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Mamie Nunnelly, et al., v. Ogden First Federal Savings and Loan Association, et al. : Brief of Respondents Ogden First Federal Savings and Loan Association, Colonial Corporation, M. L. Dye and S. G. Dye

Utah Supreme Court

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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.

No. 6657

**BRIEF OF RESPONDENTS OGDEN FIRST FEDERAL
SAVINGS AND LOAN ASSOCIATION, COLONIAL
CORPORATION, M. L. DYE AND S. G. DYE**

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BRIEF OF RESPONDENTS OGDEN FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, COLONIAL CORPORATION, M. L. DYE AND S. G. DYE

STATEMENT OF THE CASE

In their "STATEMENT OF THE CASE" appearing on pages 1-3 of their brief, appellants inadvertently fail to mention various allegations and omissions in their complaint which preclude a class suit and unmistakably disclose a misjoinder of parties and causes of action.

(Except as otherwise indicated, the italics herein are ours.)

Under appropriate titles we shall later discuss the motions to strike and the uncertainty of various allegations of the complaint.

In paragraph 11 of the complaint (R. 3-4) it is alleged that plaintiff Nunnely was the owner of an investment certificate in the Association on or about the year 1937 and that the other plaintiffs respectively owned designated investment certificates on or about the year 1935.

In paragraph 13 of the complaint (R. 4) it is alleged that "during the years 1934, 1935 and 1936" said Association came into possession and still has possession of said certificates and that same were thus obtained from plaintiffs through the alleged frauds set forth in the complaint, with no payment of said certificates or any part thereof "except various property of no substantial value." The "various property" is not identified or described and no offer to return same is made.

In paragraph 14 of the complaint (R. 4-5) the alleged frauds are enumerated, consisting of claimed representations brought to the attention of plaintiffs and others similarly situated that said certificates had slight if any value, concealment from them of the true condition of the Association, and manipulation and depression of the market for such certificates. Said frauds are alleged to have been pursuant to a conspiracy entered into in the year 1933 by "all of the defendants, together with certain other persons who were directors of the corporations." How or in what manner or by what means the alleged concealment or the alleged manipulation or depression of the market was accomplished or why the alleged frauds were not earlier discovered does

not appear. It is also alleged in said paragraph 14 that the corporate defendants "diverted from their respective treasuries large sums of money equitably belonging to said certificate holders and paid out the same for expenses and for commissions to said agents" and "to some extent" and "in some instances" funds thus diverted were used to pay for investment certificates procured from plaintiffs. Although no claim is made that any plaintiff has ever been a stockholder of defendants Colonial Corporation or Atlas Realty Company and the complaint is silent as to how or why the alleged money "diverted from their respective treasuries" belonged to plaintiffs or was of concern to them or any of them, an accounting therefor is demanded in the second paragraph of the prayer of the complaint (R. 7).

In paragraph 15 of the complaint (R. 5-6), without giving any information as to the time or place of any of the respective transactions with the respective plaintiffs or as to the identity of persons present or participating therein, or as to the consideration paid for any certificate of any plaintiff or any other term or condition of any alleged contract which any plaintiff now seeks to have rescinded, it is alleged that plaintiffs "did part with their certificates without receiving payment therefor, except as hereinabove stated."

In paragraph 16 of the complaint (R. 6) it is alleged that "the defendants" have misappropriated Association money for excessive salaries to the defendant Dyes and for illegitimate expenses in the commission of said frauds.

In paragraph 17 of the complaint (R. 6) it is alleged that in the year 1937 "the said defendants Dye and the

defendant corporations" fraudulently transferred \$85,000.00 worth of Association assets to defendant Colonial Corporation. The complaint is silent as to any possible concern of any of the other defendants in this alleged transaction.

In paragraph 18 of the complaint (R. 6) it is alleged that defendant Association and Colonial Corporation are and for several years past have been "insolvent."

In paragraph 19 of the complaint (R. 6-7) it is alleged that the amounts due plaintiffs and other investment certificate holders similarly situated are so large that said Association cannot pay them in full and a prorating of assets would therefore be necessary.

