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Notice of Appeal.

NOTICE OF APPEAL.

Filed August 27, 1935.

New Jersey Supreme Court

EARLE A. MERRILL, <i>Plaintiff-Appellant,</i> <i>vs.</i> JOHN WINANS, <i>Defendant-Respondent.</i>	}	<i>Action at Law.</i> <i>On Appeal to the Court of Errors and Appeals.</i> <i>Notice of Appeal.</i>	10
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TAKE NOTICE that the appellant Earle A. Merrill appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause.

E. A. MERRILL,
Pro se.

To:

Mr. John Winans, 50 Church street, New York, N. Y.	30
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Grounds of Appeal.

GROUND OF APPEAL.

Filed August 28, 1935.

New Jersey Court of Errors and Appeals

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EARLE A. MERRILL,
Plaintiff-Appellant,
vs.
JOHN WINANS,
Defendant-Respondent.

*Action
at Law.*

*On Appeal
from the
Supreme
Court.*

*Grounds of
Appeal.*

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The plaintiff-appellant assigns the following grounds of appeal from the judgment of the New Jersey Supreme Court in the above entitled cause:

1. Because the Supreme Court erroneously held that the ground of appeal filed in that court was "insufficient to bring anything before the court."

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2. Because the Supreme Court erroneously affirmed the judgment of the District Court of the Fourth Judicial District of the County of Union, holding that the issue raised by the state of demand was *res adjudicata*.

3. Because the Supreme Court erroneously affirmed the judgment of the District Court of the Fourth Judicial District of the County of Union, holding that the plaintiff had no cause of action in that court for lack of jurisdiction.

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Grounds of Appeal.

4. Because the Supreme Court erroneously affirmed the judgment of the District Court of the Fourth Judicial District of the County of Union, holding that the denial of the motion of the *solicitor* of a party in the Court of Chancery constituted a decision on the merits of the *legal claim* of the solicitor personally, and thus deprived the court of jurisdiction. 10

EARLE A. MERRILL,

Pro se.

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*State of Demand.***STATE OF DEMAND.**

Filed April 26, 1933.

The plaintiff, Earle A. Merrill, residing in the Town of Westfield, County of Union, and State of New Jersey, says that:

10

1. Plaintiff is the solicitor of one Eva Hefele who brought her action in the Court of Chancery of New Jersey against her husband, Frank Hefele, for the maintenance of herself and their infant daughter.

2. The defendant, John Winans, is the solicitor of said Frank Hefele.

20

3. There was a decree in favor of said Eva Hefele, which said decree was appealed by the defendant, Frank Hefele, to the Court of Errors and Appeals.

4. In accordance with Rule 21 of said Court of Errors and Appeals said Frank Hefele, appellant, deposited with the Court in Chancery the sum of \$100.00 "to answer the costs of the appeal."

30

5. The decree of the Court of Chancery was affirmed by the Court of Errors and Appeals, "with costs," on May 16, 1932, and thereupon the right became vested in this plaintiff to collect the costs out of said deposit of \$100.00.

6. Promptly thereafter, and in accordance with the rules of the Court of Errors and Appeals, application was made to the Court of Errors and Appeals for counsel fee for complainant's solicitor—the plaintiff herein.

40

State of Demand.

7. On July 15, 1932, plaintiff wrote the Clerk in Chancery:

“July 15, 1932

Mr. Ferd Garretson,
Clerk in Chancery,
State House,
Trenton, N. J.

10

Re: Hefelev. Hefelev—82/162

Dear Sir:

I enclose herewith costs assessed in the Court of Errors and Appeals.

I have applied to the court for allowance for counsel fee, which shall also be included in the costs, but this may not come before the court until some conference day in the Fall. I suggest, therefore, that, at your convenience, you send me check for the \$24.18 out of the deposit for costs and hold the balance pending the further action of the court on my application for counsel fee.

20

Yours truly,

E. A. MERRILL.”

8. On or about September 30, 1932, the Court of Errors and Appeals awarded this plaintiff, as complainant's solicitor, the sum of \$100.00 as counsel fee.

30

9. For the order of the Court of Errors and Appeals see Exhibit A attached thereto.

10. After deducting the \$24.18 previously paid to plaintiff out of the fund, and the fee of the Chancery clerk, there remained a balance of \$75.32 of said deposit for costs.

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State of Demand.

