

defendant company, and all subsequent proceedings, including a judgment obtained by the plaintiffs against the defendant company by default, upon the ground that the defendant company is a foreign corporation carrying on business out of Ontario, and has no place of business or property therein, and that leave to serve process upon the defendant company was not authorised by any of the clauses of Rule 25, and upon other grounds.

One Renaud (resident in Ontario) was made a defendant as well as the company. The plaintiffs' claim against the defendant company for which the judgment was obtained was for \$20,408 as a commission pursuant to an alleged contract.

The motion was heard in the Weekly Court at Toronto.

H. S. White, for the defendant company.

A. C. McMaster, for the plaintiffs.

SUTHERLAND, J., in a written judgment, stated the facts and said the order for service out of the jurisdiction could not be maintained under clause (g) of Rule 25, for it had not been shewn that Renaud, the defendant within Ontario, had been served. The only other clause which could be applied was clause (e), permitting service out of Ontario where the action is founded upon a breach within Ontario of a contract, wherever made, which is to be performed within Ontario. But the original contract, so far as disclosed, was made in New York, and the contract to pay commission was also apparently made there. There was nothing to justify a belief in the statement made on behalf of the plaintiffs when the first order was obtained, that payment of the commission was to be made at Toronto.

Reference to *Phillips v. Malone* (1902), 3 O.L.R. 47, 492; *Weyande v. Park Terrace Co.* (1911), 202 N.Y. 231.

The full facts were not disclosed to the Master when he made the order of the 12th January, 1916; nor to the Judge who heard the motion upon which judgment was obtained.

It was not a case in which the defendant company should merely be allowed in to defend as an indulgence, upon terms; the defendant company was entitled to have the proceedings set aside.

Reference to *Collins v. North British and Mercantile Insurance Co.*, [1894] 3 Ch. 228; *J. J. Gibbons Limited v. Berliner Gramophone Co. Limited* (1913), 28 O.L.R. 620; *Bain v. University Estates Limited and Farrow* (1914), 6 O.W.N. 22.

Order made setting aside the order for service out of the jurisdiction and the subsequent proceedings, including the judgment, with costs payable by the plaintiffs to the defendant company.