

WHISTLER *v.* HANCOCK.

1878

Jan. 11.

*Practice—Dismissal of Action for want of prosecution—Order XXIX., Rule 1
Extension of Time for delivery of Statement of Claim.*

An order was made under Order XXIX., Rule 1, dismissing an action for want of prosecution, unless a statement of claim should be delivered within a week. The week having expired, and no statement of claim having been delivered:—

Held, that the action was at an end, and there was no jurisdiction to make an order subsequently extending the time for delivery of the statement of claim.

APPEAL against an order of Fry, J., at chambers.

This was an action upon a dishonoured cheque under the Bills of Exchange Act. The defendant obtained leave to appear and defend. On the 15th of December, a master made an order under Order XXIX., Rule 1, dismissing the action for want of prosecution, unless the statement of claim were delivered within a week.

On the 22nd of December the plaintiff took out a summons to set aside the appearance, and this on the 27th of December was dismissed by the master. The plaintiff gave notice of appeal against the decision of the master. On the 29th of December the plaintiff delivered a notice in lieu of statement of claim under Order XXI., Rule 4. On the 31st of December the plaintiff took out a summons for further time for delivering statement of claim, and on the 1st of January the master made an order giving the plaintiff a week's time. This order was set aside on appeal, by Fry, J., on the ground that the master had no jurisdiction to make the order.

Jelf, for the plaintiff, moved to rescind the order of Fry, J. He contended that the master had jurisdiction under Order LVII., Rule 6.

Lyon, for the defendant, shewed cause.

COCKBURN, C.J. This is a very plain case. The defendant obtained an order that unless the statement of claim were delivered within a week the action should be at an end. The plaintiff took out a summons to set aside the appearance, and if he could have obtained an order to that effect before the week was out, he would have been the victor; but before his summons could be heard he

1878
WHISTLER
v.
HANCOCK.

fell under the operation of the order dismissing the action, and the action was at an end. It cannot be contended that the taking out of a summons to set aside the appearance in the meantime could keep the action alive after the period when by the operation of the master's order it was defunct. For these reasons, I think the master had no jurisdiction, and the order of Fry, J., was right.

MANISTY, J. I am of the same opinion. The mistake on the part of the plaintiff was in not applying within the week to set aside or vary the order of the 15th of December.

Rule refused. (1)

Solicitors for plaintiff: *Richard Jones & Co.*

Solicitor for defendant: *H. R. Jones.*

(1) This decision was followed in the Exchequer Division in *Wallis v. Hepburn* where the same question arose. An order was made at chambers on the 8th of November, 1877, to dismiss the action unless a statement of claim were delivered within ten days. The time having expired, on the 20th of November a master's order was made extending the time for delivering the statement of claim. This order having been affirmed at chambers by Pollock, B., the defendant appealed.

Jan. 12. *Jelf*, for the defendant, cited *Whistler v. Hancock*.

Pitt-Lewis, for the plaintiff.

Jan. 14. THE COURT (Cleasby, B. and Hawkins, J.), after consulting the judges of the Queen's Bench Division, held that there was no jurisdiction to make the order of the 20th of November, the action being then dead, and that the order must be set aside.

Appeal allowed.

Solicitor for plaintiff: *J. Haynes.*

Solicitors for defendant: *Peacock & Goddard.*