Hudson and Tashereau JJ.

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which such goods were invoiced to customers in Canada or the United States. Payment was to be made by customers direct to the Firm's London office, and the Firm was to remit to the Canadian office monthly the commission due to the latter on all sales in respect of which payment had been received. The "net commission" of the Canadian office, after deduction of the expenses of carrying on the same, was to be divided, one-third each, between the Firm, Gillespie and the appellant Ripstein. Later on, the respondent company purchased the business of the Firm and undertook to carry on under the agreement. The respondent company's motion, by way of declinatory exception, was maintained and the action, as against the respondent, was dismissed by the Superior Court, whose judgment was affirmed by the appellate court.

Held, reversing the judgment appealed from (Q.R. 69 K.B. 424), Davis and Hudson JJ. dissenting, that, under the circumstances of the case, all the essential facts, which together ought to give rise to the action brought by the appellant, i.e., the whole cause of his action, as constituted, had arisen in the city and district of Montreal, before the courts of which appellant was entitled to institute his action, under article 94 (3) C.C.P., and the declinatory exception should have been dismissed.—The whole business covered by the agreement, whatever be its nature, was, in the intention of the parties, to be, and was, carried on in and from the Canadian office; and the appellant's action was for an accounting of the "net commission", i.e. for an accounting of the business carried on in and through the Canadian office, in the city and district of Montreal, where the seat of the business was located.

Per Rinfret, Crocket and Taschereau JJ.—The provisions of article 94 C.C.P. are broad enough to include within their ambit any defendant, be he a foreigner, a stranger or not; and it was the evident intention of the legislature of Quebec, as expressed in that article, to grant to the Quebec courts jurisdiction over aliens or parties outside the province, if the whole cause of action arose therein.

Per Rinfret, Crocket and Taschereau JJ.—No opinion is expressed as to whether the agreement should be styled a partnership, or an agency agreement, or a contract of lease and hire of service, nor as to whether the declinatory exception was also wrong on any of the other grounds raised by it and decided by the judgments appealed from.

Per Davis J. (dissenting).—The making or assuming of the contract by the respondent company in the city of London, England, the receipt of payments by that company there from Canadian and American sales, the failure of the company "to remit" from London to Montreal certain commissions on these sales, and probably other facts necessary to establish the alleged cause of action, did not arise within the jurisdiction of the Quebec court.

Per Hudson J. (dissenting).—The agreement itself was made in London, England, the moneys were collected by the defendants there and not in Canada, contracts were made with a number of distillers and liquor dealers in London and in New York and moreover the appellant asked for an accounting in respect of all transactions had and done, whether in Canada, in the United States or in England, and, therefore, it cannot be said that the whole cause of action arose within the district of Montreal.

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APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Décary J., and maintaining the company respondent's motion, by way of declinatory exception, that the appellant's action for an accounting be dismissed on the ground that the Superior Court had no jurisdiction to hear the issue in the case.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

H. Weinfield K.C. for the appellant.

R. C. Holden K.C. and *G. B. Puddicombe* for the respondent.

The Judgment of Rinfret, Crocket and Taschereau JJ. was delivered by

RINFRET J.—The appellant brought this action in the district of Montreal, province of Quebec, against the respondent, described in the writ of summons as being

a body politic and corporate duly incorporated and having its head-office and principal place of business in the city of London, in that part of Great Britain called England;

and also against Thomas S. Gillespie and Thomas Redpath, both of the district of Montreal, summoned as co-defendants with the respondent.

The action is to the effect

that the defendants and each of them be ordered and condemned to render * * * a true and accurate accounting to plaintiff, accompanied by vouchers (pièces justificatives), showing all transactions had and done by the defendants, or either of them * * * not only in the name of and on behalf of the Canadian partnership, but also under the name of Redpath & Company and under the name of the defendant Redpath and in the name of or through the defendant Gillespie and under the name of or through the defendant Trower & Sons Limited, and this whether in Canada or in the United States of America, or in England, for account of the Canadian partnership, in connection with the products of the defendant Trower & Sons Limited, or in connection with the firms, or either of them mentioned in (the declaration); and also showing in detail all assets of every nature and kind whatsoever belonging to the Canadian partnership, or to which it is legally entitled, including * * * all profits, salaries, bonuses, commissions or other remuneration, directly or indirectly, received by the defendants, or either of them * * * in connection with the business of the Canadian partnership and in connection with the products of the firm mentioned (in the declaration); and also showing in detail the surplus and good-will of the said Canadian partnership.

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A similar action had previously been instituted in London, England, between the same parties; but, as stated at bar, it has since been discontinued.

