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Mamie Nunnelly, et al., v. Ogden First Federal Savings and Loan Association, et al. : Brief of Appellant

Utah Supreme Court

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R. Leslie Hedrick; E. A. Walton; Attorneys for Appellants;

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6657

No. 6657

In the
SUPREME COURT
of the
STATE OF UTAH

MAMIE NUNNELLY, et al.,
Plaintiffs and Appellants,

VS.

OGDEN FIRST FEDERAL SAV-
INGS AND LOAN ASSOCIA-
TION, et al.,

Defendants and Respondents

APPELLANT'S BRIEF

R. LESLIE HEDRICK,

E. A. WALTON,

Attorneys for Appellants.

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INGS AND LOAN ASSOCIA-
TION, et al.,

Defendants and Respondents

No. 6657

STATEMENT OF THE CASE

This suit was filed by Mamie Nunnelly and six other plaintiffs against the Ogden First Federal Savings and Loan Association, The Colonial Corporation, Leon Smith, Gordon Weggeland, S. G. Dye, and M. L. Dye, all of whom appeared, except Leon Smith, who defaulted, and two other defendants, Atlas Realty Company and A. B. Gorham, who were not served and did not appear.

After the sustaining by the court of motion to strike and special demurrers, the plaintiff Nunnelly and the plaintiff Taylor severed and pleaded over, and the other plaintiffs who are appellants here suffered judgment for failing to plead over. Such judgment dismissed their complaint without prejudice and they have appealed.

The complaint showed that the plaintiffs were members of the defendant Savings and Loan Association and that their certificates had come into the hands of the association without payment or at least without full payment therefor. That the defendants had all conspired to swindle the plaintiffs by getting in their certificates without redeeming the same by paying what was due thereon. That the Building and Loan Association, then known as the Colonial Building and Loan Association through its secret agents had acquired possession of the certificates under the guise of purchasing when it was bound to pay the full value thereof.

It was further alleged that the corporation was insolvent and that while insolvent it had turned over to the Colonial Corporation about \$85,000.00 of its assets in pretended redemption of the common stock in the building and loan association, which was subsequent in right to the claims of the plaintiffs. It further appeared that the two corporations had with the exception of one member a common directorate. That the financial condition of the building and loan association was such that it could have paid plaintiffs' certificates either in full or at least to the extent of 95 per cent. There were further allegations showing details of the conspiracy and false and fraudulent representations made to the plaintiffs by the defendants with respect to the value of the plaintiffs' certificates. There were allegations showing the fiduciary relations owing to the plaintiffs and the breach thereof.

There were also allegations framed under U.C.A. Section 104-3-16 to the effect that the question involved

was of a common and general interest of many persons and also that the parties were numerous and that it was impracticable to bring them all before the court, and allegations showing that there would be of necessity a loss to all certificate holders and that it would be necessary to prorate such loss among all similarly situated (Transcript 1-7).

The plaintiffs prayed for a determination of their rights and to set aside the fraudulent conveyance made to the Colonial Corporation and for various ancillary reliefs (Transcript 7).

The appearing defendants, who are respondents here, moved to strike the allegations with respect to persons similarly situated and in their eighth ground of demurrer assert no cause of action was stated in favor of such other persons. These contentions were sustained by the district court. Such defendants also demurred generally, which demurrer was overruled by the court. Such defendants also interposed a multitude of special demurrers, claiming misjoinders both of causes of action and of parties and various matters of uncertainties. These grounds of demurrer were held valid by the court, and to reverse such rulings, this appeal is taken.

ASSIGNMENT OF ERRORS

The appellants say that there is manifest and prejudicial error on the face of the record in the following particulars, namely:

1. The court erred in sustaining defendant's motion to strike parts of the complaint relating to other persons similarly situated.

