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Order.

In Chancery of New Jersey.

SAMUEL B. FELD, Complainant, and REUBEN B. KANTROWITZ, et als., Defendants.	On Bill &c. Order.

Upon this matter being opened to the Court by Peter J. McGinnis of counsel (Feld, Weiss & Feld, solicitors), on motion for an allowance to complainant for an additional counsel fee for services rendered as counsel in the appeal of the above matter:

It is on this 15th day of March, 1928, ORDERED that there be allowed to Peter J. McGinnis of counsel, the sum of Five Hundred Dollars as an additional counsel fee for services rendered in the Court of Errors and Appeals, in the appeal of the above cause from the Court of Chancery.

E. R. WALKER,
C.

Respectfully advised,

JOHN BENTLEY,
Vice Chancellor.

Opinion.

No. 41 October Term, 1927.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

SAMUEL B. FELD,
Complainant-Respondent,

and

REUBEN B. KANTROWITZ,
Defendant-Appellant.

and

HARRY H. WEINBERGER, *et als.*,
Defendants.

Argued October 26th, 1927; decided February 6th, 1928.

On Appeal from a Decree of the Court of Chancery.

For the appellant: FEDER & RINZLER, Esqs., and ARTHUR T. VANDERBILT, Esq.

For the respondent: WARD & MCGINNIS, Esqs.

Per Curiam.

This case was before this court at the February Term, 1926, for the determination of the question whether the Court of Chancery had erred in refusing an injunction pending final hearing. 99 N. J. E. 847. The complainant-respondent claims

to be a one-sixth owner of a contract to purchase an office building in the City of Passaic. The contract was taken in the name of the appellant, Reuben B. Kantrowitz, who was in fact a trustee for a syndicate although not so described in the contract. Later Kantrowitz became possessed of a five-sixths interest in the contract. The complainant below, Samuel B. Feld, had a one-sixth interest in the contract. Kantrowitz sold the contract to one, Rose Zucker, who was declared an innocent purchaser so far as Feld was concerned. Feld in his bill has brought in all the parties connected with the transaction. He asks that Kantrowitz be held as a trustee and that Kantrowitz be compelled to account to him for such share of the proceeds as he (Feld) is entitled to.

The Court of Chancery made a decree which recognized the claim of Feld to a one-sixth interest in the contract, fixed the value of said interest, directed the payment thereof to the complainant, and also directed the payment to Feld of the original investment made by him, and awarded to counsel of Feld a counsel fee. Kantrowitz was also directed to pay the taxed costs.

From this decree Kantrowitz has appealed. The following grounds of appeal are urged for a reversal of the decree:

1. The Court of Chancery had no jurisdiction to hold the cause against Kantrowitz after the bill had been dismissed as to Rose Zucker, the innocent purchaser of the contract. We see no merit in this contention. The Court of Chancery has always had jurisdiction in cases where the claim is made that property is held in trust and

in matters of account. No citations of authority on this position are needed.

2. The complainant did not sustain the burden of showing a contract in writing under the Statute of Frauds. The proofs show no document is missing except an assignment made by Kantrowitz to Harry H. Weinberger. This is accounted for. The complainant sustained his burden.

3. That the complainant is in laches and estopped from asserting his claim. There is no evidence to support such a contention.

4. Complainant's recovery should be limited to one-sixth of what Kantrowitz obtained for the property over the cost thereof. To adopt this contention would mean that a trustee ex maleficio could sacrifice a property at a sale and not be liable to his beneficiary for the real value of the property. We see no merit in this contention.

The other grounds of appeal deal with the complainant's investment, relief from costs and counsel fee paid to Mrs. Zucker, and relief from payment of any counsel fee to Feld. These were all matters which the appellant's conduct justified, in our opinion, the Court of Chancery deciding against him.

The decree appealed from is affirmed with costs. Endorsed:

Filed Feb. 6, 1928,

JOSEPH F. S. FITZPATRICK,
Clerk.

Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

Between
SAMUEL B. FELD,
Complainant,
and
REUBEN B. KANTROWITZ,
Defendant.

Notice of Appeal.

Defendant Reuben B. Kantrowitz hereby appeals from the final decree made by the Chancellor on the advice of Vice-Chancellor Bentley in the above entitled cause on March 15, 1928, and from the whole and every part thereof to the Court of Errors and Appeals in the Last Resort in all Causes.

FEDER & RINZLER,
Solicitors of Defendant Reuben B. Kantrowitz.

I conceive there is good cause for the appeal in the above cause.

ARTHUR T. VANDERBILT,
Of Counsel with Defendant Reuben B. Kantrowitz.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

SAMUEL B. FELD, Complainant-Respondent, vs. REUBEN B. KANTROWITZ, Defendant-Appellant,	On Appeal from Court of Chancery. Petition of Appeal.

To the Honorable the Court of Errors and Appeals in the Last Resort in all Causes:

The petition of Reuben B. Kantrowitz, the appellant in the above entitled cause, respectfully shows that:

Petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey on the 15th day of March, 1928, in a certain cause in said Court of Chancery wherein the said Samuel B. Feld was complainant and the said Reuben B. Kantrowitz and others were defendants, in this respect, to wit, that the said decree adjudges that Peter J. McGinnis, of counsel for complainant, be allowed from defendant the sum of Five Hundred Dollars ($500.) as an additional counsel fee for services rendered in the Court of Errors and Appeals in the appeal of the cause from the Court of Chancery.

And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the

ground that the same is erroneous in the following respects:

A. The court below erred in granting said additional counsel fee to Peter J. McGinnis, appearing as counsel for complainant.

B. The court below had no jurisdiction to allow any counsel fee in this cause for services rendered in the Court of Errors and Appeals.

C. This cause did not present a proper case for the allowance by the court below of counsel fees for services rendered in the Court of Errors and Appeals in connection with an appeal from the Court of Chancery.

Your petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden and that the petitioner may have such other relief in the premises as to this court shall seem proper.

FEDER & RINZLER,
Solicitors of Defendant Reuben B. Kantrowitz.

ARTHUR T. VANDERBILT,
Of Counsel with Defendant Reuben B. Kantrowitz.

Answer.

NEW JERSEY COURT OF ERRORS AND APPEALS.

SAMUEL B. FELD, Complainant-Respondent, and REUBEN B. KANTROWITZ, Defendant-Appellant.	On Appeal from Court of Chancery.

The answer of the above-named respondent to the petition of appeal of the above named appellant.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true for answer thereto, nevertheless, says and admits that an order was on the 15th day of March, 1928, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated, but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes, that the said order is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

WARD & McGINNIS,
Solicitors of Respondent.

PETER J. McGINNIS,
Of Counsel.

Memorandum Opinion.

(*Printed by authority of Vice Chancellor Bentley*)

COURT OF CHANCERY OF NEW JERSEY

JOHN BENTLEY

Vice Chancellor

Jersey City, N. J. Mar. 12, 1928.

Ward & McGinnis, Esq'rs,
Paterson.

Arthur T. Vanderbilt, Esq.,
Kinney Building, Newark.

Feder & Rinzler, Esq'rs,
Liggett Bld., Passaic, N. J.

Gentlemen:

After considering the arguments made by Mr. McGinnis, Mr. Feder, and the letter of Mr. Vanderbilt, I think that under all the circumstances an additional allowance to Messrs. Ward & McGinnis should be made in the sum of $500. As Mr. Vanderbilt says, Kantrowitz has already been obliged to pay a rather heavy counsel fee in proportion to the amount involved, and $500 ought to go a long ways in relieving Mr. Feld of the burden of compensating counsel for arguing the appeal.

It is true, as Mr. Vanderbilt says, that there were arguable questions presented on the appeal, and I have no quarrel with counsel for taking the appeal. However, sight cannot be lost of the fact that Mr. Feld was obliged to meet the expense of opposing the appeal, and having been successful in

both courts is entitled to a contribution from the unsuccessful party.

