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Notice of Appeal.

(Filed 2/18/32.)

In Chancery of New Jersey

77-279.

Between

JENNIE REPETTI NOBILE,
Complainant,

and

FRANK J. BARTLETTA and
DANIEL REPETTI,
Defendants.

10

On Order for
Counsel Fee.

The defendants, Frank J. Bartletta and Daniel Repetti, Executors of the Last Will and Testament of Angelo Nobile, deceased, hereby appeal from the order allowing counsel fee made in the above entitled cause on the 23rd day of January, 1932, by the Chancellor on the advice of Vice Chancellor John J. Fallon, and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes. 20

ANTHONY P. LA PORTA,
Solicitor for and of Counsel 30
with the Defendants.

Dated, February 17th, 1932.

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

ANTHONY P. LA PORTA,
Solicitor for and of Counsel
with the Defendants. 40

Petition of Appeal.

(Filed 2/17/32.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

10 Between

JENNIE REPETTI NOBILE,
Complainant-Respondent,

and

FRANK J. BARTLETTA and
DANIEL REPETTI,
Defendants-Appellants.

On Appeal
from the
Court of
Chancery.

20 TO THE HONORABLE COURT OF ERRORS AND AP-
PEALS IN THE LAST RESORT IN ALL CAUSES:

The petition of Frank J. Bartletta and Daniel Repetti, appellants in the above entitled cause respectfully shows that:

1. Your petitioners find themselves aggrieved by an order allowing counsel fee made in the Court of Chancery of New Jersey by his Honor Edwin Robert Walker, Chancellor of the State
30 of New Jersey, on the advice of Vice Chancellor John J. Fallon, bearing date January 23rd, 1932, in a certain cause wherein Jennie Repetti Nobile was the complainant and Frank J. Bartletta and Daniel Repetti were the defendants and counter-claimants, in this respect:

Under and by virtue of said order it was ordered that the complainant, Jennie Repetti Nobile, be allowed the sum of \$100 as and for a counsel fee.

40 2. The petitioners humbly appeal from the whole and every part of the order of the Chan-

Petition of Appeal.

cellor, which ordered as aforesaid, upon the ground that the same is erroneous in that:

(1) The Chancellor had no jurisdiction to make said order wherein and whereby the complainant was allowed \$100 as a counsel fee.

(2) There was no statutory right, power or jurisdiction conferred by the Legislature upon the Chancellor to make said order for a counsel fee to a successful party who secured an affirmance of a decree appealed from in a previous case between the parties to this appeal.

(3) Because the complainant-respondent was allowed a counsel fee by the Chancellor on affirmance of the decree appealed by the Court of Errors and Appeals, altho she failed to make an application to the Court of Errors and Appeals for a counsel fee for the services rendered in that Court.

The petitioners therefore pray that the said order of the Chancellor may be reversed, rescinded and for nothing holden; and that your petitioners may have such other relief in the premises as to this court shall seem proper.

ANTHONY P. LA PORTA,
Solicitor for and of Counsel
with the Defendants-Appellants.

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

ANTHONY P. LA PORTA,
Solicitor for and of Counsel
with the Defendants-Appellants.

Final Decree.

(Filed 10/9/30.)

Affirmed 109 N. J. Eq. 119.

IN CHANCERY OF NEW JERSEY.

10

Between

JENNIE REPETTI NOBILE,
Complainant,*and*FRANK J. BARTLETTA and
DANIEL REPETTI, Executors
under the last Will and Tes-
tament of Angelo Nobile, de-
ceased.

20

On Bill for
Accounting.