11. Under the terms of the order of the Court of Errors and Appeals this balance belongs to this plaintiff.

10 12. On or about January 3, 1933, this plaintiff, as solicitor of said Eva Hefele, filed with the Clerk in Chancery the order of the Chancellor authorizing the payment of said balance to this plaintiff. A copy of said order is attached hereto as Exhibit B.

13. Shortly after filing the order last referred to, plaintiff was informed by the Clerk in Chancery that said balance had been paid (apparently by inadvertence) on or about July 20, 1932, to the defendant herein.

20 14. Thereupon plaintiff demanded that defendant pay said moneys to plaintiff as moneys had and received for plaintiff's use, but defendant refused so to do.

Plaintiff demands of defendant, as his damages, the sum of \$75.32, with interest from July 20, 1932, and his costs herein.

EARLE A. MERRILL,
Pro se.

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State of Demand—Exhibit A.

Exhibit A.

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

Between

EVA HEFELE,
Complainant-Respondent,

and

FRANK HEFELE,
Defendant-Appellant.

10

*On Bill, etc.
Order.*

The decree of the Court of Chancery in favor of the complainant-respondent having been heretofore affirmed by this Court, and application having been made to this Court for the allowance of a counsel fee to the solicitor of the complainant-respondent, and the Court having considered the matter, and being of the opinion that an allowance should be made, it is, on this 30th day of September, 1932:

20

ORDERED, that the application of counsel for Eva Hefele, complainant-respondent herein, for counsel fee for services in this Court be allowed in the sum of \$100.00, which said allowance shall be included in, and taxed as a part of, the costs taxed in this court.

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*State of Demand—Exhibit B.***Exhibit B.**

IN CHANCERY OF NEW JERSEY.

82/162.

10 *Between*

EVA HEFELE,

*Complainant,**and*

FRANK HEFELE,

Defendant.

*On Bill, etc.
Order for
Payment of
Counsel
Fee.*

20 It being represented to the Court that the de-
fendant herein deposited with the Clerk of this
Court, as security for costs on appeal, the sum
of \$100.00, and that the decree of this Court was
affirmed by the Court of Errors and Appeals on
such appeal, and that the remittitur has been
filed in this Court, and that on motion made on
behalf of the complainant the Court of Errors
and Appeals allowed counsel for the complain-
ant \$100.00 as and for counsel fee, and to be in-
cluded in the taxed costs, it is, on motion of
30 E. A. Merrill, solicitor of said complainant, on
this day of December, 1932:

ORDERED: that the Clerk of this Court be, and
hereby is, authorized to pay over to E. A. Mer-
rill, solicitor of the complainant, Eva Hefele, on
account of the counsel fee allowed by the Court
of Errors and Appeals, the balance on deposit as
security for costs, but not to exceed the allow-
ance of \$100.

E. R. WALKER,
C.

40 Respectfully advised,
ALFRED A. STEIN,
Vice-Chancellor.

State of Case Settled by Court.

STATE OF CASE SETTLED BY COURT.

DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT
OF THE COUNTY OF UNION.

EARLE A. MERRILL,	}	<i>Plaintiff,</i>	<i>On Appeal.</i>	10
<i>vs.</i>				<i>State of Case Settled by Court.</i>
JOHN WINANS,		<i>Defendant.</i>		

E. A. Merrill, attorney of plaintiff-appellant.

John Winans, attorney of defendant-respondent. 20

The parties hereto having failed to agree upon a state of case on appeal, and the plaintiff-appellant having applied to me, Judge of said Court, within the time limited by law, I do hereby settle the case as follows:

The action was for money had and received by the defendant for the use of the plaintiff. The allegations of fact in the state of demand were admitted or proved. The defense was that the plaintiff had no cause of action because the matter at issue was *res judicata* and was determined by the order of the Court of Chancery discharging a rule to show cause why the defendant herein, being the solicitor of the defendant in said Chancery action, should not pay over to the plaintiff herein, being the solicitor of the complainant in the Chancery action, the sum of \$75.32 paid over to said defendant by the Clerk in Chancery as set forth in the state of demand 30 40

State of Case Settled by Court.

in the instant suit. The argument of the plaintiff was that the denial of the Chancery motion, or the discharge of the rule to show cause, allowed in the Chancery proceeding, was not such decree or order as adjudicated anything, and that the question now at issue was not, in the

10 Chancery proceeding, heard on the merits or decided as a matter of law. It was further contended by the plaintiff that in the Chancery proceeding the only parties to be recognized by the Court as such were the complainant and the defendant, and that, therefore, there was in the present action no identity of the parties and no identity in the quality of the parties. It was further argued that as between the parties to the present action there was, in the Chancery

20 proceeding, nothing sued for and no cause of action; there was, therefore, no identity of the thing sued for and no identity of the cause of action. I ruled that the discharge of the rule to show cause by the order of the Court of Chancery constituted a determination of the legal question here raised, and that the issue was, therefore, *res judicata*, and that the plaintiff herein had no cause of action.

