

thing active is done, amounting to a wilful obstruction or prevention.

Upon the ground of the absence of evidence the conviction cannot be sustained, and must be quashed. There will be an order for protection; and no costs are awarded.

HON. MR. JUSTICE KELLY.

OCTOBER 3RD, 1913.

WOLSELEY TOOL & MOTOR CAR CO., LTD. v. HUMPHRIES.

5 O. W. N. 72.

*Writ of Summons—Service out of the Jurisdiction—Rule 25 (c)—Contract—Place of Payment—Inference.*

KELLY, J., *held*, that it is well established that leave to serve out of the jurisdiction a writ of summons or notice in lieu of a writ is properly granted where, either expressly or by implication, the contract or a part of it is to be performed within the jurisdiction and there is a breach of it or of that part of it, within the jurisdiction.

*Thompson v. Palmer*, [1893] 2 Q. B. 80, followed.

Appeal by the defendant from an order of Holmested, Senior Registrar, sitting for the Master in Chambers, refusing to set aside the service of the writ of summons upon the defendant in Vancouver, British Columbia, and the order permitting the service to be made.

Featherston Aylesworth, for the defendant.

A. McLean Macdonell, K.C., for the plaintiffs.

HON. MR. JUSTICE KELLY:—This application fails. It is well established that leave to serve out of the jurisdiction a writ of summons or notice in lieu of a writ is properly granted where, either expressly or by implication, the contract or a part of it is to be performed within the jurisdiction and there is a breach of it or of that part of it, within the jurisdiction.

*Thompson v. Palmer*, [1893] 2 Q. B. 80 (C.A.), is authority for the proposition that if a proper inference from the contract is that payment is to be made within the jurisdiction then non-payment is a breach within the jurisdiction.

The contract here expressly provides for payment of the price of the auto cars in Toronto, and I think the fair and reasonable inference to be drawn from the contract and the surrounding circumstances is that any other payments