

STREET, J.

OCTOBER 14TH, 1903.

CHAMBERS.

## POSTLETHWAITE v. McWHINNEY.

*Writ of Summons—Service out of Jurisdiction—One Defendant in Jurisdiction—Rule 162 (f), (g)—Claim for Injunction—Necessary Party in Ontario—Service on before Leave to Issue Concurrent Writ.*

Appeal by defendant Sarah Ann Postlethwaite from order of Master in Chambers, ante 794, dismissing motion by appellant to set aside order allowing the issue of a concurrent writ of summons for service out of the jurisdiction, to set aside the writ issued pursuant thereto, and the service upon the appellant, and all other proceedings, upon the grounds that the material upon which the order was made was insufficient, and that the plaintiff's claim did not come within any of the clauses of Rule 162 (1).

The plaintiff was the husband of defendant Sarah Ann Postlethwaite, to whom he was married in England in 1878. On 22nd August, 1883, they entered into a separation agreement under seal, by which he agreed to pay to a trustee for her a weekly sum so long as they should live apart, and she should continue to lead a chaste life. Plaintiff came to Canada, and his wife remained in England. In 1900 a new separation agreement under seal was drawn up and executed by the husband and wife and the former trustee, and by defendant McWhinney, a solicitor in Toronto, who had agreed to act as a trustee for the wife in the place of the former trustee. By this plaintiff agreed to pay to defendant McWhinney, as trustee for the wife, \$15 a month. The payments being in arrear, an action was brought in a Division Court in Ontario by McWhinney against plaintiff to recover them. Thereafter plaintiff brought the present action to set aside the agreement, on the ground that it had been obtained by fraud. The writ of summons and a concurrent writ for service out of the jurisdiction were issued on 25th June, 1903, an order for leave to serve defendant Sarah Ann Postlethwaite, as a British subject out of the jurisdiction, having been obtained on 24th June. The writ for service within the jurisdiction was served on McWhinney on 8th July, 1903, and the concurrent writ was served on the other defendant in England in August. The statement of claim served with the latter claimed an injunction to restrain defendants from proceeding with the pending action in the Division Court.

On 29th June, 1903, on the application of plaintiff (defendant in the Division Court action) an order was made by