New Jersey Court of Errors and Appeals

BENJAMIN L. HARRISON, Plaintiff-Appellee, vs. ALBERT DICKERSON, Defendant-Appellant.	Action at Law. On Appeal.

BRIEF AND POINTS OF ALBERT DICKERSON, DEFENDANT-APPELLANT

Facts

Dickerson sued Harrison in The Small Cause Court, obtained a judgment which was appealed from to the Court of Common Pleas and there sustained, and which was then appealed to the Supreme Court, and was there also sustained.

In that suit, in The Small Cause Court, Harrison did not file a set-off, recoupment, or counterclaim, but appeared and contested the case on other grounds, which he learned were not well taken.

After judgment had been entered for Dickerson in the The Court for the Trial of Small Causes, Harrison appealed from that judgment to the Court of Common Pleas.

Also, after such appeal had been made, Harrison started suit, originally, against Dickerson in the same Court of Common Pleas, as evidenced by the amended complaint, and Dickerson's answer to the same, in State of Case.

Both of these suits between Dickerson and Harrison grew out of the same transaction; namely, the cutting, sawing and delivery of lumber for a house which Harrison was erecting; and Harrison's claim of unliquidated damages in the original suit which he commenced in the Court of Common Pleas, after he had appealed from Dickerson's judgment obtained against him in the Court for the Trial of Small Causes, does not change the principle involved; namely: Did his claim against Dickerson, if he had a just one, amount to more than two hundred dollars, the jurisdictional limit of the Court for the Trial of Small Causes?

Reference to the stipulation and transcript in the state of case, discloses the reason the Court of Common Pleas granted defendant Dickerson's motion for a non-suit.

Argument

Section 24 of "An Act Constituting Courts for the Trial of Small Causes (Revision of 1903)," Chapter 165, Laws 1903, pages 251-289, provides that,

> "if the defendant have any demand against the plaintiff, he shall file the same as a set-off or recoupment against the demand of the plaintiff on or before the first trial day or the day to which the trial shall be first adjourned, and in default thereof the said demand shall not be received in evidence

> on the trial of the cause; AND HE SHALL FOREVER THEREAFTER BE PRECLUDED FROM MAINTAINING ANY ACTION FOR SUCH DEMAND, or from setting off the same in any future suit, except where the balance found to be due to such defendant exceeds the sum of two hundred dollars, and such excess shall not have been waived."

The words "SHALL FILE THE SAME AS A SET-OFF OR RECOUPMENT" are mandatory; and the legislative intent is that the defendant file such demand against the plaintiff so that the differences between the parties can be adjusted in one action and thus avoid multiplicity of suits.

This Section 24 is practically the same as the provision relating to set-off or recoupment in the prior "Small Cause Court Acts" in New Jersey; but those acts contained no method of determining whether there was a balance due defendant in excess of two hundred dollars (or whatever the jurisdictional limit of the justice was under those acts), and the decisions of our Courts regarding set-off or recoupment in "The Small Cause Court" are not applicable to the Act of 1903 (cited above) because in that act, in Section 25, the legislature has provided a way of determining that matter, and has said in which tribunal that matter shall be determined.

Section 25 provides:

> "If the defendant file as a set-off or recoupment a demand against the plaintiff for MORE THAN TWO HUNDRED DOLLARS, and at the trial IT SHALL BE PROVED THAT A BALANCE EXCEEDING TWO HUNDRED DOLLARS IS DUE TO THE DEFENDANT, then the

> suit shall be dismissed unless the defendant consent to accept a judgment for two hundred dollars and costs in full settlement of his claim."

This section was certainly put in the Act of 1903 by the legislature for a purpose, and what was that purpose if it was not to provide a way for testing whether the claim and counter-claim of the parties were within the jurisdictional limit of the Court for the Trial of Small Causes, and if they were they could be settled there without further litigation between the parties. If that is the purpose of this section, the cases of *Sipley v. Wass,* 47 L., 187, and *Clancey v. Neumeyer,* 51 L., 301, no longer apply to the practice relating to these matters in the Small Cause Court.

