Judgement--Res Judicata--General Dismissal of a Suit in Equity Upon a Demurrer Sustained

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Judgments—Res Judicata—General Dismissal of a Suit in Equity Upon a Demurrer Sustained.—The question to be discussed is: when there is a general dismissal of a suit in equity upon a demurrer sustained, is that general dismissal res judicata of the subject matter of the suit as between the same parties of their privies? The general rule has long been recognized, by the West Virginia Supreme Court, that a decree dismissing generally an equity suit, without adding such words as "without prejudice to such other suit as the plaintiff might see proper to institute", is conclusive, or res judicata. How far does this general rule apply to the situation where a bill is dismissed on demurrer sustained?

The earliest West Virginia case on this point held:

"A decision upon a general demurrer to a bill, which has clearly gone to the merits of the case, is an effectual bar to further litigation; and where no formal defects appear on the face of the bill the court will presume that the demurrer has gone to the merits."

The former decree, which was pleaded in bar to this suit in equity was a decree dismissing generally the bill after the demurrer had been sustained, the plaintiff having failed to amend. This appeared from the record of the former suit which was before the court. The court in holding the decree of dismissal res judicata reasoned this way:

"The demurrer was general, and as no formal defects appear, the conclusion is irresistible that the court was of the opinion that the facts averred in the bill did not entitle the plaintiffs to relief and therefore it must have dismissed the suit for the want of merit. This was necessarily an adjudication of the facts set out in the bill, and a positive decision against the plaintiff on the merits * * * * *. The plaintiffs certainly, when they filed their bill, had a suit in court; and it is just as certain that, after the final action of the court on their bill, they had no such suit in court."

In a later case where a bill was dismissed upon a demurrer having been sustained, the court, in holding that it was

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error for the trial court not to add words of "without prejudice" to the decree of dismissal, said:

"A decree on full hearing dismissing a bill generally, without reservation of right to the plaintiff to sue at law, is conclusive upon all the matters involved in the case, even though there was no jurisdiction in equity because of adequate remedy at law. Unless it otherwise appear from the decree it will be taken that the dismissal was on a hearing of the merits."

Judge Brannon, in discussing the question, mentioned as an instance where such a decree might not be a bar, the case where it is patent that there is no jurisdiction in equity, for instance, a bill in chancery upon a note. However, it was suggested that even in such a patent case the defendant might not have raised the question of jurisdiction, or the court might not have dismissed the bill for that reason. The writer suggests that in such a patent case of no jurisdiction in equity, a contrary conclusion could be reached, consistent with the rule announced in this case, on its facts. Another case is in accord saying that a general dismissal of a bill in equity, because of adequate remedy at law, is a bar to an action at law. The facts here, however, were that in the former suit, which was held to be res judicata, there was filed an answer along with the demurrer. Hence, the holding of the court may be beside the point that is being discussed here. To summarize, the cases just discussed seem to hold that where a bill in equity is dismissed generally on a demurrer having been sustained, either where there was a failure to amend the declaration, or where there was no jurisdiction in equity because of adequate remedy at law, such a dismissal is res judicata.

On the other hand there are cases reaching a contrary conclusion. The court, in a recent case, said:

"The dismissal of a suit on demurrer, unless predicated upon the merits, is not res judicata. No ground for equitable jurisdiction having been stated in the former suit, there is no presumption that its dismissal on demurrer to the bill went to the merits of the cause."

As early as 1885, just three years after the case of Corruth-

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ers v. Sargent, a case held that a general dismissal, was not necessarily res judicata. There to a suit at law upon a note there was pleaded the dismissal upon demurrer of an equity bill to enforce a lien upon a tract of land securing the note, the demurrer having been sustained on the ground that it appeared by the bill that the land had already been sold, and that there had been a decree of the court affirming the sale, in which decree the claim of the plaintiffs to have the note paid was ignored. The court held that the dismissal on demurrer of the former suit was not res judicata, that it would not bar a suit at law upon the note. The court based its decision upon the ground that it was not clear by the decree of the former suit that the matter in controversy here (whether the defendant is liable at law on the note) was decided in that suit. Also it has been held:

"If the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration, which is supplied in the second suit, the judgment in the first suit is not a bar to the second."

And it has been held that where the bill was dismissed on demurrer for defective pleading, (in a partition suit there was no allegation that the plaintiff and the defendant were cotenants), it does not bar an action at law. Reaching the same result but upon different reasoning is another case. A bill in equity was held not to be barred by the general dismissal of the former suit after the sustaining of a demurrer which stated no grounds for the demurrer. The court said that since the demurrer may have been sustained on the ground of lack of equity jurisdiction rather than lack of right in the plaintiff, the decree not showing upon which ground the demurrer was sustained, the decree, therefore, was ambiguous. The court, concluding that the ambiguity justified resort to the record in interpreting the former decree, looked there and decided that presumptively the demurrer was sustained on the ground of lack of jurisdiction. The case would seem to hold that unless it appears from the decree that the demurrer was sustained

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6 N. S. supra.
7 Poole v. Dilworth, 26 W. Va. 583 (1885).
8 State v. McElDowney, 54 W. Va. 685, 700, 701, 47 S. E. 650 (1904).
9 Davis Colliery Co. v. Westfall, 78 W. Va. 735, 740, 90 S. E. 828 (1916).
10 Laing v. Price, 76 W. Va. 192, 89 S. E. 497 (1914).
on the ground that it went to the right of the plaintiff, or to the merits, then the decree is not *res judicata*.

What then is the law as laid down in the cases that have been decided? It is certain that a dismissal upon demurrer going to the merits is *res judicata*.11 Formerly the cases held that where there was a general dismissal the court would presume that the demurrer went to the merits.12 But the late cases say that there is no presumption from a general dismissal that the demurrer went to the merits;13 that if it is not clear that the demurrer went to the merits the dismissal is not *res judicata*;14 and that if the demurrer could have been sustained on any other ground than one reaching the merits the decree is ambiguous and therefore not *res judicata*.15 It would seem that unless it appears from the record that the demurrer to the bill was sustained on the ground that it went to the merits the dismissal of the suit is not *res judicata*.

—C. M. C.

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11 Pickens v. Kniseley, 36 W. Va. 794, 15 S. E. 997 (1892); dictum in Davis Colliery Co. v. Westfall, 9, *supra.*
12 N. 2, *supra.*
13 N. 7, *supra.*
14 N. 7, *supra.*
15 N. 10, *supra.*