Plaintiffs pray (R. 7) : (1) that the status of plaintiffs be adjudicated, that they be adjudged to be the owners of said certificates and "that they have judgment against the defendants for the unpaid amounts thereof"; (2) that there be an accounting by all defendants in respect of all matters alleged in the complaint; (3) that defendants be enjoined from canceling said certificates; (4) that a receiver be appointed to take charge of and conserve the assets of the defendant Association and Colonial Corporation; (5) that judgment be entered against Colonial Corporation "to the use of the defendant Ogden First Federal Savings and Loan Association and the plaintiffs" for an accounting and return to the treasury of the assets transferred to Colonial Corporation; (6) that there be a marshaling of assets and liabilities of defendant Association and a liquidation thereof and a distribution of its assets among those entitled thereto; and (7) for general relief, costs of suit and "for attorney's fees."

We shall endeavor to follow the order of discussion adopted in appellants' brief.

WHAT CAUSE OR CAUSES OF ACTION ARE STATED?

It is true that we demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action in favor of plaintiffs or any of them and against the demurring defendants and that the trial court overruled the demurrer. In support of this ruling appellants spear-head their discussion with citation of the *Badger* case, 94 Utah 97, and the *Markey* case, 186 So. 757. The *Badger* case was a suit at law to recover an unpaid balance due on a fully matured certificate. The *Markey* case was a suit at law to recover damages occasioned by the fraudulent acts complained of.

Upon the trial our general demurrer did not succeed in "smoking out" (of record) the kind of suit upon which appellants intended to rely. But on page 9 of their brief in this Court, to avoid the dilemma which even they recognize would exist in an action at law, appellants say that this case is "one in equity." Here, as in the *Badger* case, it is alleged that part payment only of the debt evidenced by the allegedly matured certificates has been made, and a money judgment is demanded for the "unpaid amounts thereof." Obviously the statement of this cause of action at law and the tort action for damages impelled the trial court to overrule the general demurrer. Any claimed cause of action in equity for rescission of the transactions complained of is fatally defective for failure to tender back

the "various property" or other considerations received by the respective appellants without offering any excuse for such failure.

In 9 C. J., at page 1241, the law is thus stated:

"In nearly all jurisdictions a bill is demurrable in which complainant does not offer to return any consideration which it shows that he has received, or otherwise place defendant in statu quo, or sufficiently excuse himself from this duty."

In *Rosenthyne v. Matthews-McCulloch Co. et al.*, 51 Utah 38, 168 Pac. 957, reference is made to said 9 C. J. at pages 1207-1219, where the well-settled law in harmony with our contention is announced, and this Court says (pp. 43-4 of the Utah report) that the law there stated is "the doctrine *which controls* in such cases."

To same effect see:

Kelly et al. v. Kershaw, 5 Utah 295, 14 Pac. 804,
at p. 296 of the Utah report;

21 C. J., p. 400;

12 C. J. S., p. 1004;

In re Fox West Coast Theatres, 88 Fed. (2d)
212 (9th C. C. A.);

Gillette et al. v. Oberholtzer et al., 264 Pac. 229,
at 230;

Higgins v. First National Bank, 183 Atl. 197
(N. J.), at 198;

De Lange v. Ogden et al., 106 S. W. (2d)
385 (Texas), at 302.

As appears from the allegations of the complaint above summarized, it contains:

(1) The alleged causes of action in contract of the respective appellants (each separate and distinct from the

others, no two of which arise out of "the same transaction," and no appellant having any title or interest in or right to prosecute any cause of action except his own or to complain of any breach by the Association of its contract with any other appellant) for a money judgment representing, as in the *Badger* case, the difference between the amount paid and the amount alleged to be due from the Association on the certificates;

(2) Allegation and demand for rescission of each of the separate and distinct transactions whereby the respective plaintiffs are alleged to have parted with their stock, no appellant having any interest in or right to complain of any transaction except that to which he was a party;

(3) The separate and distinct alleged causes of action of the respective appellants in tort for conspiracy (no appellant having any concern in or right to complain of the insufficiency of any consideration moving to other appellants or to question or complain of any alleged false representations other than those made to and believed and relied upon by him) with a prayer for judgment not only against the Association issuing the certificates but against the two other corporate defendants and each and all of the individual defendants for an amount that would be the proper measure of damage under such a cause of action, to wit, the difference between the respective amounts paid and the matured value of the certificates;