The question is: Can the defendant regardless of the provisions of Sections 24 and 25, bring suit in another Court against the plaintiff for damages for breach of the very contract on which plaintiff has brought his suit in the Court for the Trial of Small Causes, and thus put the plaintiff to expenses exceeding the amount of his claim in the latter Court; and can the defendant maintain such action unless it appear that the amount he is entitled to is less than $200? If that is so, then why not wipe out Sections 24 and 25, and, especially the latter, as useless; or, better, perhaps, why not say that defendant need not file his set-off or recoupment but may bring an action upon either in any other Court, and maintain the same until it appears that he is not entitled to recover more than $200, when the action shall be dismissed, with costs, etc., for the legislature could make its intention plain, if that were its intention, as per the decision of the Supreme Court in the case at bar.

If respondent had the right to bring this action, after he had ignored Sections 24 and 25, and he should go on and try his case in the Court of Common Pleas, was Dickerson required to set-off or recoup in said suit, the judgment he had obtained against the respondent; and, if so, by what practice would he have got around the appeal of respondent from said judgment of the Small Cause Court which was then also pending trial in said Court of Common Pleas; and if he was not obliged to set-off or recoup said judgment (pending on appeal), in respondent's original action in said Court of Common Pleas, would it not be rather unique to have two (counter) actions relating to the same subject-matter, growing out of the same contract, tried by the same Trial Court, and two judgments and sets of costs entered? Surely, if the legislative intent, as clearly expressed in Sections 24 and 25, were followed no such practice would obtain, in the face of the maxim, *Lex non proecipit inutilia, quia inutilis labor stultus;* and the well founded principle regarding mulitiplicity of suits.

Dickerson's contention is: That Harrison was compelled to pursue the course laid out in Sections 24 and 25 of "An Act Constituting Courts for the Trial of Small Causes" of 1903 (cited above), before he could bring a suit in another Court; and, if he neglected to follow such procedure, he is debarred from bringing such other suit.

Therefore, the non-suit in the Court below was properly granted, and should be sustained; and the decision of the Supreme Court set aside.

Regarding the Cases

The case of *Godkin v. Bailey,* 74 N. J. L., 655, does not apply to this case, because it was a de-

cision based upon another statute, which provides that,

> "if two or more persons be indebted to each other, such debts or demands, NOT BEING FOR UNLIQUIDATED DAMAGES, may be set off against each other."

It excludes debts or demands for unliquidated damages. If it applied to trials in the Court for the Trial of Small Causes, Sections 24 and 25, to which we have referred, would be of no effect, where they relate to a determination of the amount due with reference to the jurisdiction of the Court for the Trail of Small Causes. But if the statute upon which this decision is based ever applied to the Court for the Trial of Small Causes, it is the contention of Albert Dickerson that it was repealed, at least by implication, by the Act Constituting Courts for the Trial of Small Causes of 1903, so far as the practice in such Courts is concerned.

When the cases of *Sipley v. Wass,* 47 N. J. L., 187, and *Clancy v. Newmeyer*, 51 N. J. L., 301, were decided there was no section in the "Small Cause Act" like Section 25 in "The Act for the Trial of Small Causes" of 1903, under which this case was brought.

Evidently, Sections 25 of the present act was put in the Act of 1903, because of the need of such a section, which was disclosed by the decisions of the Court in the said cases, which is quite apparent by reference to those decisions.

To prevent unnecessary litigation, Sections 24 and 25 provide the procedure by which both parties may have their respective claims against each other determined in one suit, unless it appears from the evidence that there is a balance due of

more than two hundred dollars, the jurisdictional limit of the Court, and the determination of this matter if Sections 24 and 25 are followed would cost only the fees of filing a set-off or recoupment and of swearing the witnesses in the Court for the Trial of Small Causes.

The amount demanded by the defendant in his set-off or recoupment may appear to be a sum larger than two hundred dollars as it is set out in the set-off or recoupment, as there is no limit to the amount which may be claimed, but the true amount of balance due defendant is not ascertained until the evidence has been heard, and the matter decided. Then it is known whether the Court for the Trial of Small Causes has jurisdiction. If it has, the matter must be settled there.

We respectfully submit that the defendant in the Court for the Trial of Small Causes must comply with both Sections 24 and 25 of the "Act Constituting Courts for the Trial of Small Causes" of 1903, before he can bring an action in another Court for a larger sum against one who was plaintiff against him in the Court for the Trial of Small Causes. Harrison did not do this, and he could not maintain the suit in the Court of Common Pleas, which was properly non-suited, and therefore the decision of the Supreme Court should be set aside.