The Canadian action was served upon the defendants Gillespie and Redpath in the district of Montreal, where they have their domicile, and upon the defendant Trower & Sons Limited (respondent) through a notice published in newspapers in the district of Montreal, pursuant to art. 136 of the Code of Civil Procedure.

The respondents moved, by way of declinatory exception, that the action be dismissed in so far as they were concerned, on the ground that the appellant could not institute the action against them in the district of Montreal and that the Superior Court of that district was not competent to hear the issue with regard to them.

The declinatory exception of the respondent was maintained and the action as against the respondent was dismissed by the Superior Court, whose judgment was confirmed by the Court of King's Bench, appeal side (1).

The appellant justified the course followed by him on several grounds in respect of which he contended that the courts of the district of Montreal had jurisdiction over the respondent: that the contracts were made in Montreal; that the other defendants resided in Montreal, were served there and that accordingly all defendants could be brought before the court of the district in which one of them was validly summoned; that the relationship between the appellant and the respondent, as well as the other defendants, constituted a partnership and the action for accounting and partition in a partnership may be instituted where the accounting is due and where the partition is to be made; that the respondent had properties in the district of Montreal; that the courts of the district of Montreal could assert jurisdiction over the respondent by force of the general rule concerning jurisdiction of the courts of Quebec resulting from article 27 of the Civil Code, whereby

> aliens, although not resident in Lower Canada, may be sued in its courts for the fulfilment of obligations contracted by them in foreign countries.

In the courts of the province of Quebec the appellant failed, and he now submits on appeal to this Court the several grounds upon which he based his contestation of the respondent's declinatory exception.

(1) (1940) Q.R., 69 K.B., 424.

In my view of the matter, it is immaterial whether the agreement between the parties was made verbally in London, England, or made in writing and signed, first in England by the respondent, and subsequently in Montreal by the other defendants and by the appellant (where, therefore, it was actually completed as a binding contract).

The material point is that the written document, alleged and invoked by the appellant, contains the full terms and expresses the true effect of the agreement entered into by the parties.

Nor do I find it necessary to decide whether the agreement should be styled a partnership, or an agency agreement, or a contract of lease and hire of service. This point may well be left to be decided on the merits of the case, after the parties have had the opportunity of adducing fuller and more complete evidence than it was possible for them to put forward on the issue restricted to the question of jurisdiction.

For the purposes of the present appeal, and whether the appellant is right or not in calling the agreement a partnership, the courts must look at the allegations of the declaration and its conclusions considered in the light of the true substance of the contract itself. Thus will be ascertained the cause of the appellant's action and the place where it has arisen, conformably to paragraph 3 of art. 94 of the Code of Civil Procedure.

If the whole cause of action arose in the district of Montreal, this is sufficient, under art. 94 (3), to allow the appellant to institute his action in that district, independently of any other ground upon which he may have justified his course.

The original agreement was entered into between Agnes Marian Bence Trower, Richard Alexander Bence Trower and Henry Arthur Bence Trower, of the city of London, carrying on business in co-partnership under the style of Trower and Sons as wine and spirit merchants, of the first part, and Thomas Stevenson Gillespie and Hyman Mendel Ripstein (the appellant), both of Montreal, respectively of the second and the third part.

In the agreement, the partnership of Trower and Sons is called " the Firm ".

It was agreed that the Firm would open, at their own expense, an office at Drummond Building, or elsewhere in

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Montreal, in the province of Quebec, Canada, for the sale of their goods, and that they would appoint Thomas Redpath (one of the defendants) as the manager of such office, which, in the agreement, is referred to as the "Canadian Office".

Gillespie and Ripstein undertook to use their best endeavours to introduce customers in Canada and the United States to the Firm.

The commission on all orders obtained by the Firm from customers in Canada and the United States, whether obtained direct by the Firm or through Gillespie or Ripstein, was to be credited to the Canadian office. The firm was to send credit notes from their London office to the Canadian office, showing the amount of commission to be allowed to the Canadian office in respect of sales of goods comprised in each shipment.

It is stated that, for the purposes of the agreement, "commission" shall mean the difference between the cost price of the goods shipped by the Firm to Canada (including duty, freight and insurance) and the price at which such goods are invoiced to customers in Canada or the United States.

Payment is to be made by customers direct to the Firm's London office, and the Firm is to remit to the Canadian office monthly the commission due to the Canadian office on all sales in respect of which payment has been received.

The expense of establishing the Canadian office and all expenses of carrying on the same, including the salary, commissions or other remunerations of Redpath (the manager), and of all necessary clerks, servants and travellers employed by the Firm in Canada and the United States are to be debited to the Canadian office.