30 Exception to the Court's ruling was prayed and granted.

The state of case on appeal will include the following papers:

State of Demand.

Judgment Record.

Order of the Court of Errors and Appeals Allowing Counsel Fee.

Rule to Show Cause in Case of Eva Hefelev. Frank Hefelev in the Court of Chancery.

40

State of Case Settled by Court.

Order of Vice Chancellor Berry Discharging
said Rule to Show Cause.

Notice of Appeal.

State of Case Settled by Court.

In Witness Whereof, I have hereunto set my
hand this 27th day of December, 1933. 10

JOHN W. LYNNESS,
Judge of the District Court of the
Fourth Judicial District of the
County of Union.

Attest:

ROBERT T. SKINNER,
(SEAL) Clerk.

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*Rule to Show Cause.***RULE TO SHOW CAUSE.**

IN CHANCERY OF NEW JERSEY.

82/162

10	<p><i>Between</i></p> <p style="text-align: center;">EVA HEFELE, <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">FRANK HEFELE, <i>Defendant.</i></p>	}	<p><i>On Bill, etc.</i></p> <p><i>Order.</i></p>
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20 This matter being opened to the Court by E. A. Merrill, solicitor of the complainant herein, and the Court having heard counsel thereon, and having read and considered the affidavit filed in support of his motion, it is on this 27th day of February, 1933,

30 ORDERED: That John Winans, solicitor of the defendant herein, show cause before the Chancellor, at Chancery Chambers, Newark, New Jersey, at 10 o'clock in the forenoon, on Tuesday, March 7, 1933, why the balance of the deposit as security for costs on appeal made by the defendant herein, paid over to said John Winans on July 20, 1932, should not be paid over to E. A. Merrill, the solicitor of the complainant herein, a copy of this order and said affidavit to be served on the solicitor of the defendant on or before March 2, 1933.

LUTHER A. CAMPBELL,

C.

Respectfully advised,

40, ALFRED A. STEIN,
V.-C.

Order Discharging Rule.

ORDER DISCHARGING RULE.

IN CHANCERY OF NEW JERSEY.

82/162

EVA HEFELE, <div style="text-align: right; padding-right: 20px;"><i>Complainant,</i></div>	<i>On Bill for Maintenance, &c.</i>	10
<div style="text-align: center; padding: 5px 0;"><i>vs.</i></div>	<i>On Solicitor's Application, &c.</i>	
FRANK HEFELE, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	<i>Order.</i>	

This matter being opened to the Court by Earle A. Merrill, Esq., solicitor of complainant, in the presence of John Winans, Esq., solicitor of defendant, pursuant to an order to show cause granted herein on the 2nd day of March, 1933; and the Court having read and considered the affidavits submitted by the respective parties and heard and considered the arguments of their respective counsel: It is thereupon, on this 7th day of March, 1933, ORDERED that the motion of the complainant's solicitor be and the same hereby is in all respects denied and said order to show cause discharged, with costs.

LUTHER A. CAMPBELL,

C.

Respectfully advised:

MAJA LEON BERRY,
Vice-Chancellor.

Memorandum of District Court Judge.

**MEMORANDUM OF
DISTRICT COURT JUDGE.**

Filed as of December 5, 1933.

DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT
OF THE COUNTY OF UNION.

EARLE A. MERRILL,

Plaintiff,

vs.

JOHN WINANS,

Defendant.

On Contract.

Memorandum.

