

aside the service of notice of the writ of summons on the defendants out of Ontario, but allowing the defendants to enter a conditional appearance.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

M. L. Gordon, for the defendant Sutton.

A. W. Langmuir, for the plaintiffs.

RIDDELL, J., in a written judgment, said that the plaintiffs' appeal against the permission to enter a conditional appearance could not succeed. A foreigner not resident in Ontario is not subject to the jurisdiction of our Courts *prima facie*. It is for the plaintiff to make out conclusively that such a person falls within one of the classes referred to in Rule 25 before he can be debarred from setting up that he is not subject to our Courts. If he enter an appearance in the usual form, he is held to have attorned to the jurisdiction—so far as Rule 25 is concerned—and he cannot set up the objection in his statement of defence or at the trial: *Grocers' Wholesale Co. v. Bostock* (1910), 22 O.L.R. 130; *Tozier v. Hawkins* (1885), 15 Q.B.D. 650, 680. This, however, does not conclude the jurisdiction of the Court except the territorial jurisdiction: *Wilmott v. Macfarlane* (1896), 16 C.L.T. Occ. N. 83, 32 C.L.J. 129. There was no reason why a foreigner should not be allowed to dispute the jurisdiction; and the plaintiffs' appeal should be dismissed.

The defendant Sutton contended that the case did not come within Rule 25 (1) (*h*), because the plaintiffs had not shewn "a good cause of action against the defendant upon a contract." The Rule also says that the defendant must have "assets within Ontario of the value of \$200 at least which way be rendered liable for the satisfaction of the judgment," i.e., the judgment to be obtained in the action. Only such actions as can result in a judgment upon which the \$200 of assets in Ontario can be applied are in contemplation in Rule 25 (1) (*h*). The judgment sought in the present action was a mere declaration, upon which no assets could be applied. It was true that these assets might be applicable for the satisfaction of a judgment for costs; but costs are merely adventitious, not a part of the substantive claim in an action.

Moreover, the action was not really an action against the defendants upon the alleged contract, but only an action to determine whether there was a contract. An action against any one upon a contract must be an action against such person