(4) Causes of action of the respective appellants for an accounting with respect to alleged improper and excessive commissions paid to agents and the right to recover

which is vested in the corporations alleged to have paid same, to wit, the Association and Colonial Corporation;

(5) Causes of action of the respective appellants for an accounting with respect to alleged excessive salaries paid by the Association to the defendant Dyes, which causes of action if any are vested in said Association;

(6) Causes of action of the respective appellants to set aside the alleged fraudulent conveyance to Colonial Corporation, which causes of action if any are vested in the Association;

(7) The various causes of action of the respective plaintiffs *against* defendants, including the Association, and their cause of action *in behalf of* the Association "for an accounting and return to" its treasury of the assets alleged to have been turned over to Colonial Corporation. The Association is both plaintiff and defendant.

We very much doubt if a more extraordinary example of "shotgun" pleading than this complaint has ever been filed in any court. Accepting certain of its allegations as true, it is "just like the *Badger* case"—a suit at law to recover a balance due under the contracts alleged. Other allegations and the prayer for a money judgment against all defendants brand it as a tort action at law to recover damages for the alleged frauds. And, as above indicated, appellants say that the suit is "one in equity." Obviously the causes of action in contract and in tort are in irreconcilable conflict with the cause of action in equity for rescission.

In *Cook v. Covey-Ballard Motor Co.*, 69 Utah 161, 253

Pac. 196, the well-settled law in this and other jurisdictions relative to election of rights and remedies is thus stated at page 169 of the Utah report:

"It is well settled that one who is induced to make a sale or trade by the deceit of a vendee has the choice of two remedies upon his discovery of the fraud; he may affirm the contract and sue for his damages, or he may rescind it and sue for the property he has sold or what he has paid out on the contract. The former remedy counts upon the affirmance or validity of the transaction, the latter repudiates the transaction and counts upon its invalidity. The two remedies are inconsistent, and the choice of one rejects the other, because the sale cannot be valid and void at the same time."

THE COMPLAINT IS MULTIFARIOUS

In addition to 104-3-16, U. C. A., cited on page 8 of appellants' brief and which provides that "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," another section of our Code, to wit, 104-7-3, U. C. A., is pertinent and controlling. It reads as follows:

"The plaintiff may unite in the same complaint several causes of action, legal or equitable or both, where they all arise out of:

"(1) The same transaction, or transactions connected with the same subject of action; or,

"(2) Contract, express or implied; or

"(3) Injuries, with or without force, to person and property, or either; or,

“(4) Injuries to character; or,

“(5) Claims to recover real property with or without damages for the withholding thereof, and the rents and profits of the same, or waste committed thereon; or,

“(6) Claims to recover personal property, with or without damages for the withholding thereof; or,

“(7) Claims against a trustee by virtue of a contract or by operation of law.

“But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages and of other liens, must affect all the parties to the action, must not require different places of trial, and they must be separately stated.”

It will be observed that the last quoted section expressly refers to “equitable” as well as legal causes of action. The constitutionality of said section has not as yet been questioned. The codes of many States include sections in substance identical with 104-3-16 and 104-7-3, U. C. A. The courts of those States, without a single exception, construe those sections as forbidding joinder of parties and causes of action as has been attempted in the case at bar.

Even had the cited Utah statutes never been enacted and were the equity practice (old or new) controlling, the complaint would be fatally defective.

In *Creer et al. v. Bancroft Land & Irrigation Co.*, 90 Pac. 228 (Idaho), fourteen plaintiffs brought suit in equity to compel defendants to furnish each plaintiff the amount of water specified in his contract with defendant to be received by him. All of the contracts were upon the same printed form, with the same provisions except as to the

quantity of water to be delivered to the respective plaintiffs. In sustaining a demurrer based upon misjoinder of parties and causes of action, the Idaho court says at page 230:

“Each of the plaintiffs bases his action upon the contract executed to him alone. Neither of the plaintiffs have any interest whatever in the contract of either of the other plaintiffs. It is a well-settled rule that two or more persons having distinct causes of action, although against the same defendant, may not join as plaintiffs.” (Numerous cases cited.)

