

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

ANGLIN, J.:—The action is to recover salary or wages for services rendered by plaintiff under a contract made with him by one Singleton, an agent for an alleged English firm, Messrs. Bullwell, Currie, & Co. The contract, as stated by defendant, appears to contemplate performance in this province, within the meaning of clause (e) of Rule 162 (1), as interpreted by familiar authorities of recent date, of which it is sufficient to refer to *Blackley v. Elite Costume Co.*, 9 O. L. R. 382, 5 O. W. R. 57.

The contract was made in New Brunswick. The greater part of the work under it was performed in Ontario, and, when the moneys for which action is brought accrued due, plaintiff resided in this province. The contract appears to be silent as to the place of payment. There are no facts in evidence indicative of any intention of the parties to vary the place of payment which the law would fix, and no evidence is given that the law of New Brunswick in this respect differs from that of Ontario.

The Master (6 O. W. R. 715) set aside plaintiff's proceedings chiefly on account of his failure to produce documentary evidence of defendant's liability, which he seemed to regard as a requisite because of a dictum of Halsbury, L.C., in *Comber v. Leyland*, [1898] A. C. at p. 527. I find nothing in that case to sustain such a view. . . .

The decision in *Baxter v. Faulkner*, 6 O. W. R. 198, . . . rests upon the inference drawn from the facts there in evidence that it was not the intention of the parties that the contract should be performed within Ontario.

Upon a motion to set aside a writ served out of the jurisdiction, all that plaintiff is called upon to shew is a *prima facie* case of something triable in Ontario—some case in fact on which a verdict might result for plaintiff: *Hardingham v. Rowan*, 24 Sol. J. 309. Evidence upon affidavit that the contract was to be performed in the province is sufficient, and an issue raised by counter-affidavit upon this point should not be determined in a summary way on affidavits, but the defendant raising it should have reserved to him, by permitting the entry of a conditional appearance, the right to have this defence tried in due course, as well as any other defences he