This cause coming on to be heard in the pres-
ence of Louis Bort, of the firm of Meaney and
Lifland, Solicitors of the complainant, and
Anthony P. La Porta, Solicitor of the defendants:

30

AND the Court having examined the pleadings,
and having taken proofs orally and in open Court,
and having heard and considered the arguments
of counsel thereon, and being satisfied that on the
5th day of July, 1927, the complainant together
with her husband, Angelo Nobile, the defend-
ants' testator, purchased a certain piece of prop-
erty commonly known as 415 Grand Street, in
the City of Hoboken, County of Hudson and
State of New Jersey, as tenants by the entirety;
and that the purchase price for the said prop-
erty was Fourteen thousand (\$14,000.00) Dollars,
of which sum Ten thousand (\$10,000.00) was
raised by the execution by both the complainant

40

Final Decree.

and her husband, the said Angelo Nobile, of a purchase money Bond and Mortgage to the Jefferson Building and Loan Association of Hoboken, New Jersey; and that the said Angelo Nobile died on the 18th day of September, 1928, leaving a last Will and Testament whereby the defendants herein, Frank J. Bartletta and Daniel Repetti, were appointed executors; and that on the day of the death of the said Angelo Nobile there was due and owing to the said Jefferson Building and Loan Association of Hoboken, as arrears of principle, interest, premiums and fines, the sum of One thousand three hundred and ninety-seven Dollars and fifty cents (\$1,397.50), and to the City of Hoboken, Hudson County, New Jersey, as arrears of taxes and water rents chargeable against the said building and premises so held by the entirety as aforesaid, the sum of Five hundred and fifty-eight Dollars and thirty-six cents (\$558.36); and the Court being satisfied that the said sums totalling One thousand nine hundred and fifty-five Dollars and eight-six cents (\$1,955.86), were paid by the complainant out of her own and separate estate;

AND the Court having found and being satisfied that the said Angelo Nobile, during his lifetime collected all of the rents, issues and profits accruing from the said premises and made all necessary disbursements for repairs; and being satisfied upon the facts being admitted in open court and from the proofs herein, that the net rents, issues and profits so collected amounted to Four hundred and ninety-eight Dollars and thirty-six cents (\$498.36); and that no part thereof has been paid to complainant;

Final Decree.

10 AND the Court having considered the counter-
claim of the defendants, and being satisfied that
there were paid to complainant at divers times
during the lifetime and after the death of the
said Angelo Nobile certain sums of money aggre-
gating Seven hundred and twenty-three Dollars
and twenty-seven cents (\$723.27), which sum in-
cludes a payment of Seventy-four (\$74.00) Dol-
lars made on account of a radio which was
bought by the said Angelo Nobile during his life-
time.

20 AND the Court being of the opinion that the
complainant is entitled to contribution from the
estate of Angelo Nobile a sum equal to one-half
of the sum of One thousand nine hundred and
fifty-five Dollars and eighty-six cents (\$1,955.86)
so paid by her as aforesaid to the Jefferson Build-
ing and Loan Association of Hoboken, and to the
City of Hoboken; and that she is entitled to re-
ceive from said estate one-half of the sum of Four
hundred and ninety-eight Dollars and thirty-six
cents (\$498.36) collected by the said Angelo
Nobile as rents aforesaid, amounting in all to One
thousand two hundred and twenty-seven Dollars
30 and ten cents (\$1,227.10);

40 AND the Court being of the opinion that the
aforesaid radio mentioned in the counterclaim of
the defendants is the property of the estate of the
said Angelo Nobile and that the claim of Seventy-
four Dollars (\$74.00) made by the defendants
against the complainant should be dismissed, but
that the complainant should account to the de-
fendants, as executors aforesaid, for the remain-
ing sums paid to her as aforesaid, amounting in

Final Decree.

the aggregate to Six hundred forty-nine Dollars and twenty-seven cents (\$649.27), and that the said sum of Six hundred forty-nine Dollars and twenty-seven cents (\$649.27) should be set off against the moneys payable to the complainant as hereinabove mentioned;

10

AND the Court having considered that portion of the defendants' counterclaim which seeks to compel complainant to discharge the Bond and Mortgage held by the said Jefferson Building and Loan Association, or to indemnify the defendants by her bond with some sufficient surety against any financial loss by reason of any money deficiency arising out of a foreclosure of the mortgage lien, and being satisfied and of the opinion that such portions of the counterclaim lacks equity;

20

It is, thereupon, on this 9th day of October, 1930, ORDERED, ADJUDGED and DECREED that there is due and owing to the complainant from the estate of the said Angelo Nobile, deceased, the sum of Five hundred and seventy-seven Dollars and eighty-three cents (\$577.83).