20 Plaintiff and defendant are attorneys at law
and solicitors in Chancery of the State of New
Jersey. As such, plaintiff represented a com-
plainant wife and defendant represented a de-
fendant husband in a bill for separate main-
tenance in the Court of Chancery of this State.
The wife, through her solicitor, the plaintiff
herein, obtained a decree from which the hus-
band, through his solicitor, the defendant here-
in took an appeal. The sum of \$100.00 was de-
30 posited on appeal on May 18, 1931, with the
Clerk of the Court of Chancery pursuant to
Rule 21 of the Court of Errors and Appeals.
The Court of Errors and Appeals affirmed the
decree of the Court of Chancery, whereupon the
Clerk of the Court of Errors and Appeals taxed
the costs at \$24.18, which sum was paid in July
of 1932 to the plaintiff. July 20, 1932, or there-
abouts, the balance of \$75.32 was paid by the
Clerk of the Court of Chancery to the defendant.
40 September 30, 1932, plaintiff was allowed a

Memorandum of District Court Judge.

counsel fee of \$100.00 by the Court of Errors and Appeals, to be included and taxed as part of the costs. December of 1932, plaintiff obtained an order of the Court of Chancery directing the Chancery Clerk to pay the balance of \$75.32 to the plaintiff whereupon plaintiff was advised that said sum had been returned to the defendant previously. 10

On February 27, 1933, the plaintiff obtained an order to show cause out of the Court of Chancery why the balance of the deposit should not be paid over to the plaintiff (Exhibit D. 6). Affidavits incorporating the facts heretofore (Exhibits D. 1 and D. 3) were submitted to Vice-Chancellor Berry on March 7, 1933, pursuant to said order to show cause and arguments were had by both counsel thereon. The Vice-Chancellor, after reading the affidavits and hearing the arguments of the respective counsel, ordered that the plaintiff's motion be denied with costs (Exhibit D. 5). Defendant was next served with notice of motion returnable March 21, 1933, before Vice-Chancellor Stein, in which plaintiff sought the return of the deposit, which motion was dismissed by that Vice-Chancellor because the subject matter of that motion was previously adjudicated by Vice-Chancellor Berry (Exhibit D. 4). Plaintiff now brings action in this court by state of demand on money had and received for the use of the plaintiff for the aforementioned sum of \$75.32, setting forth substantially the facts as outlined exclusive of the 1933 Chancery motions. 20 30

A consideration of the pleadings, evidence and arguments does not lead me to consider the merits of this action. A comparison of the Chancery file and the state of demand and testi- 40

Memorandum of District Court Judge.

mony in this case shows an identity of facts and questions of law. That the plaintiff and the defendant herein were the real parties in interest in argument of the rule to show cause before Vice-Chancellor Berry and the motion before Vice-Chancellor Stein, there can be no doubt. A party may be bound by a judgment or decree where he is a real though not a nominal party to the litigation. See *Stanford v. Lyons*, 42 Eq. 411, 7 Atl. 869; *Miller v. Headley*, 158 Atl. 118; *E. R. C. Co. v. Hayes*, 151 Atl. 58. Plaintiff and defendant herein were the real parties in the proceeding in the Court of Chancery relative to the question of costs and counsel fee.

Vice-Chancellor Van Fleet, speaking for the Court of Chancery in *May etc. of City of Paterson v. Baker*, 51 Eq. 49, 26 Atl. 324, said:

“There can be no doubt then that if the complainant’s right to relief in this suit rests upon the same point or question, which, in essence and substance, was litigated and determined in the suit at law, the matter in controversy here must be regarded, as between these parties, as having been finally and conclusively settled by the judgment at law, and to stand *res adjudicata*.”

Plaintiff’s right to relief in this action rests upon the same question, which, in essence and substance, was litigated and determined in the Court of Chancery. See also *Re Walsh’s Estate*, 80 Eq. 565.

An order of the Court of Chancery may have the effect of a judgment at law. 1 C. S., p. 425, sec. 44. In the final analysis it is a determination on the questions of fact and law at issue

Memorandum of District Court Judge.

and as such, a decision. The order of Vice-Chancellor Berry states expressly,

“* * * The Court having read and considered the affidavits submitted by the respective parties and heard and considered the arguments of the respective counsel
* * * ” (Exhibit D. 5).

10

The matter has been adjudicated by the proper Court. The parties herein are solicitors of the Court of Chancery and as such, **officers of that Court**. That a Court has control over its officers is so fundamental that citation of authority is unnecessary. Should an officer of a Court of Equity perpetrate an impropriety on that Court, surely it is not incumbent upon a law court to grant equitable relief in the premises. The rights of the plaintiff herein were fully before the Court of Equity for determination in the hearing before Vice Chancellor Berry. Plaintiff has had his day in court. The plea of *res adjudicata* is a bar.