I am somewhat surprised at the argument that counsel fee cannot be allowed in this court for services rendered in the Court of Errors and Appeals, since the case of Weeks v. Lister, 62 N. J. Eq., 813, upon which I relied in Sobel v. Sobel, 99 N. J. Eq., 707, and which was affirmed by the Court of Errors and Appeals.

Yours very truly,

(Signed) JOHN BENTLEY.

New Jersey Court of Errors and Appeals

Between: Samuel B. Feld, Complainant-Respondent, and Reuben B. Kantrowitz, Defendant-Appellant.	On Appeal from Court of Chancery

BRIEF ON BEHALF OF RESPONDENT

The appeal brings up for review an order of the Court of Chancery, allowing an additional counsel fee of $500.00 to the complainant's counsel. This allowance was made after the appeal of the defendant had been dismissed, and the additional counsel fee was based on the services rendered in the appeal before the Court of Errors and Appeals.

The memorandum of Vice Chancellor Bentley (Page 9 of State of Case), relies on the cases of Weeks vs. Lister, 92 N. J. Eq. 813 and Sobel vs. Sobel, 99 N. J. Eq. 707. We think these cases are justified.

In the Weeks case, exactly the same situation arose as in the case at bar, and the Court distinctly recognized the right of the Court of Chancery to fix the counsel fee, or disbursement allowance, for services in the Court of Errors.

Said the Court in its Per Curiam opinion:

> "The application for counsel fees should be made in this Court. If the Court then passes on it, the decision is final, but if the

> Court does not pass on it, or if through mere inadvertence the application is not made while the case is before this court, then after the remittitur, the Court of Chancery has jurisdiction to grant counsel fees and printing in the Court of Errors and Appeals, upon the proper case being presented in these respects."

In the case at bar, the Court of Errors did not pass upon it. This was due to the fact that when the opinion was filed, the Court of Errors was no longer in session, so that, either because of this, or if it were possible to make application on the theory of "mere inadvertence", the power was lodged in the Court of Chancery.

In the case of Sobel vs. Sobel, 99 N. J. Eq., p. 707, the Weeks case was approved at page 710, and the Court italicized the words, "But if the Court does not pass on it."

Said the Court further:

> "Where the Court of Errors and Appeals decides a case, and remits the record to this court, all motions in the case should be made in this court, where the record is, and this includes a motion for counsel fees for services rendered in the Court of Errors and Appeals." (P. 707.)

So far as the power of the Court of Chancery is concerned to grant counsel fees, we would refer to Section 91 of the Chancery Act, which is set out in full at page four of Appellant's brief. Note the first words of the Section, "In any cause, mat-

ter or proceeding in the Court of Chancery."

This was a cause or proceeding in the Court of Chancery; the case originated there. It was appealed to the Court of Errors and Appeals, which temporarily lifted it out of the Court of Chancery. The appeal being dismissed, it was then remitted to the Court of Chancery, so that it became once more a cause in the Court of Chancery.

The court in allowing counsel fees had the right to consider the work done irrespective of where it was done. By analogy we would cite the cases where receivers are obliged to go into courts of law and institute or defend actions. When the time comes to allow proper counsel fees, the Chancellor of course, would take into consideration the amount of litigation that the receiver was obliged to take, and allow accordingly. Can it be said that the Court of Chancery was stepping out of its jurisdiction in fixing the fees in the Supreme or various Circuit Courts?

Counsel for appellant must have conceived the practice of the Chancellor as sound, otherwise this same question could have, and should have been, raised on the appeal in the main case. In the appeal there was before the court, the counsel fee of $2000, which had been allowed counsel for Mr. Feld, and considered in the work done, was for his services before the Court of Errors and Appeals, and his disbursements there.

CONCLUSION

Believing that there is no merit in the appellant's contention, it is respectfully submitted that the appeal should be dismissed.

WARD & McGINNIS,
Attorneys of Respondent.
PETER J. McGINNIS,
Of Counsel.

May Term, 1928.