The "net commission" of the Canadian office, after deduction of the expenses above mentioned, is to belong as to one-third to the Firm, as to one-third to Gillespie and as to one-third to Ripstein, and to be divided accordingly at the Canadian office on the thirty-first day of December in every year or oftener, if the parties shall so agree.

The agreement is to take effect as of the 27th day of March, 1927; and any party thereto shall be entitled to terminate the agreement by giving to the others six calendar months' notice in that behalf.

By a supplementary memorandum, it was understood that the agreement was for a period of five years, with the option of a renewal of a further five years at the end of that period.

The respondent Trower & Sons Limited later took over the operations of Trower and Sons, and, among others, the business of the Canadian office in Montreal. Accordingly they became responsible for the operations under the agreement; and that is why they were made defendants, instead of the " Firm ", whose business they had purchased and undertook to carry on.

The analysis which has just been made of the contract between the parties shows that, whatever may be the exact nature of the relationship thus created between the appellant, the other defendants and the respondent, the object of the agreement between them was the carrying on of the business there described, in the city and the district of Montreal. The seat of that business called the " Canadian Office " was opened and maintained

at Drummond Building or elsewhere in Montreal, in the province of Quebec, Canada.

The manager of such office was the defendant Redpath, in the district of Montreal.

The business to be carried on under the agreement, the transactions contemplated by the agreement, " the cash, monies received and monies paid out " were carried " through the books of Gillespie & Company, in Montreal "; and so was the banking done in connection with the Canadian business. This was established by the evidence of Redpath, the manager, without any contradiction.

It is also proven that the books and records and the accounts of the concern were kept in Montreal.

It was so far intended by the parties that the business carried on under the agreement was to be a Canadian business with situs in Montreal, that in connection with the signature of the contract between the respondent, the appellant and the other defendants, the partnership of Trower & Sons caused to be registered in Montreal a declaration signed by the several Trower partners certifying that they

carry on and intend to carry on business as wine and spirit merchants, at Drummond Building, St. Catherine street west, in the city of Montreal, under the name and firm of Trower & Sons.

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It follows from what precedes that the relationship, resulting from the agreement of the parties, centred upon the "net commission" of the Canadian office in Montreal, in respect of which alone the signatories of the document had joint interests and in the division of which exclusively the appellant was to participate.

Whatever be the nature of the agreement, it is apparent that, in the intention of the parties, the whole business covered by it was to be, and was, carried on in and from the Canadian office, in the city and district of Montreal, where the seat of the business was stated to have been established.

Now, on the face of the record and of the allegations and conclusions of the declaration, the appellant's action is for an accounting of the "net commission", and that is to say: for an accounting of the business carried on in and through the Canadian office in the city and district of Montreal.

It is not to the point to say that such business had ramifications outside of the district of Montreal, throughout the province of Quebec, Canada and the United States. The business itself was located in the city and district of Montreal and none the less so because certain of its transactions spread throughout Canada and the United States. The business and the transactions originated in the Canadian office in Montreal, whence the goods were shipped and invoiced to customers and where books, records and accounts were kept.

An accounting of that business and of those transactions was what the appellant prayed for in his action against the respondent; and all the essential facts which together gave rise to the action brought by the appellant, or, in other words: the whole cause of his action as constituted has arisen in the city and district of Montreal, before the courts of which the appellant was entitled to institute his action under paragraph 3 of art. 94 of the Code of Civil Procedure.

There may be some doubt whether the respondent Trower & Sons Limited may, for the purposes of the declinatory exception which they made, be looked upon as being domiciled outside the province of Quebec, in view of the fact that, in this case, they merely represent the interests of Trower & Sons (the partnership or "the Firm")

and that the said firm of Trower and Sons had caused to be registered, in the district of Montreal, a declaration that it was carrying on " business as wine and spirit merchants at Drummond Building, St. Catherine street west, in the city of Montreal, under the name and firm of Trower and Sons ". It may be a debatable question whether the limited company representing the Firm as it does here, and brought into the case as defendants in lieu of Trower and Sons (the partnership) so registered, should not, for the purposes of this case, be considered as carrying on business in Montreal. But the fact remains that, whether the domicile of the Firm was in London, England, or in Montreal, Canada, —with regard to the business about which we are concerned, and, for jurisdiction purposes in this case, it may well be argued that such domicile and residence should be held to be at the seat of the Canadian office, in Montreal.

Be that as it may, the whole cause of action having arisen in the city and district of Montreal, there can be no doubt that the respondent in the premises could be brought before the courts of the city of Montreal upon an action to account for the business and transactions carried on in the " Canadian Office " situated in Montreal.