And it is further ORDERED, ADJUDGED and DECREED that defendants' counterclaim insofar as it seeks to require complainant to discharge a Bond and Mortgage held by the Jefferson Building and Loan Association of Hoboken, or to give security to save the estate of the said Angelo Nobile harmless from any liability thereon, be and the same is hereby dismissed, and

30

It is further ORDERED that no costs shall be allowed or taxed by either party against the other.

40

Final Decree.

10 It is further ORDERED that the said defend-
ants, Frank J. Bartletta and Daniel Repetti, as
execuors of the estate of Angelo Nobile, deceased,
within twenty days after the service upon them,
or either of them, of true but uncertified copies
of this decree, pay to the said complainant the
sum of Five hundred and seventy-seven Dollars
and eighty-three cents (\$577.83) due to her as
aforesaid, and that, in default of such payment,
20 execution issue against the goods, and chattels,
lands, tenements, hereditaments and real estate
held by the said defendants, Frank J. Bartletta
and Daniel Repetti, as executors under and by
virtue of the last Will and Testament of the said
Angelo Nobile, directed to the Sheriff of the
County of Hudson to make said sum of Five hun-
dred and seventy-seven Dollars and eighty-three
cents (\$577.83), according to the practice of this
Court.

Respectfully advised,

E. R. WALKER,
C.

30 JNO. J. FALLON,
V. C.

40

Remittitur.

(Filed 10/19/31.)

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

JENNIE REPETTI NOBILE,
Complainant-Respondent,

and

FRANK J. BARTLETTA and
DANIEL REPETTI,
Defendants-Appellants.

On Bill From
Court of
Chancery.

10

This cause having been brought to this Court on an appeal from the Court of Chancery at the May Term of this Court and the Court having read the brief of Anthony La Porta, of counsel with the appellants and Thomas F. Meaney, of counsel with the respondent, and having duly considered the questions brought up by this appeal;

20

IT IS ON THIS 19th day of October, 1931, on motion of Thomas F. Meaney, Esq., of counsel with the said respondent, ORDERED, ADJUDGED and DECREED that the decree in the Court of Chancery made on the 9th day of October, 1930, from which the appellants appealed, be, and the same is hereby in all things affirmed, with costs of appeal to be paid by the said appellant, and that the petition of appeal be and the same is hereby dismissed.

30

IT IS FURTHER ORDERED that the record of this cause be remitted to the Court of Chancery for further proceedings thereon, according to law and the practice of that court.

A True Copy.

THOMAS A. MATHIS, 40
Clerk.

Notice of Motion to Fix Counsel Fee.

(Filed 11/23/31.)

IN CHANCERY OF NEW JERSEY.

77-279.

10	Between JENNIE REPETTI NOBILE, Complainant, <i>and</i> FRANK J. BARTLETTA and DANIEL REPETTI, Defendants.	} On Bill, &c.
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To ANTHONY P. LA PORTA, Esq.,
Solicitor of Defendants.

20 Sir:

PLEASE TAKE NOTICE that on the 23rd day of November, 1931, at the Chancery Chambers, One Exchange Place, in the City of Jersey City, New Jersey, we shall apply to the Chancellor for an order directing the defendants, as executors under the last will and testament of Angelo Nobile, deceased, to pay to the complainant a reasonable counsel fee in this cause on appeal to the Court of Errors and Appeals.

30

MEANEY & LIFLAND,
Solicitors of Complainant.

Service of a copy of the within notice of motion hereby acknowledged this 16th day of November, 1931.

A. P. LA PORTA,
Solicitor of Defendants,
Per M. C.

40

**Affidavit in Answer to Notice of Motion to
Fix Counsel Fee.**

(Filed 11/30/31.)

IN CHANCERY OF NEW JERSEY.

77-279.

10

Between

JENNIE REPETTI NOBILE,
Complainant,

and

FRANK J. BARTLETTA and
DANIEL REPETTI,
Defendants.