Respectfully submitted,

JAMES H. BOLITHO,
Attorney of Albert Dickerson.

New Jersey Court of Errors and Appeals

BENJAMIN L. HARRISON, Plaintiff-Appellee, vs. ALBERT DICKERSON, Defendant-Appellant.	Action at Law. On Appeal.

BRIEF OF BENJAMIN L. HARRISON, PLAINTIFF-APPELLEE

Facts

Benjamin L. Harrison, in 1913, instituted suit in the Common Pleas Court of the County of Morris against the defendant, Albert Dickerson for Five Hundred Dollars, for failure and neglect of the defendant to return to the plaintiff all the sawed lumber from forty-three logs cut from plaintiff's property by defendant and carted to his mill, and also for damages sustained by plaintiff occasioned by delay in completing the new house of plaintiff for which lumber was intended and in being required to purchase the balance of the lumber elsewhere, which defendant should have delivered to the plaintiff from the forty-three logs. On December 1st, 1913, the par-

ties appeared in the Common Pleas Court to try the issue and it was stipulated (Case, pp. 8 and 9), that Albert Dickerson had instituted a suit in the District Court against Harrison for $92.31, and which case was appealed to the Common Pleas Court, and that the correctness of that account was not disputed and it was further admitted that there was no set-off or recoupment filed by Harrison at the suit of Dickerson in the Justice Court.

It was thereupon moved by the attorney of Dickerson in the suit of Harrison before the Common Pleas Court that a non-suit should be granted on the ground that Section 24 of the Small Cause Court Act of 1903, forever barred plaintiff from maintaining his action because he failed to file a set-off or recoupment in the action before the Justice.

The Court thereupon granted a non-suit and an appeal was taken to the Supreme Court and by the opinion of that Court on November 20, 1914, the judgment of the Common Pleas Court was reversed and a venire *de novo* was awarded (Case, p. 11).

Argument

Under Section 1 of the Small Cause Court Act, Gen. Stat. p. 2981, actions of a civil nature, cognizable before a Justice of the Peace, shall not exceed, exclusive of costs, the sum of two hundred dollars.

The test under this section as to whether the Justice has jurisdiction is the amount *in dispute* and not the amount of the judgment, verdict or ultimate recovery. A Justice of the Peace has no jurisdiction to hear or try any case in which

the matter in dispute exceeds the sum of Two Hundred Dollars. Where a matter in dispute shows on the face of the pleadings that it is in excess of the jurisdictional amount, whether in the State of Demand or in a set-off, the Justice would be obliged to dismiss it. He cannot under the first section of the act constituting Courts for the trial of Small Causes, proceed to hear the matters contained in the set-off, if the claim demanded therein exceeds the sum of Two Hundred Dollars for this section of the act limits his jurisdiction to that amount.

In the case of *Clancy vs. Neumeyer,* 22 Vroom, page 299, Reed, J., at page 301, says:

> "The amount in dispute is therefore in excess of the jurisdictional sum limited by the Statute and it is the amount in dispute, not what may be ultimately recovered, that is the test of jurisdiction. It is apparent, therefore, that whenever one of the parties claims that there is due to him more than $200 it ends the power of the Court to try that claim."

At the bottom of page 302, he further states:

> "But the view that the justice shall in any case proceed to hear, and if he finds a balance below $200, should enter judgment in the case, and if he finds a balance above $200, should enter that fact upon his docket and dismiss the cause, rests upon the notion that jurisdiction depends upon the sum recovered and not upon the sum in dispute. But as already observed, it is the amount in dispute which, by the express terms of the Small Cause Act, determines jurisdiction."

Application of Section 24

Section 24 of the Small Cause Act, General Statutes, 2988, states:

> "that if the defendant have any demand against the plaintiff, he shall file the same as a set-off or recoupment against the demand of the plaintiff, * * * and in default thereof * * * he shall forever thereafter be precluded from maintaining any action for such demand * * * EXCEPT WHERE THE BALANCE FOUND TO BE DUE EXCEEDS THE SUM OF TWO HUNDRED DOLLARS. * **"

On this section in both the case of *Sipley vs. Wass,* 47 Law, page 187 and *Clancy vs. Neumeyer* 51 Law, page 301, it was decided that where the amount of the defendant's claim exceeded $200 he could bring suit on the same even though he had not filed it as a set-off in the previous action in the Small Cause Court.

