

BLAKEY v. LATHAM.

[1887 B. 1473.]

C. A.

1889

Nov. 6.

Practice—Time for appealing—Interlocutory or Final Order—Rules of Supreme Court, 1883, Order LVIII., r. 15.

An appeal by a Plaintiff from a judgment dismissing his action having been dismissed with costs, the Plaintiff moved for liberty to set off against the costs payable to the Defendant *L.* under that order certain costs payable to the Plaintiff by *L.* partly in that action and partly in another action between the same parties. *G.* claimed a lien upon these costs for his costs as *L.*'s solicitor in the first-mentioned action. *Kay*, J., made an order allowing the set-off, but as regards the costs in the secondly mentioned action subject to any lien *G.* could make out before the Taxing Master for his costs in the firstly mentioned action. *G.* appealed:—

Held, that as regards time for appealing, the order was interlocutory and not final, being only an order for working out the rights given by a final judgment.

THIS was an appeal by *A. V. Green* from an order of Mr. Justice *Kay* (1).

On the 26th of April, 1888, this action against *Latham* and *Lowden* (formerly trading in partnership as *Latham & Co.*) for infringement of a patent was dismissed. The Plaintiff appealed. *Lowden* appeared separately on the appeal, and on the 19th of February, 1889, it was dismissed with costs as against him. *Green*, who was his solicitor, served the Plaintiff with a notice that he claimed a lien for his costs on the costs given to *Lowden* on the appeal.

On the 8th of February, 1888, in an action of *Blakey v. Latham* (1886 B. 5365) against the same Defendants for infringement of trade-mark, judgment was given for the Plaintiff with costs for an injunction and account of profits. An appeal from this judgment was dismissed with costs on the 14th of May, 1888.

On the 10th of November, 1888, before the appeal in the patent action an order was made in the patent action allowing the Plaintiff to set off the costs of the trade-mark action and of the appeal in that action against the costs payable by the

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Plaintiff in the patent action. The costs of the motion were given to the Plaintiff.

On the 20th of December, 1888, *Lowden* was ordered to pay to the Plaintiff the costs of a motion to commit in the trade-mark action.

On the 16th of April, 1889, *Lowden* issued execution for his taxed costs of the appeal in the patent action. The Plaintiff paid the amount to the sheriff, giving him notice not to part with the money as he, the Plaintiff, claimed a set-off.

The Plaintiff then moved against *Lowden*, *Green*, and the sheriff for liberty to set off against the costs of the appeal in the patent action—(1) the profits to be ascertained in the trade-mark action; (2) the costs of the motion to commit in the trade-mark action, and (3) the costs of the motion to set off of the 10th of November, 1888, in the patent action, and for an injunction against the sheriff.

On the 10th of May, 1889, Mr. Justice *Kay* made an order declaring the Plaintiff entitled to set off against the costs payable under the order of the 19th of February, 1889—(1) the costs of the motion of the 10th of November, 1888; (2) also (but subject to the lien (if any) which the Taxing Master should find *Green* to have as solicitor for *Lowden* for costs in the patent action) the costs of the motion to commit of the 20th of December, 1888. The sheriff was directed to pay the money in his hands to stakeholders.

Green appealed from this order, but did not serve his notice of appeal until more than twenty-one days from the passing of the order.

S. Woolf, for the Plaintiff, took the preliminary objection that the appeal was out of time, the order being interlocutory: *Collins v. Vestry of Paddington* (1).

T. T. Fillan, and *C. E. E. Jenkins*, for the Appellant:—

This is a final order, for it determines the rights of the parties and there is nothing more to be done in the action. In *Standard Discount Company v. La Grange* (2) Lord Justice *Brett* in reality

(1) 5 Q. B. D. 368.

(2) 3 C. P. D. 67, 71.

defines what is a final order when he says: "No order, judgment, or other proceeding can be final which does not at once affect the *status* of the parties, for whichever side the decision may be given, so that if it is given for the plaintiff it is conclusive against the defendant, and if it is given for the defendant it is conclusive against the plaintiff," and again: "I cannot help thinking that no order in an action will be found to be final unless a decision upon the application out of which it arises, but given in favour of the other party to the action, would have determined the matter in dispute." His Lordship held the order in the case then before the Court to be interlocutory, because it was not "the last step which must be taken in order to fix the *status* of the parties with respect to the matter in dispute." Here the order finally settles the rights of the parties. This order being for working out the decree is to be treated as part of the decree: *The City of Manchester* (1).

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COTTON, L.J. :—

The only question is whether the order appealed from is interlocutory. I am of opinion that it is. It is true that Lord Justice Brett in the case of *Standard Discount Company v. La Grange* (2) used expressions which have been relied on to shew that this must be a final order. His Lordship says that no order, judgment, or other proceeding can be final which does not at once affect the *status* of the parties for whichever side the decision may be given, so that if it is given for the plaintiff it is conclusive against the defendant, and if it is given for the defendant it is conclusive against the plaintiff. But his Lordship does not say that every order which does so settle the *status* of the parties is a final order for the present purpose. In one sense every order comes to an end when judgment is delivered, but it does not come to an end so far as working out the directions contained in it is concerned. Any order, in my opinion, which does not deal with the final rights of the parties, but merely directs how the declarations of right already given in the final judgment are to be worked out is interlocutory, just as an order made before judgment is interlocutory where it gives no final

(1) 5 P. D. 221.

(2) 3 C. P. D. 67, 71.

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decision on the matters in dispute, but merely directs how the parties are to proceed in order to obtain that final decision.

In the present case there have been judgments given, one of which gives costs to the Defendant *Lowden*, the other two give costs to the Plaintiff. The order which was appealed from (I do not enter at all into the question whether it was right or wrong) was an order which directed how those directions in the final judgments were to be worked out. That in my opinion is interlocutory and not final, and therefore this appeal, if brought at all, ought to have been brought within the time limited for interlocutory appeals. I understand that there is no question that it was not brought within that time, and therefore the objection prevails.

FRY, L.J.:—

I am of the same opinion. I am glad I am not called upon to give anything like an exhaustive definition of the word “interlocutory,” but of this I am clear—that where a final judgment has been pronounced in an action, and subsequently an order has been obtained for the purpose of working out the rights given by the final judgment, that order has always been deemed, and rightly deemed, to be interlocutory. This is such an order, and therefore the notice of appeal was given too late.

Solicitors: *A. V. Green; Salaman.*

H. C. J.