20

Judgment should be no cause of action for the defendant.

JOHN W. LYNESS,

Judge.

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Notice and Ground of Appeal.

**NOTICE AND GROUND OF APPEAL
IN THE SUPREME COURT.**

Filed December 28, 1933.

NEW JERSEY SUPREME COURT.

10

EARLE A. MERRILL,

Plaintiff-Appellant,

vs.

JOHN WINANS,

Defendant-Respondent.

*Notice of
Appeal.*

20

TAKE NOTICE that the plaintiff, Earle A. Merrill, hereby appeals to the New Jersey Supreme Court from the judgment of the District Court for the Fourth Judicial District of the County of Union in the above stated action, entered December 5, 1933, on the ground that said judgment is erroneous as a matter of law.

EARLE A. MERRILL,

Pro se.

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Opinion of Supreme Court.

OPINION OF THE SUPREME COURT.

PER CURIAM :

The action in this case was instituted by Earle A. Merrill, an attorney, as plaintiff against the defendant Winans, another member of the bar, to recover a certain sum of money alleged to have been illegally withdrawn from the office of the clerk of the Court of Chancery, which sum had been deposited with the clerk as security for the costs of an appeal to the Court of Errors and Appeals.

10

It is unnecessary to go into the merits of the appeal inasmuch as the specification of cause for reversal, herein called ground of appeal, (and which is in the form of a notice of appeal to the effect that the plaintiff appeals from the judgment below "on the ground that said judgment is erroneous as a matter of law,") is insufficient to bring anything before this court. Cases controlling are *Golden Realty Co. vs. Grant Building & Loan Asso.*, 109 N. J. L. 129; *Eckert vs. Nazzaro*, 109 N. J. L. 136; *Cohn vs. Passaic National Bank*, 109 N. J. L. 449, and more recently *Caspert vs. Empire Furniture Co.*, 178 Atl. 65 (not yet officially reported).

20

We have read the proceedings, and it may not be amiss to state that if the respondent, as is claimed in the cause, has been guilty of procuring funds from the office of the Clerk of the Court of Chancery to which he was not entitled, and with knowledge of this fact brought clearly to his attention by the litigation which has already occurred, still retains these funds unlawfully, it may be a subject matter for action by the proper branch of this court under its disciplinary powers, to which body the appellant may have recourse.

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The judgment is affirmed.

*Order Affirming Judgment.***ORDER AFFIRMING JUDGMENT.**

NEW JERSEY SUPREME COURT.

10

EARLE A. MERRILL,
Plaintiff-Appellant,
vs.

JOHN WINANS,
Defendant-Appellee.

*On Appeal
 from District
 Court.*

*January
 Term, 1935.*

*Rule on
 Affirmance of
 Judgment
 and
 Remittitur.*

20

This cause having been duly submitted on briefs at the January, 1935, term of this court, by Earle A. Merrill, appellant *pro se*, and by Frederick A. Pope, Esq., attorney of appellee, and John Winans, *pro se*, and decided at the present, May, 1935, term thereof; and the court having considered the same, and finding no error in the record or proceedings in the District Court below—

30

It is thereupon ordered and adjudged that the judgment of the District Court of New Jersey, from which the above-entitled appeal was taken, be in all respects affirmed; and that the record be remitted to the said District Court of the Fourth Judicial District of the County of Union, in the State of New Jersey, to be proceeded with in accordance with this judgment and the practice of said court.

Entered Aug. 22, 1935,

On motion of

40

JOHN WINANS,
 Appellee.

Notice of Argument.

NOTICE OF ARGUMENT.

Filed August 28, 1935.

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

EARLE A. MERRILL, <i>Plaintiff-Appellant,</i> <i>vs.</i> JOHN WINANS, <i>Defendant-Respondent.</i>	}	<i>Action at Law. On Appeal from the Supreme Court. Notice of Argument.</i>	10
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TAKE NOTICE that the appellant will move the argument of the above entitled appeal before the Court of Errors and Appeals at the State House, Trenton, New Jersey, on Tuesday, October 15, 1935, at 11:00 o'clock in the morning, or as soon thereafter as counsel may be heard.

EARLE A. MERRILL,
Pro se.