In *Lockhart v. Christian et al.*, 219 Pac. 490 (N. M.), after quoting a statute in substance the same as our 104-7-3, the court says at page 491:

“The terms of this statute are clear and free from doubt or ambiguity. Two things are necessary in order to properly unite more than one cause of action. They must belong to one of the classes enumerated in the statute, and they must *each* affect *all* of the parties to the suit.”

In *Holland Oil & Gas Co. et al. v. Holland et al.*, 220 Pac. 1044 (Kan.), it was alleged that each of the plaintiffs had been induced to buy an interest in a worthless oil and gas lease by identical misrepresentations made to each of them. After quoting Kansas statutes in substance identical with those of Utah, the court says at page 1045:

“In this instance the cause of action of each plaintiff was fraud committed by false representations made to him and relied on by him to his damage. Although under the allegations of the petition the false representations made to the various plaintiffs were the same, the torts committed were several. No plaintiff was affected by the cause of action of any other, or interested in the relief demanded by any

other. The question whether Downing or Adams or Puterbaugh had been defrauded to his injury was personal to him, and not of common or general interest. If Downing's case should be tried and he should recover, the necessary elements of Adams' or Puterbaugh's cause of action would not be established."

In *F. S. Harmon & Co. v. Eastern Furniture Co. et al.*, 255 Pac. 964 (Wash.), construing Washington statutes substantially like the above cited Utah sections, the court says at page 966:

"While we have given the cited statutes a liberal construction, we have never held that two or more causes of action could be united simply because they arose out of contract or arose out of the same transaction; the rule is applicable only where *all of the parties* to the action are affected by *all of the causes of action*."

In *Baker v. Hanson et al.*, 231 Pac. 902 (Mont.), one of the causes of action pleaded confessedly affected *all* of the parties, but another cause of action pleaded did not. At page 904, after quoting the Montana statute substantially like the closing paragraph of 104-7-3, U. C. A., the court says:

"As observed before, the cause of action upon the claim for \$650.86 *does affect all of these parties*, but the cause of action upon the claim for \$1,290 *does not affect the defendant Fidelity Company*; hence the two causes of action *cannot be joined*, and the court erred in overruling the special demurrer to the complaint."

In *Pittsburg etc. Co. v. Wakefield Hardware Co.*, 47 S. E. 234 (N. C.), the court, after saying that each of the causes of action "must affect all the parties to the transaction," approves the following statement of the law at page 234:

"It is not sufficient that some of the defendants be affected by each of them. All of the defendants must be affected by each of them to warrant the union of them in one suit."

Also see:

Felt City Townsite Co. v. Felt Investment Co. et al., 50 Utah 364, 167 Pac. 835, at page 370 of the Utah report;
Crummer v. Wilson et al., 237 Pac. 1035 (Kan.);
Jordan et al. v. Buick Motor Co. et al., 75 Fed. (2d) 447 (7th C. C. A.);
Hamilton v. Empire Gas & Fuel Co. et al., 297 Fed. 422 (8th C. C. A.);
Walser et al. v. Moran, 173 Pac. 1149 (Nev.).

Appellants seek to avoid the clear mandate of the Utah statutes and the uniform decisions of the courts forbidding joinders like those here attempted by stressing the great number of plaintiffs and others alleged to be similarly situated and the alleged multiplicity of suits to be avoided. They forget that such considerations alone are never sufficient to invoke the jurisdiction of equity, and in contending otherwise they are in conflict with Mr. Pomeroy upon whom they so heavily lean for support.

In Pomeroy's Code Remedies (3rd Ed.) the language of 104-3-16, U. C. A., relative to the propriety of a joinder of several plaintiffs or a class suit where "the question is

one of a common or general interest of many persons" is quoted on page 454, and in his discussion of that section the author says at page 455:

"The suit cannot be sustained by one as the representative of the many others who really sue in his name, unless it could have been maintained if all these many others had been regularly joined as co-plaintiffs, or unless it could have been maintained by each of them suing separately and for himself."