In the case of *Sipley v. Wass,* above referred to, reported in 18 Vroom, 187, Dixon, J., delivered the opinion for the Supreme Court on the question whether a suit could be maintained in any other Court having cognizance of an action where the same had not been set-off in a previous action before the justice, the Court said:

> "The principal question raised by the pleadings in this case is whether if the defendant in a suit before the Court for the trial of Small Causes has a claim against the plaintiff so large as to involve a controversy beyond jurisdiction of that Court, he must nevertheless present it there as a set-

off or be precluded from afterwards recovering it in any other Court.

"The preclusion of the defendant in such a suit from subsequently recovering in another Court, a claim which he had against the plaintiff pending that suit, arises not from any general rule of law, but solely from the twenty-fourth section of the Justice's Court Act. That section enacts: 'If any defendant neglect or refuse to deliver a copy of his or her account or state of demand against such plaintiff, he or she shall forever thereafter be precluded from having or maintaining any action for such account or demand, or from setting off the same in any future suit; provided always that where the balance found to be due to such defendant exceeds the sum of One Hundred Dollars; then said defendant shall not be precluded from recovering his or her account or demand against such plaintiff in any other Court of Record having cognizance of the same.' "

And at page 189, the Court further said:

"The plain meaning of the section is that if a plaintiff shows that the balance due to him exceeds $100 he is not to be barred from recovery because when previously sued by the defendant before a Justice's Court, he had not interposed his claim as a set-off."

It will be observed that Section 24 referred to in case of *Sipley v. Wass,* is under the act constituting Courts for the trial of Small Causes, Revision 1874, and also under Section 1 of said

act of civil jurisdiction of the justice did not exceed One Hundred Dollars. The jurisdiction was, however, increased to two hundred dollars by act of the legislature (P. L., 1879, p. 115). There was no change in Section 24 of Revision 1874 (concerning set-off), until the Revision of Laws, Pamphlet Laws 251, constituting said Court "The Small Cause Court" whereupon Section 24, aforesaid, was revised and changed from *proviso,*

> "that where the balance found to be due to such defendant exceeds the sum of One Hundred Dollars, then the said defendant shall not be precluded from recovering his or her account or demand against such plaintiff, in any other Court of Record having cognizance of the same,"

to an exception as follows:

> "except where the balance found to be due to such defendant exceeds the sum of Two Hundred Dollars and such excess shall not have been waived."

Aside from these and a few other changes, the manifest intention of the Act of 1903 is the same as that of the Statute of 1874, upon which the opinion of *Sipley v. Wass* is based, and the plaintiff's claim being for more than $200 (the increased jurisdiction), he is not barred from recovery in another Court.

Section 25 of the Small Cause Act Does not Apply to the Case in Question

Section 25 does not apply to the facts in this case as that section provides a course of procedure in the event of set-off is filed for an amount

exceeding $200, but nothing in this section makes it compulsory upon the defendant to file as a set-off, a claim against the plaintiff where the amount of defendant's claim exceeds $200.

The objects of the Legislature in enacting Section 25 could not have been to give the justice jurisdiction to ascertain by trial whether the difference between the defendant's claim and the plaintiff's demand exceeds $200, for, if this were their object, then it would make Section 25 inconsistent with Section 1, for that section as heretofore quoted states *"Where the matter in dispute,"* and this is very aptly and plainly interpreted by Reed, J., in *Clancy v. Neumeyer,* 22 Vroom, at page 302, as follows:

> "There flows from the act of filing the off set no admission on the part of the defendant that he owes the plaintiff the amount of his demand or any part thereof. The defendant is at full liberty to contest the validity of the plaintiff's claim as is the plaintiff at liberty to contest his. *The dispute* is not therefore in reference to whether the plaintiff owes the defendant the difference between the two sums, but involves a contest as to whether each owes the other the full amount of the respective counterclaims."