On Bill, &c.

20

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

Anthony P. La Porta, being duly sworn according to law, upon his oath deposes and says:

(1) That he is the solicitor of Frank J. Bartletta and Daniel Repetti, defendants in the above stated cause.

30

(2) That an appeal was taken by the Defendants aforesaid, from a decree advised by Vice Chancellor Fallon to the Court of Errors and Appeals of New Jersey. The case was listed No. 24, May Term, 1931.

(3) That the case was submitted to the Court of Errors and Appeals on the State of Case and Briefs of the respective parties under a written stipulation to that effect, and that there was no

40

*Affidavit in Answer to Notice of Motion to
Fix Fee.*

agreement, stipulation, or understanding whatsoever, that an application for counsel fee should be made, thereafter, to the Court of Chancery of New Jersey or to the Court of Errors and Appeals.

(4) That the case was decided October 19th, 1931, adversely to the defendants aforesaid.

(5) A written opinion by Hetfield, Judge, was filed touching the affirmance of the decree appealed from advised by Vice Chancellor Fallon aforesaid.

(6) The opinion did not allow costs, nor did it allow a counsel fee. As a matter of fact neither Jennie Repetti Nobile, who was the complainant-respondent, nor her solicitors, made any application whatsoever to the Court of Errors and Appeals for a counsel fee and the Court of Errors and Appeals did not have any opportunity to grant or deny the same.

(7) This deponent further says that he was not served with a copy of the Remittitur filed in the above stated cause, and that the Remittitur, as a matter of fact, was never even shown to the deponent for his approval or objection before the making and filing of same with the Court of Errors and Appeals and the Clerk in Chancery, and he doesn't know the contents of the Remittitur as made and filed; nor was he served with any papers, or supporting affidavits, touching the present application for a counsel fee other than a mere notice entitled "Notice of Motion to Fix Counsel Fee."

*Affidavit in Answer to Notice of Motion to
Fix Fee.*

(8) This deponent further says that the decree by Vice Chancellor Fallon aforesaid was advised on the 9th day of October, 1930, and by said decree the defendants, Frank J. Bartletta and Daniel Repetti, as Executors of the Estate of Angelo Nobile, deceased, were ordered to pay to the complainant, Jennie Repetti Nobile, the sum of \$577.83 without costs. 10

(9) WHEREFORE, the application for counsel fee should be denied and dismissed with costs.

ANTHONY P. LA PORTA.

Sworn and subscribed to before me
this 28th day of November, 1931. 20

WILLIAM S. STUHR,
Master in Chancery
of New Jersey.

Copy of above affidavit hereby acknowledged
this 30th day of November, 1931.

MEANEY & LIFLAND, 30
Solicitors of Complainant.

Order Allowing Counsel Fee.

(Filed 1/23/32.)

IN CHANCERY OF NEW JERSEY.

77-279.

10

Between

JENNIE REPETTI NOBILE,
Complainant,

and

FRANK J. BARTLETTA and
DANIEL REPETTI,
Defendants.

On Bill, &c.

20

This matter being opened to the Court by Meaney & Lifland, Solicitors of Complainant, in the presence of Anthony P. La Porta, Solicitor of Defendants, on motion for allowance of counsel fee to the complainant in the above matter on appeal to the Court of Errors and Appeals,

30

IT IS ON THIS 23rd day of January, 1932, ORDERED that complainant, Jennie Repetti Nobile, be allowed the sum of One hundred Dollars as and for a counsel fee aforesaid.

E. R. WALKER,
C.

Respectfully advised,
JNO J. FALLON,
V. C.

A True Copy.

FERD. GARRETSON,
Clerk.

40

Opinion.

(Filed 1/23/32.)

IN CHANCERY OF NEW JERSEY.

77-279.

10

Between

JENNIE REPETTI NOBILE,
Complainant,

and

FRANK J. BARTLETTA and
DANIEL REPETTI,
Defendants.

On Bill, etc.

On Notice
of Motion to
Fix Counsel
Fee.(Not for publication in the official or
unofficial reports.)

