

business." I think that that was a sum reserved for the enjoyment of something other than land, namely, the goodwill. No argument in favour of the appellant can, I think, be founded upon the language used in the power of re-entry. In my opinion the whole question turns on clause 1. The true effect of that, I think, is that the only rent reserved is the 150*l*. For these reasons I think that the order appealed from is right.

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Solicitors: *Marson & Toulmin ; Nicholson, Patterson & Freeland.*

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[1909 P. 1113.]

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Practice—Appeal—Time for Appealing—Dismissal of Action as frivolous and vexatious—Interlocutory or Final Order—Rules of the Supreme Court, Order xxv., r. 4 ; Order LVIII., r. 15.

An order dismissing an action as frivolous and vexatious is for the purposes of appeal an interlocutory order.

APPEAL by the plaintiff from an order of Eve J. made upon two motions by the defendants under Order xxv., r. 4, that the statement of claim should be struck out and that the action should be dismissed as against all the defendants as being frivolous and vexatious.

The respondents, the defendants, took the objection that the appeal was out of time.

The appeal was admittedly out of time if the order appealed from was an interlocutory order within the meaning of Order LVIII., r. 15, but was not out of time if it was a final order.

Austen-Cartmell, for the first respondent. There is no authority precisely in point, but it has been the practice of the Court to treat orders of this kind made under Order xxv., r. 4, as interlocutory orders for purposes of appeal, and the authorities, so far as they go, support this view: *Hind v.*

C. A. *Marquis of Hartington* (1); *Stewart v. Royds* (2); *In re*
 1910 *Croasdell and Cammell, Laird & Co., Ltd.* (3)
 PAGE, [COZENS-HARDY M.R. referred to *Birch v. Birch* (4) and *Boswell*
In re. *v. Coaks.* (5)
 HILL FLETCHER MOULTON L.J. referred to *Salaman v. Secretary of*
 v. *State for India.* (6)]
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Lyttelton Chubb, for the remaining respondents.

Arthur Mulligan, for the appellant. The test of whether an order is final or interlocutory is, as stated by Lord Alverstone C.J. in *Bozson v. Altrincham Urban Council* (7), whether or not it finally disposes of the rights of the parties. In *Hind v. Marquis of Hartington* (1) the order was against one only of several defendants and was for a stay only, not for dismissal, and those are the grounds on which Lord Coleridge C.J. based his decision. Those two points clearly differentiate that case from a case such as this, which absolutely puts an end to the action.

In *Salaman v. Secretary of State for India* (6) and *Boswell v. Coaks* (5) the Court may have treated the appeals as interlocutory, but, so far as appears, the point was not brought to the notice of the Court, and the mere tacit acquiescence of the Court in hearing what ought to be a final appeal as an interlocutory appeal cannot be treated as decisive of the question.

[*Austen-Cartmell* referred to *Salaman v. Warner.* (8)]

In *Stewart v. Royds* (2) the order appealed from was not, at the time when it was made, an order which finally disposed of the rights of the parties, but was a conditional order, and that case is distinguishable on that ground.

[BUCKLEY L.J. referred to *Price v. Phillips* (9), where Chitty J. refused leave to appeal from an order dismissing an action as frivolous and vexatious.]

The refusal of leave to appeal is not conclusive because it is often asked for *ex abundanti cautela*.

(1) (1890) 6 Times L. R. 267.

(2) (1904) 118 L. T. Jour. 176.

(3) [1906] 2 K. B. 569.

(4) [1902] P. 130.

(5) (1894) 6 R. 167.

(6) [1906] 1 K. B. 613.

(7) [1903] 1 K. B. 547.

(8) [1891] 1 Q. B. 734.

(9) (1894) 11 Times L. R. 86.

Applying Lord Alverstone's test, a final order is not necessarily an order which will preclude the bringing of a fresh action, but is an order which finally determines the rights of the parties in the particular proceeding, and it is not the less final because it is made upon an interlocutory application. This appeal is therefore not out of time.

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COZENS-HARDY M.R. I have no intention of attempting the task of defining exhaustively or accurately the meaning of an interlocutory order. I leave that to others. The only point we have to decide here is whether the order in this particular case is an order which must be appealed against within the time limited for appeals from interlocutory orders. The plaintiff here commenced an action claiming the recovery of certain property. The defendants then did that which they were entitled to do under the inherent jurisdiction of the Court as well as under the express language of Order xxv., r. 4; they moved before the learned judge in the Court below that the statement of claim might be struck out and the action dismissed as frivolous and vexatious. They applied under Order xxv., r. 4, which is in these terms: [His Lordship read the rule.] The learned judge ordered that the statement of claim should be struck out and the action dismissed as against all the defendants as being frivolous and vexatious. From that order an appeal is presented by the plaintiff to this Court, which appeal is long out of time unless this is a final order for the purposes of appeal.

In my opinion this is an interlocutory order for the purposes of appeal. It may be that there is no authority directly and clearly in point, but I am driven to this conclusion by several considerations. In the first place I think it has been the practice to treat these appeals as interlocutory appeals. I have mentioned *Boswell v. Coaks* (1), in which that was done, and there are other cases. I do not attach very great importance to that, because the point does not seem to have been distinctly taken, but, notwithstanding that, I cannot wholly disregard the way in which practitioners and the Courts to some extent have dealt with the matter. Then I come to two decisions, one before Chitty J. and

(1) 6 R. 167.