It has never been disputed that the provisions of art. 94 C.C.P. are broad enough to include within their ambit any defendant, be he a foreigner, a stranger or not; and it was the evident intention of the legislature of Quebec, as expressed in that article, to grant to the Quebec courts jurisdiction over aliens or parties outside the province, if the whole cause of action arose therein (*Fraser* v. *Beyers-Allen Lumber Company* (1); *Gosset* v. *Robin* (2); *Archambault* v. *Bolduc* (3).)

Accordingly, upon that ground, the appellant was right in bringing the respondent before the Superior Court of the district of Montreal, in the province of Quebec; and the declinatory exception should have been dismissed with costs.

As it becomes unnecessary to discuss whether the declinatory exception was also wrong on any of the other grounds raised by it, it should be understood that we refrain to approve or disapprove of the reasons given for the judgments appealed from in respect thereof.

(1) 1913) Q.R. 45 S.C. 42, at 53.
(2) (1876) 2 Q.L.R. 91, at 107, 108.
(3) (1881) 2 Decisions de la Cour d'Appel, 110.

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The appeal should be allowed with costs throughout and the record should be returned to the Superior Court there to be proceeded with on the merits of the action.

DAVIS J. (dissenting).—This appeal arises out of the trial of a preliminary issue in the action to determine whether or not the Superior Court of the province of Quebec in and for the district of Montreal has jurisdiction to entertain this action against one of the defendants, Trower & Sons, Limited (for convenience hereinafter referred to as the company). Mr. Justice Décary, who tried the issue in the Superior Court, dismissed the action as against the company on the ground that the Superior Court did not have jurisdiction. That judgment was unanimously affirmed on appeal by the Court of King's Bench (appeal side) of the province of Quebec. The plaintiff appealed further to this Court.

The company is an English corporation having its domicil in London, England, where its head office and principal place of business are situate. It was incorporated in 1929 and shortly after its incorporation acquired the assets of an English partnership known as "Trower & Sons", which firm had in 1927 entered into an agreement with the appellant and one Gillespie, both of the city of Montreal, for the furtherance of the sale of the firm's liquors in Canada and the United States. Payment was to be made by customers direct to the firm's London office and the agreement provided that certain commissions in respect of payments on sales obtained by the firm from customers in Canada and the United States, whether obtained directly by the firm or through the appellant or Gillespie, were to be "remitted" to a Canadian office and (after payment thereout of certain local expenses referred to in the agreement) were to be divided at the Canadian office at the end of each year, one-third to the firm, one-third to the appellant and one-third to Gillespie. There was a good deal of argument before us as to whether or not this agreement, which was not made under seal, was made in London or in Montreal. In the English action to which I shall presently refer the appellant pleaded that the agreement was made in England. In the Quebec action it was only by an amendment made to his original declaration that the appellant pleaded it was made in Montreal. Both courts

below have examined into the facts and have concluded that the agreement was made in England. This, of course, is the agreement with the partnership; not an agreement with the company.

This action was brought by the appellant in the province of Quebec against Gillespie and one Redpath (both residents of the province of Quebec) and the company, for an accounting of all commissions received directly or indirectly by or on behalf of the company in connection with orders for merchandise sent by or on behalf of persons, firms or corporations in Canada or in the United States; in default of which the plaintiff asks that each defendant be condemned to pay him the sum of $225,000 as *reliquat de compte*.

At the date of the institution of this action there was pending for trial in London an action instituted there by the appellant, as plaintiff, against the same parties—the company, Gillespie and Redpath—alleging the same cause of action and seeking the same accounting and payment on the footing of the accounts to be taken. That action had been commenced by writ issued July 22nd, 1935. The Quebec action was not commenced until June 22nd, 1938. The only material difference between the English and the Quebec actions was that the appellant in his Quebec action (not originally but by amendment) set up a partnership among the parties to the action, obviously for the purpose of endeavouring to create a jurisdiction in the Quebec court on the basis that the company was a partner of the other parties defendant to the action and on the appellant's contention could therefore, under the Quebec practice and procedure, be added as a party defendant in the action. There is as a matter of fact no proof that the company ever entered into any agreement with the appellant; reliance was had entirely upon the agreement made with the English partnership prior to the incorporation of the company. I am satisfied, as were all the judges in the courts below, that on the proper construction of the document there was no partnership between the parties defendant to the action.

