1913. *February* 28. CURLEWIS, J.

Practice.—Interlocutory order.—Exception to plea.—Amended plea. —Filing of.—Unpaid costs.—Stay of proceedings.

On application by the plaintiff in an action the defendant's plea was struck off the record with costs, but the defendant was given leave to file an amended plea: —*Held*, that failure to pay the costs as ordered was no bar to the defendant filing an amended plea unless the failure to pay the costs was vexatious.

Application for an order striking respondent's amended plea off the file.

On the 6th February, 1913, application was made for an order striking out certain paragraphs of the defendant's plea. The application was granted with costs. The defendant had failed and neglected to pay the amount of the said taxed costs, but had nevertheless filed an amended plea. The applicant had refused to accept service of such amended plea until the said costs had been paid. Application was now made to have the amended plea struck off the record, with costs, and for an order that defendant should not be allowed to file one until the taxed costs had been paid.

D. de Waal, for the applicant: No further plea can be filed by the defendant until the costs of the previous application are paid, see *Jessen* v. *Jessen* (1904, T.H. 98); *Rissik and Mears's Trustee* v. *Mears* (1906, T.S. 642); *Lambert* v. *Incorporated Law Society* (1910, T.P. 1293). The refusal to pay in this case amounts to a vexatious refusal, because defendant wrote, saying she would pay on a certain date, but did not pay on that day; as to meaning of "vexatious," see *Meyers* v. *Baum* (1912, T.P.D. 744). He also referred to *Whittaker* v. *Whittaker* (1 N.L.R. 10); *Adams* v. *Macdonald* (25 N.L.R. 203); *Deneys* v. *Stoffberg* (1 M. 301); *Simpson & Co.* v. *Fleck* (2 M. 269); *Van der Riet* v. *Executors of Karnspeck* (3 M. 395); *Marincowitz* v. *Matthys* (12 S.C. 176); *Bradbury* v. *Shawe* (15 Jurist. 1042); *Weston* v. *Neal* (55 L.J., Ch. 376); *Wickham's* case (35 Ch. D. 272); *Merula*, Manier van Proc. 4, 109, 2.

Unless this application is granted the defendant can go on filing bad pleas, which can be struck out repeatedly by us. This would result in the trial being indefinitely postponed. Not paying costs in the circumstances of this case amounts to contempt of Court, and defendant should not be allowed to file her plea until she has purged her contempt by payment.

H. Kent, for the respondent: If this application be granted it would have the effect of varying the original order so as to make an order staying the proceedings until the costs of the application had been paid. With the single exception of the case of *Adams* v. *Macdonald* (25 N.L.R. 203), al the cases quoted are applications by a defendant to prevent a plaintiff from proceeding until the costs of the previously unsuccessful action are paid. The case of *Bradbury* v. *Shawe* (14 Jurist. 1042), is based upon *Wilson* v. *Bates* (3 My. & C. 197), which specifically says that even a defendant who is in contempt can always lay his defence before the Court. The Court only desires to prevent its process being abused, see *Hoare* v. *Dickson* (7 C.B. 164, at p. 177). The Court can prevent abuse by refusing leave to amend. See also *Morton* v. *Palmer* (9 Q.B.D. 89). No further proceedings are stayed, pending payment of costs unless such a condition forms part of the order of Court. A vexatious refusal to pay would amount to contempt, but the onus of proving that is upon the applicant.

D. de Waal, replied.

CURLEWIS, J.: Mr. *de Waal* has not been able to cite any direct authority in support of the application. He has referred the Court to numerous cases, in all of which, with the exception of one, the person who was sought to be restrained from further proceedings was a plaintiff or applicant who had been previously unsuccessful and ordered to pay costs. The only case cited in which a similar order was made against a defendant is *Adams* v. *Macdonald* (25 N.L.R. 203). But in that case, without wishing to express any opinion as to the correctness of the decision, the Court was apparently influenced by the fact that the defendant had been previously guilty of contempt of court, and had been ordered to pay the costs of the proceedings connected therewith. He did not pay the costs, and was afterwards, at the instance of the plaintiff, restrained from further proceedings until he had paid the costs in which he had been mulcted by the Court by reason of his contempt. Even if I take the decision as one by which this Court should be guided, it seems to me quite a different matter from the application before me. Here the application is to restrain the defendant from keeping on the file an amended plea, leave to file which the Court gave on the 16th instant. On the strength of the various cases which he has quoted, Mr. *de Waal* asks the Court to lay down the general principle that neither a plaintiff nor an applicant will be