20

Messrs. MEANEY & LIFLAND, and LOUIS BORT, for
the motion.

Mr. ANTHONY P. LA PORTA, opposed.

FALLON, V. C.:

Counsel for complainant has applied for allowance of a counsel fee of \$200.00 for services rendered in the Court of Errors and Appeals in opposing defendants' appeal from a decree entered by this Court in favor of complainant and against the defendants. The decree was unanimously affirmed. *Nobile v. Bartletta*, 109 N. J. Eq. 119. Application was not made by complainant-respondent to the Court of Errors and Appeals for an allowance of counsel fee for services rendered therein. The decision of this Court in the

40

Opinion.

10 case of *Sobel v. Sobel*, 99 N. J. Eq. 707, is in my judgment clearly dispositive of the matter *sub judice*. It was therein held that 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 to this Court, where the record is, including a motion for counsel fee for services rendered in the Court of Errors and Appeals. The decision of the Court of Errors and Appeals in the case of *Weeks v. Lister*, 62 N. J. Eq. 813, is cited and commented upon by Vice Chancellor Bentley in the above cited case.

I will advise an order allowing to complainant a counsel fee of \$100.00.

20

30

40

[8417]

26 OCT. 1932

New Jersey Court of Errors and Appeals

Between

JENNIE REPETTI NOBILE,
Complainant-Respondent,

and

FRANK J. BARTLETTA and
DANIEL REPETTI,
Defendants-Appellants.

On Appeal
From Court of
Chancery.

**BRIEF OF ANTHONY P. LA PORTA, ESQ.,
IN BEHALF OF FRANK J. BARTLETTA
AND DANIEL REPETTI, DEFENDANTS-
APPELLANTS.**

Introduction.

This is an appeal from an Order made by the Chancellor on the advice of Vice Chancellor FALLON awarding counsel fee to the complainant-respondent for services rendered in the Court of Errors and Appeals.

Statement of Facts.

A Final Decree made against the defendants-appellants by the Chancery Court was appealed to this Court. (See State of Case for Decree.) This Decree was affirmed by this Court in *109 N. J. Eq. 119*.

A Remittitur was thereupon made and the record of the case was remitted to the Court of Chancery for further proceeding thereon according to law and the practice of that Court. The Remittitur affirms the Decree with costs of appeal. There is no provision made therein for a counsel fee.

After the Final Decree appealed from was affirmed the complainant-respondent, Jennie Repetti Nobile, made an application to Vice Chancellor FALLON for an order directing the defendants-appellants, as executors, to pay to her a reasonable fee for the services rendered by her counsel in the Court of Errors and Appeals. Her application is in the form of a Notice of Motion to Fix Counsel Fee to which an Affidavit and Answer was made. (See State of Case.) So that for the facts of this appeal, this Court has before it the mere Notice of Motion to Fix Counsel Fee and the Affidavit and Answer to the Notice of Motion to Fix Counsel Fee.

The learned Vice Chancellor in the Court below, after considering said Notice of Motion and Affidavit and Answer thereto, allowed a counsel fee of \$100 and filed an opinion not to be published in the official or unofficial reports. (See State of Case for same.)

It appears that the complainant-respondent, Jennie Repetti Nobile, made no application whatsoever to the Court of Errors and Appeals for a counsel fee during or after the argument of the previous appeal, which has been affirmed as aforestated. Nevertheless she was allowed a counsel fee for the services rendered by her counsel in the Court of Errors and Appeals.

THE GROUNDS OF APPEAL ARE AS FOLLOWS:

1. The Chancellor had no jurisdiction to make said Order wherein and whereby the complainant was allowed \$100 as a counsel fee.

2. There was no statutory right, power or jurisdiction conferred by the Legislature upon the Chancellor to make said order for a counsel fee to a successful party who secured an affirmance of a decree appealed from in a previous case between the parties to this appeal.

3. Because the complainant-respondent was allowed a counsel fee by the Chancellor on affirmance of the decree appealed by the Court of Errors and Appeals, altho she failed to make an application to the Court of Errors and Appeals for a counsel fee for the services rendered in that Court.

