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IN THE

SUPREME COURT OF APPEALS OF VIRGINIA

AT RICHMOND

RECORD 1635.

THE PLANTERS NATIONAL BANK OF FREDERICKSBURG, VIRGINIA,
APPELLANT,

vs.

E. G. HEFLIN COMPANY, INC.,
APPELLEE.

APPELLANT'S REPLY TO MOTION TO DISMISS

Lawyers Publishing Co., Inc., 1333 E. Franklin St., Richmond, Va.

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To the Honorable Justices of the Supreme Court of Appeals of Virginia:

The E. G. Heflin Company, Inc., appellee in this case, has filed a motion to dismiss the appeal heretofore granted the

Planters National Bank of Fredericksburg, Virginia, which motion was returnable on November 18, 1935.

The motion to dismiss is based on two grounds, to-wit:

(1) Because the record discloses that no exception was taken by the Appellant to the entry of the final decree or to the entry of any other decree or order.

(2) Because the record further discloses that the evidence on which the decree was entered was heard *ore tenus* and the alleged transcript of the evidence was not in any way identified or authenticated by the Trial Judge and cannot, therefore, be considered by this Court, as it is not properly a part of the record.

Appellant submits that there is no merit in either ground, or in the motion itself.

As to the first ground above, it is not necessary in a chancery case to except to the entry of any decree, whether final or otherwise, in order to appeal from such final decree. No further discussion of this ground is necessary.

As to the second ground, while it is true that the testimony taken *ore tenus* and afterwards reduced to writing, was not authenticated by the Trial Judge, yet it is not only identified but was made a part of the record by decree entered in the cause on October 31, 1934.

On page 3, of its typewritten motion to dismiss, Appellee sets out that the final decree of December 11, 1934,

> "* * * does not identify or authenticate the alleged testimony, but on the other hand merely sets out that the Court heard the testimony of witnesses for both the complainant and respondent, *ore tenus*."

After making this statement, Appellee's counsel says:

> "It follows, therefore, that in order for the evidence so taken *ore tenus,* to have become a part of the record in this case, it must have been certified or authenticated by the Trial Judge within sixty days from the entry of the final decree, and then, only after counsel for the Appellee had been given reasonable notice of the time and place of such certification or authentication."

While it is true that the final decree did not refer to the testimony other than stated by counsel for Appellee, counsel overlooked the language of a previous decree, entered on October 31, 1934, and found on page 43, of the printed record in this cause. This decree, or at least so much of it as is necessary to be quoted, contains the following language, to-wit:

> "This cause came on this day to be heard upon the complainant's bill and exhibits filed therewith; the respondent's answer to said bill; the complainant's replication to said answer and *the testimony taken ore tenus and reduced to writing and filed herein on behalf of the complainant and the respondent.*
>
> "And was argued by counsel:
>
> "Upon consideration whereof, the court doth adjudge, order and decree that an issue be made up and tried at the Bar of this Court to ascertain and determine * * *"
>
> (Note: Italics ours.)

Thus it will be seen that the Court heard the cause not only

on the pleadings, but on the testimony taken *ore tenus*, reduced to writing and filed therein, by its own decree.

In addition, there appears on page 105, of the printed record, Clerk's certificate as follows:

> "CLERK'S OFFICE, CORPORATION COURT,
> FREDERICKSBURG, VA.
>
> On the 28th day of January, 1935.
>
> I, J. W. Adams, Clerk of the Corporation Court of Fredericksburg, Va., do certify that the foregoing is a true copy of the entire record in the chancery cause pending in this Court under the style:
>
> E. G. Heflin, Incorporated, a corporation,
> Plaintiff,
>
> v.
>
> The Planters National Bank of Fredericksburg, Virginia, a corporation; The Planters National Bank in Fredericksburg, Virginia, a corporation, Wm. K. Goolrick, Trustee, Defendant.
>
> I also certify that the notice required by section 6339 of the Code of Virginia, was duly given in the manner required thereby.
>
> J. W. ADAMS, Clerk."