And at page 302, as previously quoted, he stated:

> "But the view that the justice shall in any case proceed to hear, and if he finds a balance below $200, should enter judgment in the case, and if he finds a balance above $200, should enter that fact upon his docket

> and dismiss the cause, rests upon the notion that the jurisdiction depends upon the sum recovered and not upon the sum *in dispute*. But as already observed, it is the amount *in dispute* which by the express terms of the Small Cause Act, determines jurisdiction.''

It is, therefore, respectfully urged that under the law and these decisions interpreting the statute, it is not necessary for a defendant in an action in a Small Cause Court to file as a set-off a claim over which the justice has no jurisdiction, and have it dismissed by him, before an action can be maintained on the claim before a Court having the proper jurisdiction to hear and try the matter.

Harrison sued Dickerson in the Common Pleas Court for Five Hundred Dollars and it was error for the Common Pleas Court to non-suit, and in accordance with the views expressed by the Supreme Court in this case (see printed case, p. 11), the judgment awarding a trial *de novo* should be affirmed.

ELMER W. ROMINE,
Attorney and Counsel for
Plaintiff-Appellee.

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Supreme Court

of the

State of New Jersey

BENJAMIN L. HARRISON, Plaintiff and Respondent, vs. ALBERT DICKERSON, Defendant and Appellant.	Action at Law.

Notice and Grounds of Appeal

To Elmer W. Romine, Esq., Attorney of Plaintiff-Respondent:

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause in the Supreme Court on the following grounds:

1. The fact that it was admitted in the Court of Common Pleas by the said Benjamin L. Harrison that he did not file a set-off or recoupment in a certain action (growing out of the same transaction) previously instituted and tried in the Court for the Trial of Small Causes, wherein said Benjamin L. Harrison was the defendant and the said Albert Dickerson was plaintiff, operated against and estopped the said Benjamin L. Harrison from maintaining this cause of action in the Court of Common Pleas.

2. The said Court of Common Pleas legally granted a non-suit to said Albert Dickerson, because Sections 24 and 25 of the Act Constituting Courts for the Trial of Small Causes precluded said Benjamin L. Harrison from maintaining his action in another Court after he had neglected to file his claim by way of set-off or recoupment in the said action (growing out of the same transaction) in the Court for the Trial of Small Causes.

3. It makes no difference that the complaint of said Benjamin L. Harrison in the Court of Common Pleas disclosed that he sued for five hundred dollars, an amount in excess of the jurisdiction of the Court for the Trial of Small Causes, as there is no limit to the amount which may be claimed, but the amount due is ascertained only after the evidence has been heard.

4. The Court properly refused to permit Benjamin L. Harrison to present his case in the Court of Common Pleas and to introduce evidence in that Court to ascertain whether his claim amounted to more than two hundred dollars, the jurisdictional limit of the Court for the Trial of Small Causes, because that should have been ascertained in the Court for the Trial of Small Causes.

5. Said Benjamin L. Harrison was required by Sections 24 and 25 of the Act Constituting Courts for the Trial of Small Causes, as a preliminary test to maintaining his action in the Court of Common Pleas, to file his set-off or recoupment against said Albert Dickerson in the prior action between the said parties (growing out of the same transaction) in the Court for the Trial of Small Causes, and therein first ascertain that his claim

actually amounted to more than two hundred dollars.

6. Section 24 of the Act Constituting Courts for the Trial of Small Causes made it compulsory for said Benjamin L. Harrison to file a set-off or recoupment in the action between the parties in that Court, and Section 25 of said Act provided what should have been done had it appeared that he was entitled to more than two hundred dollars, if he was not willing to waive the excess over that amount, because his action was not for damages sounding in tort, but one for damages for breach of contract out of which the prior action between the said parties grew.

7. And the decision of the New Jersey Supreme Court in said cause, setting aside the non-suit and awarding a new trial is therefore erroneous.

Dated, March 20, 1916.

JAMES H. BOLITHO,
Attorney for Appellant.

Judgment Record

MORRIS COMMON PLEAS COURT

BENJAMIN L. HARRISON,
Plaintiff,

vs.

ALBERT DICKERSON,
Defendant.

Albert Dickerson, defendant in this case was summoned to answer unto Benjamin L. Harrison, the plaintiff therein, in an Action at Law upon the following complaint:

Amended Complaint

COURT OF COMMON PLEAS OF THE COUNTY OF MORRIS

BENJAMIN L. HARRISON, Plaintiff, vs. ALBERT DICKERSON, Defendant.	Action at Law.

