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to which I would rather lean upon what the learned Judge who saw the witnesses has found. I agree without hesitation in the judgment of this Court that the appeal should be allowed.

Appeal allowed. Judgment appealed from discharged, and judgment of Simpson J. restored. Respondent to pay the costs of the appeal, all costs before the order giving leave to proceed in forma pauperis, and after that order only such costs as are allowed to an appellant in forma pauperis.

C. A. W.

ROBERTS v. ROBERTS AND MOFFATT AND OTHERS.

EX PARTE ROBERTS AND MOFFATT AND OTHERS.

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SYDNEY, *Nov.* 27.

Griffith C.J., and Barton J.

Practice—Appeal from interlocutory judgment—Order dismissing suit as frivolous and vexatious—Notice of appeal not filed in time—Rules of High Court 1903, *Part* II., *Sec.* I., *rr.* 4, 5.

An order made by a Justice of the High Court dismissing a suit as frivolous and vexatious is not a final judgment within the meaning of r. 4 of the *Appeal Rules*, Sec. I., and, therefore, notice of appeal from such an order must be filed within 10 days from the date of the order, as required by rr. 4 (sub-sec. (2)), and 5.

Notice of appeal by the plaintiff from an order made by *Barton* J., on 22nd October 1908, dismissing the plaintiff's suit as frivolous and vexatious, struck out on the ground that it was not filed in time.

MOTION to strike out notice of appeal.

The plaintiff brought an action in October 1907 against the defendants for a number of alleged causes of action. Some of the defendants were dismissed from the suit while it was pending, and the remaining defendants took out a summons to have the statement of claim struck out on the ground that it disclosed

no cause of action, and was frivolous and vexatious. The matter was heard by *Barton* J., who, on 22nd October 1908, delivered a reserved judgment dismissing the action against those defendants. The order was dated 21st October 1908, and on 10th November, twenty days from the date of the order, the plaintiff filed and served notice of appeal.

The defendants now moved to have the notice of appeal struck out on the ground that it was not filed within the time prescribed by the *Rules of High Court* 1903, and was frivolous and vexatious and an abuse of the process of the Court.

Maughan, for the applicants. The application is to have the appeal struck out, or in the alternative, for an order that all proceedings be stayed unless the appellant gives proper security. The appeal is from an interlocutory order. The notice of appeal should by r. 4, sub-sec. (2), and r. 5, of the *Rules of High Court* 1903, Part II., Sec. I., have been filed and served within ten days from the date of the order appealed from. It is, therefore, out of time and should be struck out. The order of *Barton* J. did not finally dispose of the rights of the parties, it merely decided that the particular proceeedings were vexatious. It still remains open for the plaintiff to bring his claim, if he has one, before the Court, in a proper manner. [He referred to *Hind* v. *Marquis of Hartington* (1); *Salaman* v. *Warner* (2); *Price* v. *Phillips* (3); *Bozson* v. *Altrincham Urban District Council* (4); *In re Croasdell and Cammell, Laird & Co. Ltd.* (5); *Shubrook* v. *Tufnell* (6).]

Appellant, in person. The judgment of *Barton* J. disposed of the matter finally. A fresh proceeding for the same causes of action would be met by the plea of *res judicata*.

[GRIFFITH C.J.—No, there is not a judgment for the defendants, but only an expression of the Judge's opinion that the particular action is frivolous.]

I ask for an extension of the time for filing notice, under sub-sec. (3) of r. 4.

(1) 6 T.L.R., 267.
(2) (1891) 1 Q.B., 734.
(3) 11 T.L.R., 86.
(4) (1903) 1 K.B., 547.
(5) (1906) 2 K.B., 569.
(6) 9 Q.B.D., 621.

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ROBERTS v. ROBERTS & MOFFATT; EX PARTE ROBERTS & MOFFATT.

Griffith C.J.

GRIFFITH C.J. The point made by the applicants is that the order of *Barton* J., dismissing an action upon a summons under the jurisdiction of the Court to dismiss actions that are frivolous and vexatious, was an interlocutory order and not a final judgment. In the case of an interlocutory order the time prescribed for giving notice of appeal is ten days from the date of the order appealed from. In my opinion there can be no doubt that an order of this sort is interlocutory and not a final judgment within the meaning of rule 4. That rule provides that "In this rule the term 'final judgment' includes any judgment, decree, order, or sentence, by which the rights of the parties are finally concluded with respect to the matters in question in the cause or matter, or any of them, not being a decision upon a mere matter of procedure." If this order had been made on an application for leave to sign final judgment summarily I think that the order would be a final judgment within the meaning of the rule. But an order dismissing an action on the ground that it is frivolous, or that the statement of claim does not disclose any substantial cause of action, is not final, because the actual facts are still open to be investigated between the parties if properly brought before the Court. This order does not fall within the terms of the definition of final judgment. The appeal, therefore, is too late. The Court, however, has power to enlarge the time for appealing. But no material on which we could grant such a concession is suggested in this case, and I think it would require a great deal more than the grounds set out in the notice of appeal to induce the Court to extend the time for appealing.

The application, therefore, must succeed. The notice of appeal will be set aside, and the plaintiff must pay the costs of the application.

BARTON J. concurred.

Notice of appeal struck out with costs.

Solicitors, for the applicants, *Norton, Smith & Co.*

C. A. W.