2. The court erred in sustaining the ninth ground of the demurrer.

3. The court erred in sustaining the tenth ground of the demurrer.

4. The court erred in sustaining the eleventh ground of the demurrer.

5. The court erred in sustaining the twelfth ground of the demurrer.

6. The court erred in sustaining the thirteenth ground of the demurrer.

7. The court erred in sustaining the fourteenth ground of the demurrer.

8. The court erred in sustaining the fifteenth ground of the demurrer.

9. The court erred in sustaining the seventeenth ground of the demurrer.

10. The court erred in sustaining the twenty-third ground of the demurrer.

11. The court erred in sustaining the twenty-fourth ground of the demurrer.

12. The court erred in sustaining the twenty-fifth ground of the demurrer.

BRIEF AND ARGUMENT

I.

A GOOD CAUSE OF ACTION IS STATED

As the court held with us upon this point, we shall be very brief.

In the case of Badger and Company v. Fidelity Building and Loan Association, 94 Utah 97, 75 P. (2d) 669, the plaintiff was the owner of an investment certificate worth \$2500.00. The defendant through a secret agent, the Atlas Realty Company, purported to buy the same at fifty cents on the dollar. On discovery of the fraud plaintiff sued for and recovered the balance due. The defendant there claimed that it had a right to purchase such certificate at a discount. This court in line with the authorities generally, held against the claim and that the defendant had only made by the pretended purchase a partial payment.

We also cite Markey v. Hibernia Homestead Association (La.) 186 So. 757, which holds that an attempted purchase by the association who had concealed the true value from the stockholders and retired the shares through the form of purchasing plaintiff's stock at a discount in order to make the remaining stock more valuable was invalid and actionable. We also cite State v. Oberlin B. & L. Association, 35 Ohio State 258, Shaw v. Clark, 6 Vt. 202; 27 A. D. 578; American Trust Company v. California, etc. 15 Cal, (2d) 42, 98 P. (2d) 497; Hoggan v. Price River, etc. Co., 55 Utah 170; 184 P. 556; Wood v. McLean Drug Co., 266 Ill. App. 5.

II.

THE COMPLAINT IS NOT MULTIFARIOUS

U.C.A. 104-3-12 permits the joinder of persons having an interest in the subject of the action.

This section abolished the common law notion that

plaintiffs were required to have a *joint* interest in the action.

However, such joint interest was never required in suist in equity. Pom, Rem. § § 112, 113.

U.C.A. 104-3-13 provides that any person may be a defendant who is adverse to the plaintiff.

This section abolished the common law notion that the liability on defendants had to be joint.

But such notion never did prevail in equity.

U.A.C. 104-30-2 provides "judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants."

This was always the rule in equity.

U.C.A. 88-2-2 among other things provides "whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter the rules of equity shall prevail."

This provision is held to be mandatory. Hammond v. Wall, 51 Utah 464, 171 P. 148.

In Spear Manufacturing Co. vs. Shinn 93 (Ark) 346, 124 S.W. 1045, three separate general creditors brought a creditors' suit against the debtor corporation and two of the corporations to whom first corporation had transferred its assets, seeking judgment for their debt and for an accounting, etc. The court held that there was no misjoinder of plaintiffs even if the question had been raised below. The debtor corporation was insolvent and the other corporations had agreed to pay certain of its debts, but the total indebtedness of the

defendant corporation was more than the other defendant corporations had agreed to pay and as the court said, "therefore all the creditors had they joined in the suit could only have been paid a proportionate amount of their debts out of the fund." The court further said "all the creditors of the debtor corporation had a community of interest in the subject of the action and the relief demanded and they could be joined under such circumstances as plaintiffs."

Citing among other authorities:

4. Pomery Equity, Sec. 415.

Tower Manufacturing Co. vs. Thompson 90 (Ala.) 129.

Gibson vs. Trowbridge, 93 Ala. 579, P.S. 370

As to creditors' suits the necessity of first getting a judgment has been abolished in twelve state. (including Utah.)