New Jersey Court of Errors and Appeals

Between
SAMUEL B. FELD,
Complainant-Respondent,

and

REUBEN B. KANTROWITZ,
Defendant-Appellant.

On Appeal from Court of Chancery.

BRIEF FOR DEFENDANT-APPELLANT.

An appeal was taken to this Court at the October, 1927 term by the present defendant-appellant from a decree of the Court of Chancery, which is summarized in the opinion of this Court as follows: (S. C. p. 3, ll. 21-29)

> "The Court of Chancery made a decree which recognized the claim of Feld to a one-sixth interest in the contract, fixed the value of said interest, directed the payment thereof to the complainant, and also directed the payment to Feld of the original investment made by him, and awarded to counsel of Feld a counsel fee. Kantrowitz was also directed to pay the taxed costs."

The opinion of this Court, filed February 6, 1928, concluded with the words: "The decree appealed from is affirmed with costs." (S. C. p. 4, ll. 32-35).

No application has been made to the Court of Errors and Appeals by counsel for the complainant-respondent for the allowance of any counsel

fee. After the entry of the remittitur such an application was made to Vice-Chancellor Bentley who had originally heard the case, and an order was entered on March 15, 1928 "that there be allowed to Peter J. McGinnis of counsel, the sum of Five Hundred Dollars as an additional counsel fee for services rendered in the Court of Errors and Appeals, in the appeal of the above cause from the Court of Chancery". (S. C. p. 1, ll. 25-30)

It is from this order that the present appeal has been taken. This was neither a matrimonial suit nor one involving a fund within the control of the Court. The question involved, therefore, is whether this was a proper case for an application directly to the Court of Errors and Appeals for a counsel fee, and whether, no such application having been made to this Court, the case was a proper one for an allowance by the Court of Chancery after the entry of the remittitur.

It is the contention of defendant-appellant that the authority of the Court of Chancery to allow counsel fees for work done in the Court of Errors and Appeals is limited by the decision of this Court in *Weeks* v. *Lister,* 62 N. J. Eq. 813, to "a proper case being presented in these respects"; that a "proper case" for the allowance of counsel fees by the Court of Errors and Appeals itself is either a matrimonial suit or one involving a fund within the control of the Court; that the Court of Errors and Appeals would not have made any allowance for counsel fees in the present case had such application been presented; and that, therefore, the Court of Chancery had no jurisdiction to make the order of March 15, 1928.

POINT I.

This case did not present a proper case for the allowance by the court below of counsel fees for services rendered in the Court of Errors and Appeals in connection with an appeal from the Court of Chancery.

The leading case in this state on the question presented by this appeal is *Weeks* v. *Lister,* 62 N. J. Eq. 813, in which this Court said:

> "The application for counsel fees should first be made in this court. If the court then passes on it, the decision is final, but if the court does not pass on it, or if through mere inadvertance the application for counsel fees is not made while the case is before this court, then after the remittitur, the court of chancery has jurisdiction to grant counsel fees and printing in the Court of Errors and Appeals upon a proper case being presented in these respects."

The learned Vice-Chancellor in his memorandum opinion relied upon *Weeks* v. *Lister,* 62 N. J. Eq. 813 and *Sobel* v. *Sobel,* 99 N. J. Eq. 77, affirmed 5 N. J. Adv. Rep. 271; 138 Atl. 893.

These cases are clearly distinguishable. In Weeks v. Lister there was a fund within the control of the Court, and it was, therefore, a proper case for an original application to the Court of Errors and Appeals for a counsel fee. Sobel v. Sobel presented to this Court an appeal from a decree awarding alimony, and since an application was properly made directly to this Court in a matrimonial suit for an allowance of counsel fees, and this Court not having passed on it, it was

proper for the Court of Chancery to entertain the application subsequently made by the petitioner's counsel.

It becomes necessary, therefore, to examine into the authority of this Court and of the Court of Chancery to allow counsel fees in ordinary suits *inter partes*. The general rule is that the power of the Courts to allow counsel fees depends upon statutes.