THE CHANCELLOR HAD NO RIGHT, POWER OR JURISDICTION TO MAKE SAID ORDER FOR A COUNSEL FEE TO THE COMPLAINANT-RESPONDENT UNDER THE FACTS OF THIS CASE FOR THE FOLLOWING REASONS:

1. Because there is no statute allowing her a counsel fee on her procuring an affirmance of the decree of Chancery appealed to the Court of Errors and Appeals for services rendered in this Court.

2. Because she failed to make any application whatsoever to the Court of Errors and Appeals for the services rendered by her solicitor on the appeal.

Law and Argument.

COUNSEL FEES ARE ALLOWABLE ONLY UNDER THE STATUTE.

It has been held in *Ex parte Welsh*, 93 N. J. Eq. 303; 116 At. 23, that an allowance of counsel fee rests solely on the statutes, except where trust funds in the control of the court are being administered; that on a voluntary dismissal by plaintiff, a court of equity cannot allow counsel fees to defendant, either under *Chancery Act, Section 91*, authorizing such allowance to the party obtaining the order or decree, or under *P. L. 1915, page 185, Section 6*, authorizing the court to charge the successful party with a reasonable counsel fee.

THE STATUTORY LAWS AS TO COUNSEL FEES ARE AS FOLLOWS:

"Section 91 of the Chancery Act (C. S. p. 445; P. L. 1910, p. 427) provides that—

"In any cause, matter or proceeding in the Court of Chancery, the Chancellor may make such allowance 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."

"Chapter 116 of the Session Laws of 1915, page 184, Section 6, enacts that—

"The court upon making any order or decree may charge the successful party with costs, or a reasonable counsel fee, or both, in any case in which the court shall deem it just to do so."

A COUNSEL FEE IS ONLY ALLOWED TO THE SUCCESSFUL PARTY FOR SERVICES RENDERED IN THE COURT OF ERRORS AND APPEALS BY THE COURT OF CHANCERY WHERE THE CHANCERY COURT IS REVERSED AND A DECREE IS THEN MADE BY THE CHANCERY COURT IN CONFORMITY WITH THE DECISION OF THE COURT OF ERRORS AND APPEALS.

In *Simpson v. Klipstein*, (1919) 90 N. J. Eq. 197; 106 Atl. 375, an application was made by the defendant for entry of decree on remittitur and for allowance of counsel fee. The application was granted. There a decree for specific performance had been advised by the Chancery Court which was reversed by the Court of Errors and Appeals.

This case is distinguishable, however, from the case *sub judice* in this—the Final Decree of the Court of Chancery appealed from is still in full force and effect. There is no other decree. At the time this decree was procured no costs or counsel fee were allowed by the Court of Chancery so that the complainant on an application for counsel fee is no longer the party obtaining the order or decree under *Section 91 of the Chancery Act* and therefore the Chancellor cannot make any allowance by way of counsel fee to her for the services rendered in the Court of Errors and Appeals.

THE APPLICATION FOR COUNSEL FEE SHOULD FIRST BE MADE IN THE COURT OF ERRORS AND APPEALS.

Under the case of *Sobel v. Sobel*, 99 N. J. Eq. 707; 134 Atl. 189, affirmed with an opinion by Chief Justice GUMMERE, 100 N. J. Eq. 532; 135 Atl. 893 (1927), Vice Chancellor BENTLEY granted the complainant's application for counsel fee for

services rendered on appeal in the Court of Errors and Appeals. In his opinion he sets out the following fact:

“During the appeal, application was made by petitioner’s counsel to the Court of Errors and Appeals for allowance of counsel fee for the services rendered in the appellate court. The customary motion was made by some member of that court to carry the application to conference, and the motion was adopted by the court. When the opinion of that court was delivered and filed, it disposed of the question presented by the appeal, but made no mention whatsoever of the application by the appellee for counsel fee. In other words, the meritorious question of the appeal was decided, but there was no decision on the motion for counsel fee. After the cause had been remitted back to this court, notice was given by petitioner’s solicitor of the present application.”