See 5. Pomery Equity, 4th Edition, page 5131, Sec. 2315.

In the case of Steiner vs. Parker 108 Ala, 357, 19 S. 386 it was claimed that there was a misjoinder because simple contract creditors were joined with judgment creditors in a creditors' suit. The court holding that there was no misjoinder of the two classes of creditors said that the court had power to make proper adjustment as to any matters of priority between the classes.

See also Tyler vs. Savage (a class suit) 143 U. S. 79, 36 L. 82.

This case was cited and approved by the Utah court in White vs. Texas Co. 55 Utah, 190 and in Rochester, etc. Insurance Co. vs. Schmidt 126 Fed. 998, a case where the bill was sustained because of the necessity to prorate the recovery.

It should be remembered that the courts of Utah function under the code of civil procedure. To a very large extent the code has abolished the technical rules as to parties, practice and pleadings which prevailed at the common law. True it is that the essential distinctions between purely legal rights and equitable rights and the distinction between purely legal relief and various kinds of equitable relief still exist, nevertheless, the methods of asserting such rights and obtaining such reliefs are practically the same and such methods are briefly speaking worked out by means of a civil action.

Sec. 104-3-12, U.C.A. provides: All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs except when otherwise provided in this code.

Sec. 104-3-13, U.C.A. provides: That any person may be made a defendant who is a necessary party to a complete determination or settlement of the question.

Sec. 104-3-16, U.C.A. is as follows: Of the parties to an action those who are united in interest must be joined as plaintiffs or defendants, but if the consent of any one who should have been obtained as plaintiff cannot be obtained he may be made a defendant the reason thereof being stated in the Complaint; and when the question is one of a common or general interest of many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

The doctrine of this section always obtained in equity cases, but under the code it has no such limitation and applies equally to purely legal actions.

Sec. 104-30-2, U.C.A. provides that judgment may be given for or against one or more plaintiffs and for or against one or more defendants.

This, of course, is in accordance with the equity practice, but works a change in the common law rule as to actions at law.

The case at bar is, however, one in equity. And does not depend upon the code of civil procedure necessarily for its maintenance. It involves the equitable grounds of avoiding a multiplicity of suits, of equality in equity (especially with respect to a limited and insufficient fund), frauds, breach of fiduciary duties following trust funds and accounting.

Without quoting, we invite the court's attention to 1 Pom. Equity, Sec. 270-4, Sec. 407-10, 3 Pom. Equity, Sec. 1394, Pom. Code Remedies, Secs. 247, 267, 285 and 388.

White vs. Texas Co., 59 Utah, 180, as to parties involved and liability is similar in form and the court held no misjoinder and not multifarious.

In Duke vs. Boyd County, (Ky) 7 S.W. (2d), 839, an action at law by several policemen for themselves and others similarly situated to separately recover was sustained by reason of a Statute like our 104-3-16.

The same holding was made in Garley vs. Louisville, (Ky.), 65 S.W. 844.

In McCann vs. City of Louisville, (Ky.) 63 S.W. 446, a class suit (at law) was sustained. That was a suit by taxpayers to recover severally taxes unlawfully levied.

The court there said that the case was analogous to a

similar suit by stockholders having several claims against their corporation and they cited *Whaley vs. Commonwealth*, (Ky.) 61 S.W. 35, which sustained a class suit to recover for the benefit of all taxpayers similarly situated.

In the last case the court cited and approved *I Pom. Equity*, Sec. 270.

In the case of *Rohr, et al, vs. Stanton, et al*, 78 Mont. 494, 254 P. 869, several creditors joined in a suit in behalf of themselves and about one thousand other depositors to recover severally from the stockholders of a defunct bank. The suit was sustained. The court also observed that the prayer of the Complaint was not to be considered in determining the sufficiency of the Complaint and to the extent that it might be broader than the Complaint it would be disregarded.

See also *Day vs. Buckingham*, 87 Wis. 215, 58 N.W. 254.

