

Chy. Div'l Court.]

[Jan. 22.]

KNICKERBOCKER CO. v. RATZ.

Costs—Settlement of action—Motion for costs—Power of master or judge in chambers to dispose of costs—Principle of decision—Circumstances of case—Appeal to Divisional Court—Jurisdiction.

The plaintiffs were manufacturers of a machine for which they had a patent of invention. The defendants were millers, and had in their possession a machine which the plaintiffs deemed to be an infringement of their patent. This action was brought to restrain the defendants from infringing and for damages. Before action the plaintiffs sent the defendants a letter of warning. The answer to this was simply a denial of infringement. After service of the writ of summons, the solicitor for the defendants wrote a letter to the plaintiffs, stating that his clients had a machine which might be, though it was not admitted to be, an infringement; that it had not been used for two years; that the defendants did not intend to make any further use of it; and asking for discontinuance of the action. The plaintiffs delivered their statement of claim, and the defendants their defence, in which they offered a covenant not to use any machine in contravention of the plaintiffs' patent, and with which they brought \$10 into court. The plaintiffs accepted this in settlement of the action, but, not being able to agree with the defendants as to who should pay the costs, made a motion for an order for payment by the defendants.

Upon this motion the Master in Chambers ordered that the defendants should pay the costs; but ROBERTSON, J., upon appeal, ordered that each party should pay their own costs up to the time of the motion (which the defendants had offered before the motion), and that the plaintiffs should pay the costs of the motion and appeal.

Upon further appeal to a Divisional Court, composed of BOYD, C., and MEREDITH, J., there was a division of opinion, and the appeal was dismissed without costs.

Per BOYD, C.: The plaintiffs, believing the machine to be an invasion of their rights, were not obliged to rest upon the mere intentions of the defendants not to use it. All that the plaintiffs claimed before action was conceded by the settlement after action, and the litigation was provoked by the response of the defendants to the letter before action. The plaintiffs having given notice of their demand before action, there was nothing to take the case out of the ordinary rule that the person in the wrong should answer in costs. If the main question in dispute is settled, leaving only costs to be determined, the proper course is for the parties to agree to leave them on affidavits to the Judge or Master in Chambers, whose judgment is subject to appeal to the same extent as in other cases of costs.

Per MEREDITH, J.: The Master in Chambers had no power to try to determine the question of costs, unless as an arbitrator, chosen by the parties; nor had the Judge in Chambers any such power; and the court could not properly entertain the appeal.

Mabee for the plaintiffs.

W. H. P. Clement for the defendants.