

H. W. Mickle, for the defendant.

A. C. McMaster, for the plaintiffs.

MR. HOLMESTED:—The claim of the plaintiffs arises in this way. They made a contract with the defendant in Ireland for the purchase of a certain quantity of roses. They were informed by the defendant that the freight must be paid through to destination and he demanded from the plaintiffs money to enable him to pay this freight. The plaintiffs complied with this demand and sent defendant, as they allege, \$977.23 on account. The roses were consigned to the plaintiffs at, it is alleged, the wrong place, viz., Queenston instead of Oakville, how that may be I do not think it is necessary now to inquire; but two breaches of the contract are practically admitted (1) non-payment of freight as to which see *Orient Co. v. Brekke*, [1913] 1 K. B. 531; (2) Excessive amount of goods, viz., 1,000 trees more than ordered as to which see *Shipton v. Weil*, [1912] 1 K. B. 574. In these circumstances the plaintiffs refused to accept the goods and they claim to recover (1) the amount advanced as above mentioned; (2) freight and duty paid by them in respect of the roses, and (3) for cartage, labour and fertilizer expended by them on the roses by arrangement with the defendant.

The plaintiffs are not, therefore, suing on the contract or for breach of the contract. They say in effect—true it is, there was a contract between us and the defendant, but he failed to carry it out, and we are suing to recover money which we have paid and for which in fact no consideration has been received. This liability arises on an implied contract to refund the money advanced, and on an express contract to pay for the cartage, etc. The debtor, according to the ordinary rule is bound to seek his creditor and the money claimed by the plaintiffs therefore is payable in Ontario and the case therefore seems to be within Rule 25 (1) e. But the plaintiffs also rely on the fact that the defendant has property within the jurisdiction of the value of \$200 and more. The property in question consists of the roses which were sent out pursuant to the contract, and the defendant's counsel contended that it is begging the very question in issue in the action to say that they are the defendant's property—the contention of the defendant being that they are now the property of the plaintiffs, and that argument would certainly be entitled to great weight were it not for the fact