

CARTWRIGHT, MASTER.

APRIL 27TH, 1906.

CHAMBERS.

PIGGOTT v. FRENCH.

Default Judgment—Motion to Set aside—Irregularity in Service of Process—Waiver—Delay in Moving—Dismissal of Motion—Costs.

Motion by defendant French to set aside a default judgment entered in April, 1905, which directed a sale of lands.

The facts appear in the reports of appeals in the same action, 6 O. W. R. 398, 877.

C. A. Moss, for defendant French.

F. E. Hodgins, K.C., for plaintiffs.

THE MASTER:—The proceedings are attacked on many grounds. The first is, that, although both defendants were served out of the jurisdiction, and were stated by plaintiffs' solicitors to be American citizens, yet no writ of summons for service out of the jurisdiction was issued. The writ issued was one for service in this province, and an order was obtained for service of notice of such writ on defendants.

This seems to come within the principle of *Hewitson v. Fabre*, 21 Q. B. D. 6. There defendant was by mistake thought to be a British subject, and was accordingly served in France with the form of writ proper for such a case. Defendant did not appear; but when proceedings were taken against him in France on the default judgment, he moved to set the proceedings aside, and succeeded. Field, J., said that defendant had applied soon enough, and that the proceedings were void ab initio.

There can be no doubt in the present case that if application had been made promptly, the proceedings here would have been similarly dealt with.

There were many other serious defects, which were not disputed at the argument.

The answer to the motion was: (1) that it was really not that of defendant at all, as it appeared on the motion made on 5th February that one Hudson had then acquired the interests of both plaintiffs and defendants in the action; and