Skinner vs. Mitchell, 108, Kan. 861, 197 P. 569.

Watson vs. Huntington, 215 F. 472.

Goldfield, etc. & Co. vs. Richfield, 194 F. 198.

A. S. & R. Co. vs. Godfrey, 158 F. 225

In *Whiting vs. Elmira, etc. Ass'n*. 61 N.Y.S. 27, a class suit by several purchasers of lots in behalf of themselves and others seeking damages and an accounting, the court sustained the suit and held there was no misjoinder of plaintiffs and no misjoinder of causes of action.

See also *Platt vs. Calvin*, 50 Ohio St. 702, 36 N.E. 735, which sustained a class suit in behalf of several hundred persons to recover a money judgment for money stolen by the defendant.

Where the fund is limited the suit should be brought as a class suit for the benefit of all creditors.

Bell vs. Mendenhall, 71 Min. 331, 73 N.W. 1086
and same case 78 Min. 57, 80 N.W. 843.

This case was followed by Keith vs. Mellenthin, 92 Min. 527, 100 N.W. 366.

In State vs. District Court, 90 Mont. 213, 300 P. 544, a class suit by depositors was sustained. The court held that the plaintiffs did not need to be in all respects similarly situated, but that it was sufficient that they had some interest in a common question.

See also Logan vs. Equitable Trust Co., 145, Oregon 684, 29 P. (2d) 511.

International and etc. vs. Red Jacket, etc. Co., 18 F. 2839.

It is not essential that each plaintiff have an interest in all of the matters involved in the suit, but it is sufficient if each has an interest in some matter involved in common with others.

Roney vs. Chicago T. & T. Co. 354, Ill., 144, 188 N.E. 194.

A bill on behalf of all depositors against all stockholders is not multifarious.

Rose vs. Morrow, 153 Tenn. 97, 282 S.W. 379.

See also 19 Am. Jur., Secs. 245-256.

Illustrative of the application of the code of civil procedure to joinder of plaintiffs where the suit becomes in effect merely for legal relief are are cases of:

Kinsman, et al, vs. Utah Gas and Coke Co., 53 Utah 10 and Wasatch Oil Refining Co. vs. Wade, 92 Utah 50, 63 P. (2d) 1070.

In Featherstone vs. National Republic Bancorporation 272, Ill. Ap. 500, the court held that a class suit was eminently proper in behalf of several depositors.

See also Pom. Remedies, 4th Edition, Secs. 285 and 388.

Hoggan vs. Price River Ir. Co., 55 Utah 170, 176, 184, P. 536.

Stevens vs. So. Ogden Land Co., 14 Utah 232.

Ludlow vs. Colorado & Co. (Utah) 137 P. (2d), 347.

Horne vs. Utah Oil Refining Co., 59 Utah 279, 202, P. 815.

McIntosh vs. Marling, 150 Ind. 301, 49 N.E. 164.

In the case of Gaiser vs. Buck 203 Ind. 9, 179 N.E. 1, 82 A.L.R. 1384, a general creditor (depositor) of the bank brought a suit "on behalf of herself and of other creditors similarly situated" alleging that there were a very large number of others similarly situated against the stockholders of the bank to recover the double liability. The lower court sustained the demurrer. The demurrer was general, but apparently in Indiana the general demurrer raises the question.

Reversing, the Supreme Court said that the action was properly brought under the section of the code identical with our section as to common or general interest and numerous parties.

In Boyd vs. Schneider (C.C.A. 7th) 131 Fed. 223, the court held that where the depositors relied on the same theory

of recovery a class suit was proper and the Complaint was not multifarious, citing Pom. Eq., Sec 245.

Where the fund was insufficient to pay claimants in full the court held that a class suit was proper, citing Pom. Eq., Sec. 74, 10.

National Surety vs. Graves, 211 Ala. 533, 101 So. 190.