Plaintiff residing at Hanover Township, Morris County, New Jersey, says that:

(1) Plaintiff on or about January 15, 1913, at the defendant's saw mill, at Mount Tabor, requested defendant to cut for him some standing timber from plaintiff's property at Whatnong Terrace, Hanover Township, cart the timber so cut to defendant's saw mill and saw the same into lumber for said plaintiff, which defendant agreed to do.

(2) Plaintiff further stated to defendant on or about January 15, 1913, at his, the defendant's mill, that the work must be commenced at once, as plaintiff desired the lumber to be sawed in time for use in the construction of a new house to be erected by plaintiff within three months from that time at Whatnong Terrace and defendant agreed to deliver the lumber to be sawed from the logs in time for such use as the plaintiff requested.

(3) Defendant further agreed with plaintiff to saw up such logs as were taken by him from plaintiff's property into lumber; after all sawing was

done and logs made into lumber, defendant was to render bill to plaintiff for his charges, for cutting and carting of logs and sawing of the lumber, and if correct, plaintiff agreed with defendant to pay the same by permitting defendant to take sufficient of the lumber as sawed as would equal the amount of said bill.

(4) Defendant in pursuance of said agreement cut from plaintiff's property forty-three logs and carted them away from plaintiff's property to his, the defendant's, saw-mill.

(5) The defendant thereafter at various times delivered to plaintiff a total of about 3,000 board feet of lumber as sawed from plaintiff's logs, but no portion of the balance of the sawed lumber or logs, as cut, has been returned or delivered to the plaintiff, although it has been demanded.

(6) Because of the failure of defendant to comply with plaintiff's request and carry out agreement to deliver the lumber cut from plaintiff's logs in time for use in plaintiff's new house, plaintiff was compelled to and did purchase the lumber required elsewhere at a greater cost and at considerable more expense to the plaintiff's damage.

Plaintiff demands as damages Five hundred dollars.

ELMER W. ROMINE,
Attorney for Plaintiff.

Answer

COURT OF COMMON PLEAS OF THE COUNTY OF MORRIS

BENJAMIN L. HARRISON,
Plaintiff,
vs.
ALBERT DICKERSON,
Defendant.

Defendant residing at Mount Tabor, in the Township of Denville, in the County of Morris and State of New Jersey, says that:

1. He denies the truth of the matters contained in the complaint; and submits it to the country.

2. On August 21st, 1913, in an action in the Small Cause Court, before M. S. Lambert, Esq., one of the Justices of the Peace, in and for the said County of Morris, defendant in this action recovered a judgment against the plaintiff herein for Fifty-five dollars and costs of suit.

3. The cause of action upon which the said judgment was recovered was a cause of action growing out of the same transaction as that set out in the complaint filed in this cause.

4. Plaintiff in this cause of action, who was defendant in that action, did not make demand or claim against this defendant by filing any set-off, recoupment, or counterclaim of any kind.

5. Therefore, the defendant herein makes the following objections in point of law.

(*a*) That, because in the said action in the said The Small Cause Court, plaintiff herein did not file such set-off, recoupment or counterclaim, he is precluded from maintaining this action for such demand or claim.

(*b*) That, because this action is based on the sale of standing timber, defendant will also rely on Section Four of the Statute of Frauds.

Dated, August 21, 1913.

JAMES H. BOLITHO,
Attorney for Defendant.

Judgment

BENJAMIN L. HARRISON, Plaintiff, vs. ALBERT DICKERSON, Defendant.	Action at Law.

This action was heard before Judge Joshua R. Salmon, with a jury in the presence of the counsel of respective parties at the Morris Common Pleas, on December first, One thousand nine hundred and thirteen.

This case being called and a jury being empanelled and sworn to try the same and the attorney of the defendant after the opening by the attorney of the plaintiff and after an agreement as to the state of the facts in the case by the respectice counsel, moves the Court to dismiss the plain-

tiff's case and direct the jury to render a verdict for the defendant, whereupon the Court dismissed the case with costs.

Costs taxed at $44.94.

Stipulation and Transcript

MORRIS COUNTY COURT OF COMMON PLEAS

BENJAMIN L. HARRISON, Plaintiff, vs. ALBERT DICKERSON, Defendant.	Action at Law.