> "The general rule requires each party to the litigation to pay his own counsel fees. Attorney's fees are not allowable in the absence of a statute, or in the absence of some agreement or stipulation specially authorizing the allowance thereof; and it has been held that the rule applies equally in courts of law and in courts of equity." (15 C. J. Section 248.)

Section 91 of the Chancery Act (1 C. S. 445) confers such authority upon the Court of Chancery as follows:

> "91. *Counsel fees and costs; allowances; fees in foreclosure; amount.* In any cause, matter or proceeding in the Court of Chancery the chancellor may make such allowances by way of counsel fee to the party or parties obtaining the order or decree as shall seem to him to be reasonable and proper, and shall direct which of the parties shall pay such allowances; or, where such allowances are ordered to be paid out of property or funds, shall specify and direct the property or funds liable therefor. The chancellor may provide for the inclusion of such allowances in the taxable costs, or may provide for their collection in such other manner as is agreeable to the practice of the court."

There is no similar statutory provision permiting the Court of Errors and Appeals to allow counsel fees in ordinary suits *inter partes*.

Section 15 of the Act concerning the Court of Errors and Appeals (2 C. S. 1710) provides as follows:

> "It shall be in the discretion of this Court, in cases of appeal from a decree or order of the chancellor, to award costs or not."

This statute is inapplicable because costs do not include substantial counsel fees.

And Rule 40 of the Court of Errors and Appeals Rules, provides that:

> "The prevailing party shall be considered as recovering costs in this Court, when costs are by law recoverable, in which shall be included costs of printing the state of case, unless the Court shall, in express terms, adjudge to the contrary."

In *Apperson* v. *Mutual Benefit Ins. Co.*, 38 N. J. L. 388, Justice Depue defined "costs" as follows:

> "The word costs is a word of known legal signification. It signifies, when used in relation to the expenses of legal proceedings, the sums prescribed by law as charges for the services enumerated in the fee bill. Costs are only recoverable by force of a statute, and the allowance of them, in any case, will depend on the terms of the statute. *Corrigal* v. *London Railway Co.*, 5 M. & G. 219; *Metler* v. *E. and A. R. R. Co.*, 8 Vroom 222. In taxing costs, the only charges which can be allowed are those specifically provided for in the fee bill, and are not to be increased or diminished at the discretion of the court. *Anonymous, Spencer 112.* Under a statute which provided that, where a com-

> plaint shall be dismissed, the party making the same shall be liable for all *fees* to *officers,* and for *all costs and expenses* incurred by the defendant, it was held that the costs and expenses recoverable by a defendant on a dismissal were only taxable costs, such as were allowable under the fee bill. *Potter* v. *Richards,* 10 Wend. 607.
>
> "We think the legislature used the word costs in this section in a strict legal sense, as embracing only such items as would be legally taxable, in favor of the successful party, and at such rates as are fixed by law."

See also on the point that counsel fees are not costs:

> *Carrill* v. *Golden,* 1 Misc. 265;
> *Brown* v. *Corey,* 134 Mass. 249;
> *Mutual Life* v. *Kroehle,* 61 N. Y. S. 944;
> *Hamilton* v. *Trumble,* (Md.) 59 Atl. 719.

"An Act to regulate fees" (2 C. S. 2277) provides at page 2281 for counsel fees in the Court of Errors and Appeals and Supreme Court:

> "for trial of a cause or arguing a demurrer or special verdict, three dollars."

It is this statute which determines the extent of the fee which may be taxed when this Court allows costs pursuant to 2 C. S. 1710, Section 15, and Rule 40.

It has been held that except as permitted by our statutes and except in cases involving the administration of estates, substantial counsel fees cannot be awarded.

Justice Reed in *O'Rourke* v. *Cleveland,* 49 N. J. Eq. 577, a contempt proceeding in the Court of Errors and Appeals, said at page 579:

> "The power to award a counsel fee is purely statutory. No legislative authority in this state can be discovered which permits it in this class of proceedings."