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PROCEEDINGS OF THE

NEW YORK COUNTY COURT OF SESSIONS
AND APPEALS

10

1898	1899	1900	1901	1902	1903	1904	1905	1906	1907	1908	1909	1910	1911	1912	1913	1914	1915	1916	1917	1918	1919	1920	1921	1922	1923	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933	1934	1935	1936	1937	1938	1939	1940	1941	1942	1943	1944	1945	1946	1947	1948	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	2035	2036	2037	2038	2039	2040	2041	2042	2043	2044	2045	2046	2047	2048	2049	2050	2051	2052	2053	2054	2055	2056	2057	2058	2059	2060	2061	2062	2063	2064	2065	2066	2067	2068	2069	2070	2071	2072	2073	2074	2075	2076	2077	2078	2079	2080	2081	2082	2083	2084	2085	2086	2087	2088	2089	2090	2091	2092	2093	2094	2095	2096	2097	2098	2099	2100
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127OCT.T.1935

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

EARLE A. MERRILL,
Plaintiff-Appellant,

vs.

JOHN WINANS,
Defendant-Respondent.

On Appeal.

BRIEF ON BEHALF OF THE PLAINTIFF-APPELLANT.

Statement.

This is an appeal from a judgment of the Supreme Court affirming the judgment of the District Court of the Fourth Judicial District of the County of Union holding that it was *without jurisdiction* to determine the issue raised by the state of demand, for the reason that the issue was *res judicata* because of the denial of a motion in the Court of Chancery in a certain suit for maintenance brought by one Eva Hefele against her husband, Frank Hefele, the *solicitors* in the Chancery suit being the same individuals as the *parties* to this suit.

The determination of the District Court that it was *without jurisdiction*, and its consequent refusal to determine the meritorious issue between the parties, was appealed to the Supreme Court by the plaintiff "on the ground that said judgment is erroneous as a matter of law" (Case, p. 18).

The Supreme Court affirmed on the single ground that this assignment of error was "insufficient to bring anything before this court" (Case, p. 19, l. 23).

The suit in the District Court had its origin under the following circumstances. In the suit of *Hefele v. Hefele* there was a decree that the defendant pay complainant \$35.00 per week. The decree was appealed and defendant deposited \$100.00 with the clerk in Chancery, under rule 21 of the Court of Errors and Appeals, "to answer the costs of the appeal." The decree was affirmed "*with costs*", on May 16, 1932.

The solicitor of the complainant promptly applied to the Court of Errors and Appeals for counsel fee in that court. Memoranda were filed with the court by both parties, under the amended rules of February 8, 1932.

Following this application, and after the costs then accrued had been taxed and the remittitur filed, the solicitor of the complainant wrote the clerk in chancery as follows:

"July 15, 1932.

Mr. Ferd Garretson,
Clerk in Chancery,
State House,
Trenton, N. J.

Re: Hefele v. Hefele—82/162

Dear Sir:

I enclose herewith costs assessed in the Court of Errors and Appeals.

I have applied to the court for allowance for counsel fee, which shall also be included in the costs, but this may not come before the court until some conference day in the Fall. I suggest, therefore, that, at your convenience, you send me check for the \$24.18 out of the deposit for costs and hold the balance pending the further action of the court on my application for counsel fee.

Yours truly,

E. A. Merrill."

On July 20, 1932, the clerk in chancery remitted to the solicitor of the complainant \$24.18, and to the solicitor of the defendant the balance of \$75.32, disregarding or, probably, inadvertently overlooking, the notice and request of July 15th.

On September 30, 1932, the Court of Errors and Appeals awarded the solicitor of the complainant a counsel fee of \$100.00. In December, 1932, an order was made by Vice-Chancellor Stein authorizing the clerk in chancery to pay the balance of the deposit for costs to the solicitor of the complainant.

It then, for the first time, came to the knowledge of complainant's solicitor that this balance already had been paid to the defendant's solicitor by the chancery clerk.

Plaintiff then demanded that this balance of \$75.32 be paid over to him, by defendant, but the demand was refused and defendant still persists in that refusal, and still retains that balance of the deposit.

Complainant, by her solicitor, subsequently procured an order directing the solicitor of the defendant to show cause why he should not pay this balance to the solicitor of the complainant, or return it to the clerk in chancery (Case, p. 12), but the rule was discharged (Case, p. 13).

No opinion was filed by the Vice-Chancellor, but authority for his action will be found in two opinions by Chancellor Walker. It is to be observed that the respective *solicitors* argued the motion, and they were not "*parties*" in the chancery suit.