allowed to proceed with further litigation until he has paid the costs of a previous unsuccessful action or application in connection with the same matter. But the position of a defendant appears to me to be quite different from that of an unsuccessful plaintiff or applicant. The Court has, generally speaking, adopted the rule that a plaintiff who has been unsuccessful in an action will not be permitted to harass the defendant with further proceedings concerning the same cause of action, unless he has paid the costs of that unsuccessful action. I can well understand that the same principle applies to an applicant who has been ordered to pay the costs of an unsuccessful application. But the position is quite different as regards a defendant. Here the defendant is not harassing the plaintiff by any proceedings. The defendant, during the course of the action, in an interlocutory matter, was ordered to pay the costs of an application to strike out portion of her plea, and leave was granted to her to file an amended plea, if so advised. I do not think that the rule which applies to a plaintiff ought to be applied to the defendant in this case—unless, of course, there were something before the Court to show that the defendant had acted vexatiously. Mr. *de Waal* has referred to the decisions in *Jessen* v. *Jessen* (1904, T.H. 98), and *Rissik and Mears's Trustee* v. *Mears* (1906, T.S. 642); and he contends that the Court should not distinguish between the case of a defendant and the case of a plaintiff or applicant. In *Jessen* v. *Jessen* my brother WESSELS adopted the view of Lord Justice LINDLEY in *In re Wickham* (35 Ch. D. 272), and though Mr. *de Waal* has referred to it as being only a *dictum* of that learned Judge, I find on reference to the report that Lord Justice COTTON expressed himself to the same effect. He says (p. 280): "I do not say that mere non-payment of costs is enough. . . . . I do not come to this decision on the ground of any general rule, but on the ground that the Court ought carefully to exercise its jurisdiction, and, having regard to the circumstances of the case, stay the proceedings if it thinks them unreasonable." The view which my brother WESSELS adopted in *Jessen* v. *Jessen* was apparently followed by my brother BRISTOWE in the later case of *Rissik and Mears's Trustee* v. *Mears*. I see no reason for not following it, especially where it concerns a defendant. There is much more force in that view where it concerns a defendant, as in the present case, who has been ordered to pay the costs of interlocutory proceedings, than in the case of a plaintiff or applicant who has been ordered to pay the costs of such proceedings. In my

opinion the plaintiff is not entitled to object to the defendant filing an amended plea unless the plaintiff satisfies the Court that the conduct of the defendant in not paying the costs which she has been ordered to pay is vexatious. There is no allegation to that effect. The respondent's attorney has made an affidavit stating that the respondent is endeavouring to obtain money to pay the costs, and therefore, quite apart from the want of allegation of vexatious conduct on the part of the defendant, it is not a case in which the Court ought to prevent the defendant from placing her defence on record. The application must be refused.

Mr. *de Waal* has urged that, in view of the fact that the respondent's attorney stated that the costs would be paid "by the end of the week," and that no further notice was taken of the plaintiff's letter of the 22nd February, the Court ought not to grant the respondent her costs of the application. But I do not think the respondent ought to be refused costs. The application fails by reason of there not being sufficient grounds set out in the application for the order which is asked. As I have said, there is nothing to show that there has been vexatious conduct on the part of the respondent, and, therefore, the ordinary course should be followed, namely, that the application being refused, the respondent is entitled to the costs of the application.

Attorney for Applicant: *J. Aaronson;* Attorney for Respondent: *M. Lichtenstein.*

[Reported by *Adolf Davis*, Esq., Advocate.]

REX v. WEYMAN.

1913. *March* 3. WESSELS, MASON, and GREGOROWSKI, JJ.

Criminal law.—Habitual criminal.—Counterfeit coin.—Ordinance 26 *of* 1904, *sec.* 24.—*Act* 9 *of* 1911, *schedule.*

Among the offences mentioned in the schedule to Act 9 of 1911 is "counterfeiting coin or uttering counterfeit coin knowing the same to be counterfeit":—*Held*, that under such offence was included a contravention of sec. 24 of Ordinance 26 of 1904.

Argument on question reserved for the decision of the Provincial Division by CURLEWIS, J.