Similarly in *re Welsh,* 93 N. J. Eq. 303, Vice-Chancellor Backes said at page 305:

> "Allowance of counsel fee rests solely on the statutes, except where trust funds in the control of the court are being administered. *In re Queen,* 82 N. J. Eq. 588; *Sparks* v. *Ross,* 82 N. J. Eq. 121; *Lawyers Title and Trust Co.* v. *Comptroller,* 85 N. J. Eq. 481."

Similarly, on the subject of counsel fees in connection with an appeal from the Orphans' Court to the Prerogative Court, Vice-Chancellor Backes also decided, in *In re Queen,* 82 N. J. Eq. 588, that specific statutory authority was necessary, the administration of the funds of the estate not having been directly involved in the appeal. He said at pages 590-591:

> "The appeal in this case was taken from an order of the Orphans' Court dismissing a petition to vacate a decree denying probate of a purported will, and to set aside letters of administration granted by the surrogate of the county on the ground that the Orphan's Court was without jurisdiction to entertain the subject matter, because, as it was alleged, the decedent was a non-resident. The proceedings were solely to review the propriety of the dismissing order. The jurisdiction was strictly appellate. The appeal did not concern the funds of the estate. On such a review, this court is without authority to impose upon the defeated suitor counsel fees as part of the costs and expenses, unless authorized by statute or the settled practice of the court. There is no

statute which permits it. *Such practice does not obtain in our court of errors and appeals, nor does it exist here.* The costs which the prevailing party, on an appeal of this kind, is entitled to, are only those specifically provided for in the fee bill, and are not to be increased or diminished at the discretion of the court. *Apperson* v. *Mutual Benefit Life Insurance Co.,* 38 N. J. Law (9 Vr.) 388. Costs, generally, are regulated by the Fees and Costs Act (Comp. Stat. p. 2277), which prevails, except where substituted, supplemented or superseded by kindred enactments, as for instance, the Fees and Costs Act at law (Comp. Stat. p. 4129), the Fees and Costs act in Chancery (Comp. Stat. p. 445) those provided by the Orphan's Court Act (Comp. Stat. p. 3886), and the like. It required an act of the legislature to empower the Court of Chancery to award counsel fees to a successful complainant (P. L. 1902 p. 540), and another to permit that court to grant such allowance to a successful defendant. P. L. 1910 p. 427."

Vice-Ordinary Backes quite properly pointed out the analogy between the lack of authority, in both the Court of Errors and Appeals and the Prerogative Court, in the absence of statute, to allow counsel fees in connection with appeals which did not directly involve a fund under the control of the Court. The power of the Court of Errors to allow counsel fees in appeals dealing with the administration of estates is traceable to the early common law and is at present inherent in the Court and exists independently of statute. A similar historical explanation underlies the authority of the Court to grant counsel fees in matrimonial appeals, the husband being regarded as liable for the payment of his wife's reasonable expenses in connection with the matrimonial litigation.

But beyond these two classes of cases, statutory authority for allowances to counsel is required. Accordingly, since this case presented an ordinary suit *inter partes,* had an application been made by counsel for complainant-respondent directly to this Court for the allowance of a counsel fee, his application would necessarily have been denied by this Court.

Consequently, counsel for complainant-respondent could not, after the entry of the remittitur, present to the Court of Chancery "a proper case in these respects" as required by *Weeks* v. *Lister,* 62 N. J. Eq. 813, for an allowance for work done in connection with the appeal to this Court, and the Court of Chancery had no jurisdiction to make the order of March 15, 1928.

POINT II.

Conclusion.

For the reasons considered in the foregoing argument, it is respectfully urged that the Court of Chancery erred in allowing a counsel fee for services rendered in the Court of Errors and Appeals in this class of case, and that the order of March 15, 1928 should be reversed, set aside and for nothing holden, with costs to defendant-appellant.

Respectfully submitted,

FEDER & RINZLER,
Solicitors of Defendant-Appellant.

ARTHUR T. VANDERBILT,
of Counsel.