

APRIL 7TH, 1903.

DIVISIONAL COURT.

VOIGT v. ORTH.

Judgment—Default of Defence—Writ of Summons—Service out of Jurisdiction—Order Fixing Time for Delivery of Defence—Informal Defence—Irregular Judgment—Order Dismissing Application to Set aside—Final Order—County Court Appeal.

Appeal by defendant from order of Judge of County Court of Essex in an action in that Court dismissing application by defendant to set aside a judgment against him for default of defence in an action on a foreign judgment.

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

E. S. Wigle, Windsor, for plaintiff.

The judgment of the Court (BOYD, C., FERGUSON, J., MACLAREN, J. A.) was delivered by

BOYD, C.—Both plaintiff and defendant are foreigners, but upon the plaintiff filing an affidavit that defendant had property in this Province of the value of \$200, the County Court Judge made an order allowing a writ of summons to be issued for service by notice on a foreigner out of the jurisdiction, and providing that defendant should have 12 days "within which to appear to notice of the writ and file his defence to the action." The writ was issued as a specially indorsed writ, and so no statement of claim was served with the notice (Rule 166). Within the twelve days defendant entered an appearance and therewith filed a defence in these words: "The defendant admits only \$103, but otherwise disputes plaintiff's claim in this action." . . . This step was taken in strict pursuance of the Judge's order, which was served upon defendant. It is a proper pleading according to Division Court standards, and is essentially a defence, though of somewhat novel simplicity. It was disregarded, however, and final judgment was signed for want of delivery of a defence, and execution issued thereon. Under the order defendant was not called on to deliver his defence, but only to file it, and with this defence on the record, the judgment is a nullity. According to proper practice there should be simply an appearance entered, to be followed by a statement of claim, unless defendant notifies plaintiff that he does not require such statement to be delivered: Rules 171, 243, 245. But plaintiff is bound by the terms of his order.

The County Court Judge's order dismissing the application to set aside the judgment contained a clause that on payment of \$5 in ten days defendant might move to set aside