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the other before the Court of Appeal, which seem to me to cover the present case. In *Price v. Phillips* (1) a motion was made to strike out the statement of claim and to dismiss the action in terms identical with the motion in this case. Chitty J. acceded to the motion and dismissed the action, and then he went on to say that "inasmuch as actions like the present should not be encouraged he declined—and he believed it to be merciful to decline—leave to appeal." That proceeded obviously on the footing that the order was an interlocutory order which could not have been appealed from without leave, and he declined to give leave. Then we come to a case which to my mind covers this in principle. That is the case of *Stewart v. Royds* (2), to which I was a party. It is only reported in the *Law Times Journal*. There an order was made in the Court below on the application of the defendant against the plaintiff, who was resident abroad, to give security for costs within a certain time, and if the security was not given within the specified time the action to be dismissed with costs. The security was not given within the time. The plaintiff appealed from the order dismissing the action on the ground that the security was not given owing to a mistake, and he therefore asked the Court to extend the time for giving security. Notice of appeal was given within three months of the date of the order, and the Court held that this was an appeal from an interlocutory order and that it ought not to be heard as being out of time. It is true that that might be said to be a conditional order, but the condition had been complied with, and so far as matters stood when it came before the Court of Appeal it was no longer conditional. It was an order dismissing the action in an event which had happened. I think that is in point. I do not forget also the case of *Hind v. Marquis of Hartington* (3), but, as Mr. Mulligan, who has argued this case very clearly, concisely, and ably, pointed out, there may be a distinction there, because Lord Coleridge C.J. seems to have based his judgment on a ground which I confess, with great respect, I have some difficulty in following, namely, that the order was against one defendant only, and also on the ground that in form the order was for a stay and not for a

(1) 11 Times L. R. 86, 87.

(2) 118 L. T. Jour. 176.

(3) 6 Times L. R. 267.

dismissal. In principle, however, I think that it almost covers this case.

It is, on public grounds and on grounds of good sense, a matter of extreme importance that an appeal from an order dismissing an action as being frivolous and vexatious should be disposed of by the Court of Appeal, if disposed of at all, in the shortest possible time, and if there were no authority to assist us I should be disposed to come to the conclusion that an order of this kind ought to be treated as an interlocutory order. But, as I have said, having regard to the course of practice, to the decision of Chitty J. in a case precisely like this, and to the strictly analogous and scarcely distinguishable case of *Stewart v. Royds* (1) in this Court, I agree with the contention of the respondents that this appeal is out of time and ought to be dismissed.

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FLETCHER MOULTON L.J. I am of the same opinion for the same reasons. But I attach somewhat more importance to the case of *Salaman v. Secretary of State for India* (2), to which I referred in argument, where the Court of Appeal treated such an order as interlocutory. I remember perfectly well that the Court directed that a special Court of three should take that appeal, although it was an interlocutory appeal, owing to the importance of the question to be decided. Seeing that we had the nature of the appeal before us and deliberately treated it as an interlocutory appeal which would be taken by two judges unless the special circumstances of the case were such that the Court thought it more satisfactory that it should be taken by three, I am quite satisfied that the members of the Court considered the point and judicially came to the conclusion that the order in that case was an interlocutory order and treated it as such. In my opinion this amounts to a decision of this Court upon the point. I agree that this appeal should be dismissed.

BUCKLEY L.J. The rules are so expressed and the decisions are so conflicting that I confess I am unable to arrive at any conclusion satisfactory to my own mind as to whether this is

(1) 118 L. T. Jour. 176.

(2) [1906] 1 K. B. 613.

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an interlocutory or a final order. It is plain that many orders which *prima facie* are final are not final but are interlocutory for the purposes of appeal, such, for instance, as orders made in favour of creditors or claimants in an administration action finally determining their rights. The reason, as I understand it, is that although their rights are finally determined it remains to work out the administration of the fund in order to give effect to those rights. There are many cases in which orders have been held to be interlocutory because something remains to be done to give effect to them, although in one sense they are final orders. This, however, is an order in favour of the defendants and it brings this action altogether to an end. To my mind it would be reasonable to say that that is a final order. But I do not think I am entitled to found myself on that, because there have been many decisions in which orders apparently final have been treated as interlocutory. The Master of the Rolls has referred to one or two of them. I could perhaps distinguish them if I set myself to work to do so, but practically the substance of the matter is this. It does not matter very much whether an order of this kind is held to be interlocutory or final so long as the Court decides the matter one way or the other so that suitors know what their rights are. I am not prepared to differ from the view taken by the other members of the Court. I yield my judgment to theirs without saying that I am completely satisfied with the reasons given for the view that this is an interlocutory order. A decision to that effect is certainly the more desirable, because if the order is reversed the action will have to go on and if it is to go on it ought to go on at once. I therefore concur with the other members of the Court. But I desire to say that in my opinion it is essential that the proper authority should lay down plain rules as to what are interlocutory orders, for as matters now stand it is the fact that it is impossible for the suitor in many cases to know whether an order is interlocutory or final.

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H. B. H.