

F. Aylesworth, for the defendant.

T. L. Monahan, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—Under a contract made at Alviston in the County of Lambton, the defendants, who reside at Mosa, in the County of Middlesex, contracted to sell certain lumber to the plaintiffs, whose head office is at Owen Sound. The lumber was not delivered. Action is now brought to recover \$82.50, damages for this alleged breach of contract. A notice disputing the territorial jurisdiction of the Court was duly filed. Defendants, assuming that the action would be transferred, did not attend the Court. Judgment was given for the plaintiff, and execution was ultimately issued. The money has been paid into Court, but not yet paid over.

It must be conceded that the Owen Sound Court had under these circumstances no jurisdiction.

Upon the argument the usual cases were cited.

I do not desire to depart in any way from what I said in *Canadian Oil Companies v. McConnell*, 27 O. L. R. 549; but I think the case in hand differs from that in that here it appears to me to be sufficiently shewn that there is a real case to try.

Therefore, exercising the discretion that I have, I grant the prohibition; limited, however, in such a way as not to prevent an order being made to transfer the action to the proper Court, where it may be tried upon its merits.

The money in Court should remain as security for the plaintiff's recovery if they succeed at the trial; and, as the whole trouble has been brought about by the negligence of the defendants in not appearing at the hearing, I give no costs of the motion. I regret that I have not power to make the payments of costs a condition of the making of the order, though there is perhaps enough in the case to indicate that this would be unduly severe.