Transcript of shorthand notes taken at the trial of the above entitled cause, at the Court House in Morristown, N. J., on December 1, 1913.

Before HON. JOSHUA R. SALMON, Judge and a Jury.

For the plaintiff, Elmer W. Romine.
For the defendant, James H. Bolitho.

Mr. Romine: It is admitted by the counsel in this case that the claim of the defendant against the plaintiff, of $92.31, in the case of Albert Dickerson, plaintiff, vs. Benjamin L. Harrison, defendant, as tried before Justice Lambert in the Court below, which is now on appeal in this Court,

is correct, and we do not ask the defendant to prove the correctness of that account.

We further admit that there was no set-off filed, or recoupment, by the plaintiff in this case, in the suit before the justice of the peace wherein the plaintiff in this case was the defendant at the suit of Dickerson the plaintiff.

We further admit that the plaintiff in this case paid to the defendant eight dollars before the suit in the Justice Court.

Mr. Romine opens for the plaintiff.

Mr. Bolitho: I move the Court to dismiss the plaintiff's case and direct the jury to render a verdict for the defendant for $84 and costs, on the ground of the provision of the law contained in Sections 24 and 25 of the Small Cause Court Act of 1903, to the effect that if the defendant (who is the plaintiff here) in the Court below fails to file his set-off or recoupment in that action, he is forever barred from maintaining an action for the same, and therefore cannot maintain his action in this Court.

The Court: You said "If the defendant below failed to file a recoupment;" you mean "because?"

Mr. Bolitho: I will correct that.

The Court: I think what I ought to do is to dismiss this case, and without directing the jury to do anything; to go on with your appeal and try the matter out *de novo*. This is the disposition that I will make of it; the motion to dismiss the case will be granted because of the facts obtaining relating to the stipulation between the parties.

Mr. Romine: I will take an exception to your Honor's ruling, on the ground that our set-off is

for unliquidated damages, and according to law we could not possibly file a set-off or recoupment in any Court for unliquidated damages. And also because the amount of our claim exceeds the $200 limit of jurisdiction of the justice.

The Court: Of course an exception is granted.

JOSHUA R. SALMON,
Judge, etc.

Whereupon the Court granted a non-suit in favor of the defendant, Albert Dickerson and against the plaintiff, Benjamin L. Harrison.

ELMER W. ROMINE,
Attorney of Benjamin L. Harrison.

Certificate

State of New Jersey, } ss:
County of Morris. }

I, Elias Bertram Mott, Clerk of the County of Morris and also Clerk of the Court of Common Pleas, holden in and for said County, do hereby certify that the foregoing are true full and correct copies of the Notice of Appeal, Amended Complaint, Answer and Judgment Record, in the case of Benjamin L. Harrison, plaintiff vs. Albert Dickerson, defendant, as fully and entirely as the same remains on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court and County at Morristown, this Eleventh day of February, A. D., 1914.

ELIAS BERTRAM MOTT,
Clerk.

(Seal)

Decision

NEW JERSEY SUPREME COURT

JUNE TERM, 1914

BENJAMIN L. HARRISON,
Appellant,
v.
ALBERT DICKERSON,
Respondent.

Submitted July 15, 1914; Decided Nov. 20, 1914.

On Appeal.

Before GUMMERE, C. J. and Justices GARRISON and MINTURN.

For the appellant, E. W. Romine.

For the respondent,

PER CURIAM:

The Common Pleas non-suited the plaintiff in an action brought in that Court and *ad damnum* $500. The ground of the non-suit was that the plaintiff, when sued in a Justice's Court upon a cause of action that arose out of the same transaction, did not file any set-off or recoupment based upon the claim for which the action in the Pleas was brought. The judgment of non-suit was erroneous under the cases of Sipley v. Wass (47 N. J. L., p. 187) and Clancy v. Neumayer (51 N. J. L., p. 299). It is argued that these decisions are inapplicable because of Section 25 of the Small Cause Act of 1903 (Revision) which was

enacted after the decisions in question had been made. We do not think that Section 25 has this effect; it provides what shall happen if a set-off is filed but does not abrogate the previous decisions as to the compulsion to file it.

The judgment of the pleas is reversed and a *venire de novo* awarded.