In *Collins v. Kiederling*, 87 N. J. E. 12-15, Chancellor Walker said that "a decree cannot be made as to any person who is not a *party to the suit*." (Italics mine.)

In *Kaufman v. Jurczak*, 102 N. J. E. 66, Chancellor Walker remarked that:

“obviously * * * a solicitor in chancery is the mere agent or representative of a party, *but not a party himself*. And it has already been decided that no one but a *party* to a suit can make any motion in it except for the purpose of being made a party. * * * The conduct of suits belongs to the parties and *they only* have the right to apply for order or direction. *A solicitor not being a party is a stranger to a suit in a legal and technical sense.*” (Italics mine.)

That the motion in the Court of Chancery was improperly made seems clear, and no criticism is made of the order of the Chancellor discharging the rule, but plaintiff took exception to the holding of the District Court that the argument by the *solicitors* of the parties complainant and defendant upon the rule to show cause in the Court of Chancery was a *litigation* between this plaintiff and this defendant *personally*, as parties in that court, and deprived the District Court of jurisdiction.

The plaintiff-appellant here contends that the ground of appeal in the Supreme Court was sufficient to bring the *jurisdictional issue* before the court, and appeals to this court to reverse the judgment of the District Court and the affirmation of that judgment by the Supreme Court, on the following grounds:

1. Because the Supreme Court erroneously held that the ground of appeal filed in that court was “insufficient to bring anything before the court.”

2. Because the Supreme Court erroneously affirmed the judgment of the District Court of the Fourth Judicial District of the County of Union, holding that the issue raised by the state of demand was *res adjudicata*.

3. Because the Supreme Court erroneously affirmed the judgment of the District Court of the Fourth Judicial District of the County of Union, holding that the plaintiff had no cause of action in that court for lack of jurisdiction.

4. Because the Supreme Court erroneously affirmed the judgment of the District Court of the Fourth Judicial District of the County of Union, holding that the denial of the motion of the *solicitor* of a party in the Court of Chancery constituted a decision on the merits of the *legal claim* of the solicitor personally, and thus deprived the District Court of jurisdiction.

POINT I.

The ground of appeal filed in the Supreme Court was sufficient.

The judgment of the District Court was appealed to the Supreme Court on the single ground that "said judgment is erroneous as a matter of law."

"The defense (in the District Court) was that the plaintiff had no cause of action because the matter at issue was *res adjudicata* * * *" (Case, p. 9, l. 30), and the judgment was: "the plea of *res adjudicata* is a bar" (Case, p. 17, l. 24).

Now, to hold that the issue was *res adjudicata* was to hold that the District Court *had no jurisdiction*. That was the single question decided.

That was the error complained of, and it was an error of law.

The ground of appeal was not a general allegation of error. It was not a blanket ground. It was not vague. It required no study on the part of the court to ascertain what was the error in particular. It was not indefinite. It required no speculation on the part of the court as to its meaning. No conflicting inferences could be raised. The trial judge, in effect, adjudged that: "This court is without jurisdiction." The appellant complained that "said judgment is erroneous as a matter of law" (Case, p. 18, l. 24). All that the Supreme Court apparently says is that appellant should have enlarged his statement by adding the following italicized words: "Said judgment, *that the court is without jurisdiction, is erroneous as a matter of law. The trial judge should have held that the court had jurisdiction.*"

Counsel respectfully submits that the latter statement is simply a less concise way of assigning the error, and adds nothing by way of clarity or definiteness.

Furthermore, *a question of jurisdiction requires no formal assignment of error.* This court has repeatedly held that the question of jurisdiction is never considered as waived, and may be argued in the court above even if neither raised nor argued in the court below. *State v. Snell*, 96 N. J. L. 299; *State v. O'Leary*, 110 N. J. L. 36.

This court may even, of its own option and without argument, consider and decide a jurisdictional issue. *Donohue v. Campbell*, 98 N. J. L. 755; *Allen v. Paterson*, 99 N. J. L. 489.

In *McMichael v. Horay*, 90 N. J. L. 142, the court go even further:

“The true doctrine is that a court of appeals need not, not that it cannot, decide a question arising on a record before it, which was not raised in a court below, whether that court be an intermediate court of appeals, or a court of first instance; and it is the constant practice of appellate courts to notice and decide questions of jurisdiction, * * * residing in records before them, without those questions having been raised below.”

The question in this court is as to the propriety of the judgment below. *McCrorry Stores Corp. v. Braunstein*, 99 N. J. L. 166.