Chief Justice GUMMERE in affirming the order allowing a counsel fee granted by Vice Chancellor BENTLEY did not affirm the case under *Section 91 of the Chancery Act*, but concluded that the case of *Weeks v. Lister*, 62 N. J. Eq. 813; 53 Atl. 1125, controlled the situation and therefore required an affirmance of the Vice Chancellor’s order under review. The Chief Justice in interpreting the holding of the *Weeks’ case supra* said:

“In that case, after the remittitur went down from this court, an application was made to us by counsel for the respondent, who had succeeded in this court, to direct an amendment by inserting therein an allow-

ance for counsel fees. We declined to recall the remittitur from the Court of Chancery for the purpose indicated, and in doing so we stated that the application for counsel fees for service rendered in this court should first be made in this court; that, if the court passes upon it, our decision is final, but, if the court does not pass upon it, then, after the remittitur has gone down, the Court of Chancery has jurisdiction to grant counsel fees for services rendered in this court, and also costs of printing the case for use in this court, when proper grounds are shown for the making of such an order."

It is therefore significant that while the learned Chief Justice in interpreting the *Weeks' case supra* does not quote the exact language used in the *Weeks' case*, nevertheless, he stresses the fact that the application for counsel fee for services rendered in the Court of Errors and Appeals should first be made in that court and that its decision is final if the matter is passed upon by it.

THE DECISION OF VICE CHANCELLOR FALLON WAS BASED UPON THE CASE OF *Sobel v. Sobel*, 99 N. J. Eq. 707, IN WHICH HE SAYS THAT, IN ~~THE~~ ^{THE} JUDGMENT, IT IS CLEARLY DISPOSITIVE OF THE MATTER *sub judice*.

That case is clearly distinguishable from the case *sub judice* in that, it was a matrimonial case and counsel fee, suit money and costs are allowed almost as a matter of course, wife being a privileged suitor. See *Westerfield v. Westerfield*, 36 N. J. Eq. 195.

The case under consideration, however, is a non-matrimonial action and the statute must be examined into to ascertain whether or not a counsel fee can be allowed.

Under the Final Decree of the Chancellor, which is printed in the State of Case for the convenience of this court, it was ordered as follows:

“It is further ORDERED that no costs shall be allowed or taxed by either party against the other.”

This provision was made because of the fact that on the accounting the complainant prevailed in part in the court below and the defendants prevailed also in part in the court below. An examination of this decree will also reveal the fact that no counsel fee was allowed, and this was because of the case of *Beall v. New York & New Jersey Water Co.*, 87 N. J. Eq. 390; 101 At. 576, which states that:

“The rule is that, where a complainant and a defendant are each successful on one or more substantial issues, neither party is entitled to costs or counsel fee against the other.”

The learned Vice Chancellor had this very case under consideration when he advised the Final Decree. Now then, can the Court of Chancery, after a remittitur has been filed on affirmance of a decree made by it, reassume jurisdiction without even attempting to modify its Final Decree, and make an independent order allowing a counsel fee because of the fact that its decree was affirmed by the Court of Errors and Appeals? But

this question naturally assumes a statutory right of the court to allow a counsel fee, which we contend does not exist.

Conclusion.

In conclusion we wish to state that the order allowing a counsel fee by the Court of Chancery should be reversed for the aforementioned reasons.

Respectfully submitted,

ANTHONY P. LA PORTA,
Solicitor for and of Counsel
with Frank J. Bartletta and
Daniel Repetti, defendants-
appellants.

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26 OCT. 1 1932

New Jersey Court of Errors and Appeals

JENNIE REPETTI NOBILE,
Complainant-Respondent,

and

FRANK V. BARTLETTA and
DANIEL REPETTI,
Defendants-Appellants.

On Appeal
from Court of
Chancery.

BRIEF OF RESPONDENT.

