

upon this clause is that the person within Ontario is to be served before an order can be granted allowing plaintiff to serve the defendant who is out of the jurisdiction. This is easily practicable under Rules 129 and 130. Plaintiff issues a writ of service within the jurisdiction, addressed to both defendants, and serves it upon the defendants within the jurisdiction; he then applies for leave to issue a concurrent writ of service out of the jurisdiction, upon the defendant who is out of the jurisdiction, shewing by affidavits the fact of service upon the other defendant within the jurisdiction, and the other necessary facts. The form No. 2 under Rule 128 shews that the writ for service out is directed only to the defendant out of the jurisdiction.

In the present case plaintiff obtained his order for service upon Mrs. Postlethwaite out of the jurisdiction before issuing his writ at all, being perhaps misled by *In re Jones v. Bissonnette*, 3 O. L. R. 54, 1 O. W. R. 13.

In England it is held that the service upon the defendant in the jurisdiction is, under the terms of clause (g), a condition which must first be performed to entitle a plaintiff to an order for service upon the defendants out of the jurisdiction, and that a plaintiff who had obtained such an order without first having complied with the condition must begin *de novo*: *Collins v. North British Co.*, [1894] 3 Ch. 228, 236; *Yorkshire, etc., Co. v. Eglington, etc., Co.*, 54 L. J. Ch. N. S. 581. The question . . . does not . . . appear to have been raised and adjudicated upon in any of the cases in our own Courts. . . .

[*Livingston v. Sibbald*, 15 P. R. 15, *Mackay v. Colonial Investment and Loan Co.*, 4 O. L. R. 571, 577, 1 O. W. R. 569, 592, 646, and *In re Jones v. Bissonnette*, 3 O. L. R. 54, 1 O. W. R. 13, explained.] . . .

The question is for the first time squarely raised, and I think I am at liberty to determine it irrespective of former cases.

I am of opinion that the construction placed upon clause (g) in *Collins v. North British Co.* is the proper one, and that proof of service upon defendant within the jurisdiction is an essential pre-requisite to the right to obtain an order under that clause for service upon the defendant who is out of the jurisdiction, and is not a mere irregularity which should be condemned.

Appeal allowed and order allowing the service and the service of the writ and statement of claim upon defendant Mrs. Postlethwaite set aside, without prejudice to plaintiff applying for a further order for leave to issue a concurrent writ for service upon her out of the jurisdiction.