From what has been quoted, the Court will perceive that not only did the lower court make the written testimony a part of the record by its decree of October 31, 1934, but the Clerk supplemented this by certifying that the printed record is a true copy of the *entire record* in the cause which, of course, includes the testimony taken *ore tenus*, reduced to writing and filed therein.

Appellee's counsel relies largely on the case of *Ross Cutter Company* v. *Rutherford,* 157 Va., 674, but the two cases are in no way similar.

In the *Ross Cutter Case,* a motion to dismiss was sustained because the testimony taken *ore tenus* therein was neither authenticated by the judge nor, *"identified by any decree,"* entered in the case. True, one decree referred to testimony taken *ore tenus* but did not state that it was reduced to writing or filed in the cause, hence it did not become a part of the record.

On the other hand, in the instant case, the decree of October 31, 1934, expressly recites that the case came on to be heard on the pleadings and the testimony taken *ore tenus,* and further recites that such testimony was reduced to writing, *and filed in the cause on behalf of complainant and respondent.*

We submit that this sufficiently identifies the testimony, but if anything else is needed, it is supplied by the Clerk's certificate to the effect that the printed record is a copy of the *entire record,* which, of course, includes the testimony reduced to writing and filed therein by virtue of the court's own decree.

We believe there can be no doubt of the fact that where a decree in the cause recites, as did that of October 31, 1934, that evidence was taken *ore tenus* before the Court, reduced to writing and filed therein, and the Clerk certifies the record, including such testimony as, "a true copy of the entire record," it will be conclusively presumed that the testimony contained therein was that heard by the Court and filed by virtue of its decree.

True, in the *Ross Cutter Company Case,* the Court held the

certificate of the Clerk, that a transcript of the oral testimony was filed as a part of the record, was insufficient to make it a part of the record without the authenticating certificate of the judge, but in that case, as has previously been pointed out, there was no decree showing that such testimony had been reduced to writing, or that it had been filed in the cause.

Again, in that case the Clerk merely certified that,

> "the foregoing pages contain so much of the record in the chancery suit * * * as is requested by the attorney for the plaintiff"

while in the instant case, the clerk certifies, as shown above, that

> "The foregoing is a true copy of the entire record."

In *Ross Cutter Company* v. *Rutherford, supra,* at the outset of the opinion by Justice Epes, occurs the following paragraph:

> "There is no certificate signed by the Judge which in any way earmarks or identifies the matter contained in what purports to be a transcript of the testimony as containing the testimony introduced *ore tenus* before it; nor is it so identified by any decree entered in the case."

It will be observed that it is not necessary that the Judge shall certify or authenticate the testimony, if it is, "identified by any decre entered in the case." Surely this court, which has sought to eliminate technicalities in order that cases might be heard on their merits, will not extend the rule laid down in the *Ross Cutter case,* to the point of requiring oral testimony to be further identified than is done by the

decree and clerk's certificate in the instant case. True, there might have been set out in the decree, the names of all the witnesses who testified either for plaintiff or defendant, but this would have unnecessarily prolonged the decree, without adding to its force.

As suggested above, the policy of this court has been to decide cases on their merits and to avoid dismissing them on technicalities, so far as possible.

Thus, in *Rinehart & Dennis Co.* v. *Brown*, 137 Va. 673, Judge Burks said:

> "* * * it has been the policy of this court for many years, and is still, to subordinate form to substance, and not to allow the substantial rights of parties to be taken away for the sake of adherence to any form of procedure, not essential to the orderly conduct of judicial proceeding."

