

claim against the plaintiffs, Garland, Palmer, and the Australian company in respect of the trade mark, and that this portion of the counterclaim should be excluded, with the right, of course, to the Canadian company to make it the subject of a separate action, if so advised.

The remainder of the counterclaim was not objected to, and should stand, and the defendants the Dunlop Tire Company, Limited (called herein "the Canadian company"), should pay the costs of the application and appeal.

OCTOBER 27TH, 1902.

DIVISIONAL COURT.

ABBOTT v. ATLANTIC REFINING CO.

*Principal and Agent—Undisclosed Principal—Action by Agent—Breach of Contract—Construction of Roof—Guarantee—Representation as to Ownership—Addition of Principal as Party—Recovery—Damages.*

Appeal by defendants from judgment of County Court of Simcoe in favour of plaintiffs in an action originally brought by George A. Abbott alone upon a guarantee by defendants that a roof completed by them upon a new building belonging to Mary S. Abbott, wife of George A. Abbott, would remain waterproof for five years, and an agreement that in case of its leakage within that time they would repair it at their own expense. Mary S. Abbott was afterwards added as plaintiff. She was erecting the building in question upon her own land for herself; her husband was acting as her agent in making the contracts for its erection, and superintending the work done on her behalf, but had no personal interest in it. The defendants became aware that a roof was to be put on, and wrote the husband that in order to introduce their roofing material into "your town" they would put on "your roof" for a fixed price. To this he replied in his own name accepting their offer to put on "my roof;" and thereupon they gave the guarantee now sued on, in which they referred to the roof as "your roof," and also again used the expression "your town."

W. M. Boulton, for defendants, contended that to permit evidence shewing that the husband was acting merely as agent for the wife would be to allow him to contradict the writings in which he described the roof as his.

J. C. Brokovski, Coldwater, for plaintiffs.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—In my opinion the expressions did not necessarily imply the representation on the husband's part that he