In the case of Price vs. Price 118 W. Va. 48, 188 S.E. 770, the court held that equity should exercise jurisdiction where the fund was insufficient to pay claimants in full in order to carry out the maxim equality in equity.

In an elaborately considered case, citing many authorities, the New York Court of Appeals held that a class suit was proper where the fund was insufficient to pay the claimants in full.

Guffanti vs. National Surety Co., 196 N. Y. 452, 90 N.E. 174.

Mr. Pomeroy says: "Where a number of persons have separate and individual claims and rights of action against the same party but all arise from some common cause are governed by the same legal rule and involve similar facts, and the whole matter being settled in a single suit brought by all these persons, uniting as co-plaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone". 1 Pom Equity §245. Mr. Pomeroy, of course, condensed and generalized. In Sec. 255, etc. Mr. Pomeroy expands and develops the proposition with considerable citation of authority.

Further at Sec. 268 Mr. Pomeroy shows the development of the doctrine and a tendency at one time to restrict the same to technical "Bills of Peace".

At Sec. 269 he says that "the weight of authority is simply overwhelming, that the jurisdiction may and should be exercised either on behalf of a numerous body of separate claimants against a single party or on behalf of a separate party against such a numerous body, although there is no "single" common title, no "single" community of right or of "single" interest in the subject matter among these individuals, but where there is and because there is a community of interest among them in the questions of law and fact involved in the general question or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body."

"Courts of the highest standing and ability have repeatedly exercised this jurisdiction where the individual claims were not only legally separate, but were separate in time and each arose from an entirely separate and distinct transaction simply because there was a community of interest among all the claimants in the question at issue and in the remedy." In the same section he says that "while the foregoing conclusions are supported by the great weight of judicial authority, they are in my opinion no less clearly sustained by principle."

III.

THE SPECIAL DEMURRERS FOR UNCERTAINTY ARE NOT WELL TAKEN

Ground 12 of the demurrer which was sustained by the court became wholly immaterial to consider after the sustaining of the motion to strike.

Ground 13 of the demurrer asserts uncertainty with respect to things that are peculiarly within the knowledge of the demurrants.

Ground 13 of the demurrer is hypercritical in the extreme. It is not material what particular officer or agent made the representations. It is sufficient that the representations were made by any agent whatever and the facts are presumptively within the knowledge of the demurring defendants.

Ground 15 complains that it cannot be ascertained in what manner the defendants depressed the market, or manipulated or created the market. We are not required to plead the evidence. It is sufficient in pleading to allege the fact. If the defendants created a sham and fictitious market, presumptively they know how they did it and whether they did it in one way or another is of no consequence.

Ground 17 of the demurrer also complains of uncertainty with respect to matters that are peculiarly within the knowledge of the defendants.

Ground 18 of the demurrer relates to matters that are peculiarly within the knowledge of the defendants. Furthermore, the precise mode or manner or precise amount of diversions are not material to inquire into for the purpose of establishing the main contention of the plaintiffs, that they are entitled to be regarded as still members and shareholders of the building and loan association.

Ground 23 of the demurrer relates to matters peculiarly within the knowledge of the defendants. There is nothing uncertain about the allegation that "defendant building and loan association claims to be the owner by purchase" of the

certificates. This is an allegation of an ultimate fact. If the association does not make such claims it is easy to say so. If it does make the claim, it is easy to say so. It would be idle to plead the evidence with respect to such matters. All of such matters are presumptively within the knowledge of the demurring defendants.

Ground 25 and 26 are not grounds of demurrer at all. They attack the prayers of the complaint rather than the complaint itself. The demurrants might just as well have demurred for want of facts sufficient to constitute a cause of action for divorce or a cause of action in "quo warranto, etc."

Ground 24 of the demurrer raises a question which deserves and demands the consideration of the court.

