

Consolidated Rule 162 the word 'writ' shall be deemed to include any document by which a matter or proceeding is commenced. . . .")

We agree with the argument of Mr. Middleton that the third party notice is a "proceeding" within the meaning of the statute of 1903; but then the difficulty comes that there is no jurisdiction to permit service upon a third party unless the third party proceeding is in respect of a breach happening within Ontario of a contract, whether it is made in Ontario or elsewhere. (Rule 162 (1)—Service out of Ontario of a writ . . . may be allowed . . . wherever . . . (e) the action is founded on . . . a breach within Ontario of a contract, wherever made, which is to be performed within Ontario. . . .)

We are unable to yield to the argument of Mr. Middleton that if the action is one within the terms of the Rule, the third party notice may be served, although in an action by the defendant against the third party the case would not be within the Rule.

We think the word "action," in that portion of the Rule applicable to this case, must be read as if "third party proceeding;" or words to that effect, were the language used.

Then, if that be so, it follows that in this case there was no breach within Ontario. The contract under which indemnity is sought is a contract under which there is no obligation to indemnify until judgment has been recovered and the amount paid by the defendants, who are the persons to be indemnified.

The time, therefore, has not arrived when a breach of that contract can take place, and upon that short ground we think this case must be disposed of adversely to the contention of the respondents.

It would very probably be desirable, if the judgment could be made effective against the third parties, that the Rules should be made wide enough to cover such a case as this, because it would be undesirable to have the matter litigated between plaintiff and defendants, and all gone over again, with possibly a different result as to the liability between the plaintiff and the defendants in this action to that reached in the action between the defendants and the persons who have agreed to indemnify them.

The appeal will be allowed, without costs here or below. The learned Judge below seems to have proceeded upon the