

there; but the action must be based on such a breach, and the jurisdiction of the home court is not attracted in respect of a breach of that part of the contract which is to be performed abroad, by reason of a breach of another part of it which is to be performed within the jurisdiction.

The plaintiff, living in England, brought an action in England against the defendants, an incorporated company, doing business in Ontario, for damages for breach of contract to deliver certain goods. By the terms of the contract the delivery was to be at the port of shipment in America, and payment was to be made on receipt of and in exchange for shipping documents in England.

*Held*, that the breach upon which the action was based took place at the American port, and the defendants, not having been subject to the English court either by residence or submission in the contract, there was no jurisdiction in that court under Order XI. to summon the defendants to appear before it, or to entertain the action, and the judgment obtained in England in that action (the defendants not appearing), however effectual it might be in England, not having been moved against there, was of no avail to support an action upon it in Ontario.

*Held*, however, that the original cause of action had not merged in the judgment, and the plaintiff was entitled to succeed upon an alternative claim thereupon, made in the action brought in Ontario on the English judgment.

The trial Judge held both causes of action to be proved, and the plaintiff elected to take judgment in respect of the claim based upon the English judgment.

*Held*, that the plaintiff was not so bound by his election that he was prevented from taking judgment upon the alternative claim when he was held by the Court of Appeal, upon the defendants' appeal, not entitled to succeed upon the English judgment.

*Held*, also, that an order was properly made at the trial adding as plaintiffs the personal representatives of the original plaintiff, who died after the commencement of the action, and that the action was properly constituted.

Judgment of RIDDELL, J., varied.

*Lynch-Staunton*, K.C., for defendants, appellants. *Kirwan Martin*, for plaintiffs.