WARNER *vs.* BURTON.

An attorney was employed by a woman to prosecute a bill against her husband for divorce, alimony, &c. After interlocutory decree, by default, on the application of the husband, and by consent of the wife, the decree was set aside, and the bill dismissed; but on a showing by the attorney that he had a claim for fees and expenses incurred in prosecuting the suit, the Court referred his claim to the Master, and ordered that a portion of defendant's property be placed in the hands of a receiver, to be held subject to the final order of the Court on the coming in of the report of the Master, &c: HELD, That the Court having power over the subject matter, the order so made could not be superseded by this Court, but that the final decree of the Court, in the matter, would be subject to review on appeal.

Application for Supersedeas.

Franklin S. Warner presented a petition to this Court, at the present term, stating that on the 12th day of March, A. D. 1849, Selina, his wife, filed a bill against him in the Lafayette Circuit Court, for divorce and alimony.

That, at the return term, he permitted an interlocutory decree to go against him, which was to become absolute unless he showed cause against it on or before the third day of the following term.

That on the 3d day of the next term, (Nov. 1849,) he appeared before said Court, and filed a petition representing that said Selina was living and cohabiting with him as his wife, and that said

suit was prosecuted and proceeded in, without authority and contrary to her wish and desire—exhibiting therewith the written statement of said Selina to that effect—and praying not only that said decree might be set aside, but also that the bill might be dismissed.

That, therefore, James A. Burton, Esq., the solicitor who instituted and prosecuted said bill for divorce, without previous notice to petitioner, presented his petition to said Court, alleging that his fees and expenses in prosecuting said suit amounted to $2,500, and insisted that the fees and expenses, so due him, should be made and decreed to be a lien and charge upon the property of your petitioner. That, upon the presentation of the petition of said Burton, the said court, without hearing any testimony, or affording petitioner, Warner, an opportunity to respond, or be heard in opposition to said petition, and even before Burton's counsel had taken his seat, after presenting the petition, made a decree not only setting aside said interlocutory decree, and dismissing the said bill, but also directing and adjudging that the Master, in chancery for said county, should take and state an account of the expenses, &c., mentioned in the said petition of said Burton, and make a report at the next term of said Circuit Court—that certain slaves, *to wit:* Ben, Jim, Mary, Eliza and her child, all property held and owned by petitioner in his own right, and also the proceeds arising and accruing to petitioner from a certain suit then pending in that Court between him and one John Cockrell, should be placed in the custody and control of a receiver, and should stand and be charged with the payment of the amount so found to be due to said Burton as aforesaid—to which order upon the application of Burton, petitioner excepted, and tendered his bill of exceptions which was signed, sealed and made part of the record of the said case. That all of said facts would more fully appear by a transcript of the record of the proceedings in said case, which was exhibited.

Petitioner alleged that the order made as aforesaid on the application of Burton, was a usurpation of power, &c., and null and void. Prayer for perpetual supersedeas.

The transcript filed with the petition for supersedeas aforesaid, shows that Mrs. Warner filed her bill for divorce and alimony, and to have restored to her a number of slaves, and other property which she possessed on her marriage with Warner. That she obtained an interlocutory decree, as stated in the petition, and the Court appointed a receiver to take charge of the property, &c.

The application of Burton, states that he was employed by her to prosecute the suit, and that he filed the bill, and obtained the decree aforesaid. That after obtaining the decree, Warner ran some of the negroes off to Mississippi, and Mrs. Warner employed him to pursue Warner, and recover the slaves, which he did at great expense loss of time, &c. He claimed as reasonable compensation for his services, expenses in prosecuting the suit, and pursuing Warner to Mississippi, and recovering the negroes, &c., $2,500.

The order of Court was as stated in Warner's petition.

WATKINS & CURRAN, for the petition, contended that the Circuit Court possessed no power to adjudicate upon the rights of the petition without giving him an opportunity of being heard; that the adjudication as to the right of Burton was final and not interlocutory, and as the Court possessed no power to decree against Warner, the proceeding is void, and ought to be superseded:

That the law will not imply an undertaking by the husband to pay the fees, where a wife employs a lawyer to prosecute a bill for divorce. *Dorsey v. Goodenow, Wright's Ohio Rep.* 120. 7 *T. R.* 432. 1 *Saund. R.* 284. 5 *Taunt. R.* 356.

S. H. HEMPSTEAD AND E. CUMMINS, contra, argued that the action of the Court below cannot be reviewed in this manner, unless the proceedings are utterly void; that as in this case there was no usurpation of power, but, if any thing, error in exercising a power clearly conferred, a writ of supersedeas should not be granted. And as to the general power of courts to protect attorneys in the recovery of fees, costs and expenses, cited *Read v.*

Duffer, 6 *T. R.* 361. *Cole v. Bennett*, 6 *Price* 15. *Cross on Liens*, 227, 228, 9, *Law Lib. Gould v. Davis, Compton and Jervis* 415. 1 *Dowling's Pra. Cas.* 238. 1 *Newland, ch.* 426, 3 *Atk.* 719. *Pinder v. Morris*, 3 *Caines* 165 *Ten Brock v. De Witt*, 10 *Wend.* 618. *Power v. Kent*, 1 *Cow.* 172. *Dennett v. Cutts*, 11 *N. Hamp.* 163. *Pope v. Armstrong*, 3 *S. and M.* 214.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

This is an application for a supersedeas to the Lafayette Circuit Court. From the facts as presented by the record, we think it clear that the Court had the power to do the act complained of, and whether the power has been rightfully exercised or not, is not inquirable into in this form of proceeding. It was said by the Supreme Court of Ohio, in the case of *Dorsey v. Goodenow*, (*Wright's Rep.* 120,) that "Power is possessed by the Court to make an allowance to the wife, *pendente lite*. In a proper case made, the Court will make an allowance large enough to enable her to carry on her suit, and to subsist upon while it is pending." That case is in harmony with all the authorities which we have been able to consult upon the subject. If the Court had the power in this case to make an allowance out of the husband's estate to enable the wife to pay the fees of her attorney, and thereby to carry on her suit, we think it clearly follows that the attorney was equally entitled to protection when an attempt was made to dismiss the suit, and that, too, under circumstances strongly indicating collusion between his client and defendant to cheat and defraud him out of his fees and disbursements. The power of the Court over the subject being conceded, there is an end of this application, as we are not at liberty to enquire into any errors or irregularities which may have intervened in the exercise of such powers. The order complained of is merely interlocutory, and its merits can only be investigated when the whole case upon a final decree shall be presented. This Court in the case of *Carnall v. Crawford county*, (6 *Eng.* 618) held that before final judgment nothing short of a clear defect of power in the subordinate court, or clear breach of duty, and

irreparable mischief by delay, should make a case for interposition; otherwise, the extraordinary powers of superintending control would conflict with, and in effect, supersede the ordinary appellate jurisdiction as regulated by law. The application is therefore refused.