The statement of facts contained in appellants' brief is correct, and there is nothing we can add thereto, except to emphasize, as a fact, the remark made by appellants on page 8 of their brief that costs (and therefore counsel fees) were disallowed in the original decree advised by Vice-Chancellor Fallon, not on the ground that complainant was unsuccessful in her suit, but because both parties had succeeded in one or more material issues, under the doctrine enunciated in *Horner v. Heinecke*, 86 N. J. Eq. 176; *Beall v. New York and New Jersey Water Co.*, 87 N. J. Eq. 390, and *Folkman v. Myers*, 93 N. J. Eq. 215.

POINT I.

A counsel fee may be allowed a successful party for services rendered in the Court of Errors and Appeals on affirmance of a decree of the Court of Chancery.

Appellants seem to draw a distinction (page 5 of their brief) in cases where this Court reverses a decree of the Court of Chancery, citing *Simpson*

v. *Klipstein*, 90 N. J. Eq. 197. To the contrary, we cite *Weeks v. Lister*, 62 N. J. Eq. 813 (Court of Errors and Appeals), where a counsel fee was allowed to counsel for respondents on affirmance of the decree. The *Weeks* case also dissolves the distinction sought to be made of the case of *Sobel v. Sobel*, 99 N. J. Eq. 707 (upon which Vice-Chancellor Fallon rested his decision in making the order now appealed from).

In the last analysis, appellants' argument is that in view of the fact that the final decree disallowed costs to either party and that decree was affirmed on appeal, the decree, in its original form, is "still in full force and effect" (see page 5 of appellants' brief) and now precludes the allowance of costs or counsel fee. True, the denial of taxed costs necessarily includes the denial of any allowance as counsel fee. *Folkman v. Myers*, 93 N. J. Eq. 215. But the denial of costs to either or both parties by the decree of the Chancellor does not carry, on affirmance of the decree, denial of costs in the Court of Errors and Appeals. *Horner v. Heinecke*, 86 N. J. Eq. 176, in which opinion Mr. Justice Trenchard said: "The decree below will be affirmed, with costs in this Court."

By section 84 of the Chancery Act of 1902 and by section 91 thereof, as amended in 1910, the allowance of costs and counsel fees lies in the sound discretion of the Court. By section 15 of "An Act relating to the Court of Errors and Appeals (Revision of 1900)", 2 C. S. 1710, it is within the discretion of this Court to award costs in cases of appeal from a decree or order of the Chancellor. We are familiar with no act which permits of the allowance of a counsel fee for services rendered in the Court of Errors and Appeals; yet there is no gainsaying the fact that such awards have been made, both on affirmance

and reversal. *Weeks v. Lister, supra; Simpson v. Klipstein, supra.* The practice is recognized in the amendment of rule 9 of the rules of the Court of Errors and Appeals, promulgated February 8, 1932.

POINT II.

The Court of Chancery has the jurisdiction and power to allow a counsel fee for services rendered in the Court of Errors and Appeals.

Assuming that the foregoing contention that respondent is entitled to a counsel fee for services rendered by her solicitors on appeal, is correct, the remaining question raised by appellants is as to the jurisdiction or power of the Court of Chancery to make the allowance. Appellants contend that the order now appealed from is irregular, because no application was made, in the first instance, to this Court, citing *Sobel v. Sobel, supra*, as affirmed in 100 N. J. Eq. 532. True, the opinion of the Chief Justice states that an application should first be made to the Court of Errors and Appeals, but the case, we submit, is direct authority for the proposition that such an application is not prerequisite to an allowance as here made. The language is clear and admits of no doubt; “. . . after the *remittitur* has gone down, the Court of Chancery has jurisdiction to grant counsel fees for services rendered in this Court . . .” The decision of the Court was rested upon the case of *Weeks v. Lister, supra*, the language of which is equally explicit. “. . . if the court does not pass on it (application for counsel fees), or if through mere inadvertence the application is not made while the case is before the court,

then after the *remittitur*, the Court of Chancery has jurisdiction to grant counsel fees”

We respectfully submit, therefore, that the order of the Court of Chancery, advised by Vice-Chancellor Fallon, allowing respondent \$100.00 as counsel fee for services rendered, in this case, in the Court of Errors and Appeals, be affirmed.

Respectfully submitted,

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LOUIS BORT,
On the Brief.