Again, in *Brame* v. *Guarantee Finance Co.*, 139 Va. 394, where the form of certifying the record in a chancery case was objected to, the court refused to dismiss the appeal and in the opinion by Chief Justice Campbell, said at page 398:

> "As to the second assignment, if it was the custom of the appellate court to lose itself in the realm of technicalities, the motion to dismiss should be sustained. The record comes here merely as a copy 'teste', and not in the usual form in which records are required to be presented. It is the boast, however, of the courts of this jurisdiction that litigants are entitled to have their rights determined unfettered by the harsh rules of technical construction and application."

The court has not regarded with favor, motions to dismiss an appeal, as appears from the following cases:

Orr v. *Pennington*, 93 Va. 268.
N. Y. Life Ins. Co. v. *Franklin*, 118 Va. 418.
Fire Association v. *Turlington*, 136 Va. 44.
Trust Company v. *Fletcher*, 152 Va. 868.

In the instant case, the final decree was entered on December 11, 1934, the Clerk certified the record on January 28, 1935, and this court granted an appeal on February 22, 1935. Appellee did not file his motion to dismiss until November 18, 1935, long after the record, as certified by the Clerk, had been printed.

The question here raised seems synonymous with that considered by the Court in *Todd* v. *Sykes*, 97 Va. 143. In this case the trial judge filed a written opinion in the papers, which was not signed or authenticated by him, but was referred to in a decree as having been filed in the record. The court, at page 159, said:

> "* * * this being the case, the opinion thus referred to in the decree became a part of the record."

The exact language of the decree in *Todd* v. *Sykes* is as follows:

> "On condition, whereof, the court being of the opinion, for reasons stated in writing and filed in the record in this cause * * *."

Before this decision the court on a similar question which arose in *Legrand* v. *Rixey*, 83 Va. 862, said at page 877 (where the opinion was initialed only):

> "We do not mean that the mere opinion of the trial

> judge, which may happen to be in writing and copied into the record, constitutes a part thereof, but we do say that where the decree—as in this case—refers to the opinion of the trial judge in terms that make it clear that the object was to refer to it to explain what was determined, and the reasons therefor, then such opinion becomes legitimately a part of the record * *."

The decree in *Legrand* v. *Rixey* contains the following language:

> "For reasons stated in a written opinion filed with the papers, * * *."

It might just as well be argued that a written opinion of the trial judge, referred to in a decree as having been filed but which is not authenticated, is not sufficiently identified, as to argue that a decree, such as the one in this case, does not sufficiently identify the testimony therein made a part of the record.

In *Day* v. *Hale*, 22 Gratt. 146, depositions taken were not mentioned in the decree, though the record showed that both parties took depositions. Appellee insisted that the depositions were not part of the record because of failure to mention them in the decree. In overruling this objection the court said at page 160:

> "* * * the decree is evidently founded upon the evidence. It is fair to presume that it was a clerical omission in drawing the decree and that the case was heard upon the depositions."

To the same effect is *Ford* v. *Watts*, 95 Va. 192.

Reverting to the *Ross Cutter Company Case, supra,* there

was nothing in the record to show that the oral testimony referred to therein had been either reduced to writing or filed. Neither of these important fundamentals were incorporated in any decree entered in the cause. This fact evidently explains the action of this court in granting the motion to dismiss. In the instant case, however, as has been shown, a decree of the trial court contained an affirmative statement of both of these facts. In other words, the decree was based in part on the testimony taken *ore tenus,* reduced to writing and filed therein, thereby making it, according to the usual chancery practice, a part of the record.

In *Craig* v. *Sebrell,* 9th Gratt. 131, where the trial court sets out in its decree that it had, among other things, considered the papers in another case in arriving at its decision in the case before it, and where objection was made, the Court said at page 135:

> "The objection that this injunction case should not have been looked into, because it has not been made part of this case by the bill or answer, nor made an exhibit by any entry on the order book, is sufficiently answered by the decree, which itself makes it an exhibit in this cause."

An important case is that of *Barrett* v. *McAllister,* 12 S. E. 1106, decided by the Court of Appeals of West Virginia.