To say that a holding that the issue is *res adjudicata* “is erroneous as a matter of law” is, counsel submits, just as sound an assignment of error as to say that the Supreme Court erred because it “found in favor of the plaintiff instead of defendant,” and such was held, by this court, in *McCarthy v. West Hoboken*, 93 N. J. L. 247, to be “a good assignment.”

So, in *Ludlow v. Vilensky*, 7 M. 339, before Chief Justice Gummere and Mr. Justice Parker, the court said, of a ground of appeal that “the learned trial judge erroneously directed a verdict for the plaintiff”: “This is a proper ground of appeal.”

After all, what we are seeking is substantial justice, and it should not be defeated merely to support a purely technical formulary. Such will tend to neutralize the frequently expressed wish of the court that counsel make their grounds of appeal concise; counsel will hesitate to limit grounds of appeal if thereby exposed to the hazard of a denial of a hearing. Even where the

ground of appeal is clearly wrong the court may, nevertheless, pass upon the meritorious question. *Petersen v. Sovereign Camp, etc.*, 97 N. J. L. 497; *Abbe v. Erie R. R. Co.*, 97 N. J. L. 212.

This plaintiff became entitled, as solicitor of the complainant in the chancery suit, to costs and counsel fee in excess of \$400. He has never received anything from the complainant, and has received toward costs and counsel fees only the \$24.18 paid over to him by the chancery clerk out of the deposit. Thus far the defendant in the chancery suit has shown himself immune to execution and there is no prospect of a change in that situation.

POINT II.

The cases cited in the opinion of the Supreme Court are not relevant.

The cases cited in the opinion of the Supreme Court as "controlling (*Golden Realty Co. v. Grant B. & L. Ass'n*, 109 N. J. L. 129; *Eckert v. Nazzaro*, 109 N. J. L. 136; *Cohn v. Passaic Nat. Bk.*, 109 N. J. L. 449; *Caspert v. Empire Furniture Co.*, 178 A. 65—not officially reported)," counsel submits are not relevant. In each of those cases, and in other cases of a similar character, there was a trial of the merits, resulting in a *verdict*, as well as a judgment.

The comment, in the Caspert case, *supra*, upon the holding of this court in *Trenton Banking Co. v. Rittenhouse*, 96 N. J. L. 450, does not affect the argument here, as that trial, also, went to the merits and resulted in a *verdict*, as well as a judgment.

In all of these cases there was a finding in favor either of the plaintiff or of the defendant, and the grounds of appeal went to *trial* errors.

But in the instant case there was neither trial nor verdict—"a consideration of the pleadings, evidence and arguments does not lead me to consider the merits of this action," said the trial judge (Case, p. 15, l. 37). There was no judgment in favor of one of the parties, and against the other. The error was not in finding for one party instead of for the other; the error was in refusing to make any finding at all. This feature not only distinguishes this case from the cases cited by the Supreme Court, but from all other cases which counsel has been able to find. *The trial judge, simply decided that he was without jurisdiction and threw the case out.*

Counsel submits that where the sole issue is jurisdictional, and there is but one question to be determined, and that question goes solely to the jurisdiction and appears on the face of the record in unambiguous terms, and the court of first instance has decided only the legal question involved, and there is neither verdict nor judgment in favor of or against either party affecting the merits, but only a holding that the merits cannot be considered because of lack of jurisdiction, it is a sufficient statement of the ground of appeal, and sufficiently apprises the court of the error alleged, to say that "said judgment is erroneous as a matter of law."

It is said in the Opinion of the Supreme Court that plaintiff may have recourse to "the proper branch of this (the Supreme) court under its disciplinary powers" if defendant "still retains these funds unlawfully" (Case, p. 19, l. 39); this limitation seems almost to compel an appeal in order that, if the appeal be successful, the lawfulness or unlawfulness of such retention may be determined.

The judgment of the District Court of the Fourth Judicial District of the County of Union, and of the Supreme Court, should be reversed, and there should be a finding of jurisdiction in said District Court to try the issue raised in plaintiff's state-of-demand.

Respectfully submitted,

EARLE A. MERRILL,
Pro Se.

It is a very old book, and the paper is very yellowed and stained. The text is very faint and difficult to read. It appears to be a historical document or a collection of letters. The handwriting is in an old script, possibly Latin or a similar European language. The ink is very light, and the paper shows signs of significant age and wear.

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