We were informed by counsel during the argument, though it is not part of the record, that since the commencement of the Quebec action the English action has been dismissed with costs, the appellant having failed to

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comply with an order made in the English action for security for costs. But the English action was pending for trial at the time of the commencement of this similar action in Quebec, and I should think that in itself may have made the Quebec action a vexatious one sufficient to have entitled the company to have it dismissed. But the courts below have dismissed the action as against the company upon the ground of want of jurisdiction in the Court. The company was not served personally (it was summoned merely by publication in Montreal newspapers) though it appeared to contest the jurisdiction of the court over it. Further, when the action was instituted, the company had no known office or place of business in the province of Quebec and no officer, agent or representative there. Neither had the company any assets in the province of Quebec. Upon those facts the courts below have held there was no jurisdiction over the company in this action in the courts of the province of Quebec.

It cannot be said, in my opinion, that the Quebec court is " the court of the place where the whole cause of action has arisen ", within the meaning of article 94 (3) of the Quebec Code of Civil Procedure. The Quebec authorities to which we were referred as to the meaning of " the whole cause of action " are in agreement with the Ontario authorities on similar words, i.e., all the material facts which must be proved in order to entitle the plaintiff to recover must have arisen within the jurisdiction of the Court. The English decisions, to like effect, are collected in Hals. 2nd ed., vol. 1, p. 8. In this case, the making or assuming of a contract by the company, the receipt of payments by the company in London from Canadian and American sales, the failure of the company " to remit " from London to Montreal certain commissions on these sales, and probably other facts necessary to establish the alleged cause of action, did not arise within the jurisdiction of the Quebec court.

It was contended for the appellant that article 103 of the Quebec Code of Civil Procedure entitled the appellant to bring the company before the Quebec court. The relevant part of the article reads as follows:

> 103. In matters purely personal, if there are several defendants in the same action residing in different districts, they may all be brought before the court of the district in which one of them has been summoned, provided that such summons be not made with the intention of withdrawing the real parties from the courts which would otherwise have jurisdiction.

It was argued by counsel for the appellant that that article entitled the appellant to bring the English company before the Quebec court as one of "several defendants in the same action residing in different districts." But the word "districts" in the article plainly means judicial districts within the province of Quebec. The article has no application to a person resident outside the province of Quebec. Mr. Justice Barclay in the Court of King's Bench has carefully canvassed that point. It was urged that such an interpretation of the article leaves no provision in the Code, in an action purely personal where there are several defendants residing in different places, to bring before the court a person residing outside the province of Quebec. There may be a *casus omissus* (I have not felt it necessary to consider that) but that would not entitle the Court to construe the article in any other way than its plain language requires.

I should dismiss the appeal with costs.

HUDSON J. (dissenting).—The questions involved in this appeal are largely matters of practice and procedure governed by the Quebec Code of Civil Procedure and, in view of the unanimous opinion of the judges in the court below, I would be disposed to dismiss this appeal without further comment. But my brother Rinfret has taken a point which, while mentioned in the court below, was apparently not seriously discussed, that is, whether or not the whole cause of action arose in Montreal, so as to bring the plaintiff's claim within the provisions of article 94 (3) of the Code of Civil Procedure, which reads as follows:

> 94. In matters purely personal, other than those mentioned in articles 96, 97, 98, 103 and 104, the defendant may always, notwithstanding any stipulation, agreement or undertaking to the contrary, be summoned:
>
> * * *
>
> 3. Before the court of the place where the whole cause of action has arisen * * *

It seems to me that the whole cause of action referred to in this article must signify all of the facts, causes, moyens and motifs alleged in the declaration, which, if traversed, must be proven. This interpretation has been placed on the article by many decisions in the courts of Quebec.

In the present action, as stated by my brother Rinfret, the place from where the services rendered by the plaintiffs

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radiated was Montreal; there was the office where the accounts were kept and where the eventual division of profits was to be made. On the other hand, the contract itself was made in London, England. Moneys collected as a consequence of plaintiffs' work were collected by the defendants in London, not in Canada, and although the plaintiffs ask for an accounting in respect of business done at or through Montreal, yet they also say that the defendants made a contract with a number of distillers and liquor dealers in London and in New York, in the profits of which they were entitled to participate, and in their prayer they ask for an accounting by the defendants, Trower and Sons, Limited, in respect of all transactions had and done * * * by or under the name of or through the defendants, Trower and Sons, Limited, and this whether in Canada or in the United States of America or in England.

In view of these claims, with respect I cannot see how it can be said that the whole cause of action here arose within the district of Montreal and, for that reason, I would dismiss the appeal.

Appeal allowed with costs.

Solicitors for the appellant: *Weinfield & Rudenko.*

Solicitors for the respondent: *Meredith, Holden, Heward & Holden.*