MIDDLETON, J., IN CHAMBERS. NOVEMBER 21ST, 1912.

J. J. GIBBONS, LTD. v. BERLINER GRAMAPHONE CO. LIMITED.

Writ of Summons—Service out of Jurisdiction—Order Allowing Service—Con. Rule 162(*e*), (*h*)*—Place of Contract—Assets in Ontario—Place where Payment to be Made—Situs of Debt—Jurisdiction of Foreign Court—Exercise of Discretion by Court.*

Appeal from an order made by George S. Holmested, Esq., K.C., sitting for the Master in Chambers, on the 11th November, 1912, dismissing an application of the defendant to set aside an order made by the Master in Chambers on September 20th, 1912, permitting the issue and service of a writ of summons out of Ontario.

R. C. H. Cassels, for the defendant.
J. F. Boland, for the plaintiff.

MIDDLETON, J.:—The appellant contends, not only that the case is not one falling within the provisions of Rule 162, but that as in the exercise of discretion the plaintiff ought not to be permitted to sue within Ontario.

The plaintiff seeks to bring this action within the terms of sub-section (e) and of sub-section (h) of Rule 162. It is said that the action is founded on a breach within Ontario of a contract which is to be performed within Ontario; and in the second place it is said that the defendant has assets within Ontario of the value of more than two hundred dollars which may be rendered liable to the satisfaction of the judgment.

The action is founded upon a verbal agreement made in Montreal, subsequently confirmed by writing. The plaintiff's letter of June 6th states, "We hereby confirm your verbal agreement with our Mr. Tedman." This verbal agreement was made in Montreal.

According to the law of Quebec, if no place of payment is expressly or impliedly indicated by the contract, payment must be made at the domicile of the debtor. There was no term, express or implied, for payment elsewhere; and payments under this contract are, therefore, to be made in Montreal.

It is not enough that payment or performance of the contract might be well made within Ontario. The rule as it now stands