Paragraph 21 of the complaint is "the plaintiffs did not discover the existence of any of said frauds until within the last two and one-half years." The ground of demurrer alleged is that "no facts are alleged in said complain establishing or in any manner explaining why any alleged frauds or facts constituting such frauds were not earlier discovered."

Under our statute the cause of action does not arise until discovery of the fraud. U.C.A. 104-2-24.

In the case of *K. P. Railway vs. McCornick* 20 Kans. 107, the plaintiff suing for fraud alleged, "plaintiff did not discover such fraud until the first day of December, 1874" (a time within the statute). The defendant moved that plaintiff among other things be required to state the circumstances of the discovery of the fraud, etc. The motion was sustained and the Supreme Court reversed. Judge Brewer delivered the opinion saying: "The question is when did plaintiff discover

the wrong and not was he diligent in its investigation." And he said that the rule of the old equity practice does not obtain. This case was approved in *Zivernik vs. Kemper* 50 Ohio St. 208, 34 N.E. 250, holding that all that is necessary for plaintiff to allege is that the fraud was not discovered until a time within the statutory period.

In *Alexander vs. Cleland* 13 N. M. 524, 86 P. 425 under substantially the same statute as ours the court said "the words used in these sections seem to us to be as plain as any in the English language, there can be no doubt as to their meaning." The Complain had alleged "it was not until about the month of July, 1902, that the plaintiff learned of the fraudulent claim of the defendant, etc." And such date being within the period of the statute the court held it sufficient and that that ground of the demurrer should have been overruled.

In *Stearns vs. Hochbrunn* 24 Wash. 206, 64 P. 165 under a statute like our own the court holding that it was not necessary to allege beyond the terms of the statute referred to the fact that the English statute contained the words "or with reasonable diligence might have been," first known or discovered and the court said "the question is when did the plaintiff discover the wrong and not was he diligent in his investigation?" "The question is one of time and not of conduct."

Ground 11 of the demurrer asserts misjoinder of causes of action. This ground first assumes falsely that there is stated no right of interest common to all the plaintiffs. Demurrants ignore the many points that are common to all the plaintiffs, e.g. The general scheme to defraud all investment stockholders except the insiders. The necessity to prorate the losses. The fraudulent conveyances to the common stockholder, the

Colonial Corporation, etc.

This ground next assumes falsely that the various reliefs prayed for constitute several and distinct causes of action and that each step in the transaction constitutes a distinct cause of action.

This ground falsely assumes that there is a misjoinder of parties.

Ground 9 of the demurrer, that there is a misjoinder of plaintiffs falsely assumes that there is no matter of interest in the subject matter that is common to all the plaintiffs.

Ground 10 of the demurrer, that there is a misjoinder of defendants is untrue to the record. It ignores the fact that all the defendants are charged with the commission of the wrongs and of being participants therein and it ignores the law that under the code (as well as always in equity) defendants tho only severally liable and in different degrees are proper parties.

Moreover this ground (the others also) are not specific as the statute requires. There must be a distinct specification of the ground. U.C.A. 104-8-2.

Only the defendant that is misjoined can make the objection.

1 Sutherland Code Pleading, §291.

The demurrant must state the particulars—who is misjoined with whom and why.

See O'Callaghan vs. Bode, 84 Cal. 489, 24, P. 269.
Krelling vs. Krelling, 118 Cal. 413, 50, P. 546.

Demurrer for uncertainty will not lie where ultimate facts are pleaded sufficient to appraise adversary of the claims.

Bowers vs. Carter, 59 U. 249, 202, P. 1093.

Jeremy & Co. vs. D. & R. G. Rd., 60 Utah 153,
207, P. 155.

Less certainty is required where the facts are peculiarly within the knowledge of the adversary.

49 C. J. 378.

Industrial Com. vs. Wasatch Co., 80 Utah 225,
14 P. (2d) 988.

It is respectfully submitted that the judgment should be reversed.

E. A. WALTON,

R. LESLIE HEDRICK,

Attorneys for Appellants.