In this case, the Court points that since bills of exception are unknown to equity practice, there is no other way of making an affidavit, exhibit or deposition part of the record, unless it is done so by reference in a decree. In the opinion the Court said:

> "I have always understood the practice to be as de-

> cided in *Craig* v. *Sebrell,* 9 Gratt. 131, that where any pleading or deposition is referred to in the decree, it is thereby made a part of the record."

Quoting from an earlier West Virginia case, the Court said (p. 1110):

> "The Clerk certifies that the foregoing answer was the one tendered and refused. It is as thoroughly identified as an exhibit or as depositions are in any chancery record."

The reasons of the court are clearly stated as follows:

> "Without multiplying authorities, I take this to be the true rule in chancery: that where a plea or answer is referred to in a decree or order as having come under the cognizance of the court, either for the purpose of filing or rejecting it, it does thereby become a part of the record and no further action, by way of exception or otherwise is necessary upon the part of the defendant to enable him to prosecute an appeal upon the rejection of his plea or answer. It is true, as cited by counsel, that there is to be found in the case of *Ruffner* v. *Hewitt,* 14 W. Va. 744, a dictum to the contrary. But it will be observed that nothing is said of the point in the syllabus and we must regard it therefore, as an inadvertance, arising from a failure on the part of the judge who delivered the opinion to discriminate between the practice at law and in chancery. Fortunately, we have a case in our own court exactly in point. In *Stevens* v. *Brown,* 24 W. Va. 234, the question arose upon the refusal of the lower court to permit an answer to be filed, and it was

contended by the appellees that the answer was no part of the record. To this position this Court replied, as follows:

> " 'It is here insisted that the answer is no part of the record. If it is not, I know of no way in which it can be made a part of the record, excpt by spreading it at length on the chancery order book, as a bill of exception is unknown in chancery practice. The order shows that the defendants tendered their answer, to the filing of which the plaintiffs objected, and the court sustained the objection and refused to permit the answer to be filed. The Clerk certifies that the foregoing answer was the one tendered and refused. It is as thoroughly identified as an exhibit or depositions are in any chancery record. The answer is clearly a part of the record'."

We have already pointed out the distinction between the instant case and the *Ross Cutter Company Case,* but since certain cases from foreign jurisdictions are cited in the latter, it may be well to direct the attention of the court to the fact that in the case of *Blease* v. *Garlington,* 92 U. S. (1), the Supreme Court actually decided the case on its merits. The two Illinois cases cited, expressly hold that the appellee has the burden of making up the record. In one of these cases, *Hughes* v. *Washington,* 65 Ill. 247, the Court said:

> "And, in all common law cases, under our statute, it is the duty of the party desiring to have the case reviewed on the evidence, to preserve it in the record, or the presumption will be indulged that the court below acted properly with its decision. Not so with a

> decree, as no presumption is indulged beyond the extent to which it is sustained by the proofs appearing in the record. Hence, it devolves upon the party in whose favor it is rendered to preserve evidence that will sustain the decree, or it must find that facts were proved that will sustain the decree, or it will be reversed."

The Arkansas and Oklahoma cases are based on statute law, as are those of Kentucky, and throw no particular light on the instant case.

In the Arkansas case of *Harmon* v. *Harmon,* 237 S. W. 1096, on rehearing, the opinion contains the following language:

> "Neither does it appear from the record that the stenographer's transcript of the oral evidence was filed in the chancery court, endorsed as filed, or directed to be filed by an order of that court. Lacking these requirements it cannot be treated either as a bill of exception or as a part of the record under the statute."

In view of what has been set out herein, it is respectfully submitted that the motion of appellee to dismiss this cause should be overruled and the cause heard on its merits.

Respectfully submitted,

THE PLANTERS NATIONAL BANK OF FREDERICKSBURG, VIRGINIA.

By: C. O'CONOR GOOLRICK, Attorney.