We seriously question appellants' interpretation of Section 245 and other sections of Volume 1 of Pomeroy's Equity Jurisprudence cited in their brief. Several courts have severely criticized some of the language there employed, and no court in any jurisdiction, state or federal, has ever approved any such law or doctrine as that which appellants ascribe to Mr. Pomeroy. In Section 251½ of said Volume 1, Mr. Pomeroy aptly states that the jurisdiction of equity does not exist "*because of multiplicity of suits but to avoid them*" and condemns "spurious 'bills of peace,' " where, after joinder, there would merely be "a bundle of separate suits."

Although Mr. Pomeroy has never advocated a doctrine that would permit a joinder of plaintiffs having separate and distinct causes of action arising out of separate and distinct transactions where an adjudication of the claims of one plaintiff could not operate as an adjudication of the rights of any other plaintiff and where the claims of each must necessarily rest on different evidence, he has approved a more liberal rule with respect to joinder than that generally followed. Cases like *Duke et al. v. Boyd County*, 7 S. W. (2d) 839 (Ky.), where the rights of three plaintiff peace officers

and twenty-five other peace officers to recover a fee fixed by statute would be conclusively determined by an adjudication as to the constitutionality of the statute illustrate this departure. But see *Lile et al. v. Kefauver et al.*, 51 S. W. (2d) 473 (Ky.), in which the court discusses its decision in the *Duke* case. A joinder of various persons each claiming to be a creditor of a defunct bank sought to join as plaintiffs in a suit to recover judgment against the directors for the respective amounts claimed by them. In support of its conclusion that there could be no class suit or a joinder of causes of action by two or more plaintiffs, the court says at page 475:

“In cases where an individual creditor seeks to recover a debt due him, there is no such community of interest with other claimants having similar claims as to authorize a class suit.”

In *Miller et al. v. Arizona Bank et al.*, 43 Pac. (2d) 518 (Ariz.), the text from Pomeroy relied upon by appellants is discussed at length. At page 528 the court thus announces what it believes to be “the true test to be applied” in determining whether there may be a class suit or a joinder of various plaintiffs and causes of action:

“Can proof of the vital fact necessary to establish the right of one plaintiff be made by the same evidence which is necessary to establish a corresponding right in each of the other plaintiffs?”

In the course of its opinion (pp. 526-7) the Arizona court quotes at length from the decision of the Supreme Court of California in *Noroian v. Bennett*, 179 Pac. 158, 159, where joinder was denied because there was “no single

fact or act, the determination of which will determine the rights of all the plaintiffs" and because, although the causes of action of the various plaintiffs were similar and based upon the alleged fraud of the defendants, each was separate and distinct from the others and not "capable of proof by the same evidence." The opinions in the California and Arizona cases just cited are well worth reading.

In *Whiting v. Elmira Industrial Ass'n.*, 61 N. Y. Supp. 27, cited by appellants, suit was brought by plaintiff in behalf of himself and others in like situation for profits from the sale of lots alleged to be due pursuant to a contract between the parties. The court calls attention to the fact that the only possible difference between the claims of plaintiff and other parties to the contract in whose behalf he brought suit was in the amounts to be distributed between them and remarks that this difference "is more mythical than genuine." In the later case of *Brown v. Werblin et al.*, 244 N. Y. Supp. 209, a situation very similar to that in the case at bar was presented. Plaintiff there brought suit for herself and for the benefit of all others similarly situated. She alleged that the defendants entered into a conspiracy to reap large profits by victimizing innocent investors in the preferred and common stocks of Advance-Rumely Company by agreeing to form a pool to acquire large blocks of said stocks; to create a false market for same; to procure the publication in tipsters' sheets of articles calculated to deceive; and through various other devices recited in detail to induce plaintiffs to buy said stocks and thus lose large sums of money. It was further alleged in the complaint that profits realized in these fraudulent transactions were

a trust fund, to which plaintiff and others similarly situated were entitled. With reference to Sec. 195 of the Civil Practice Act of New York (in substance like 104-7-3, U. C. A.) and the right of plaintiff to prosecute the suit, the court says at pages 212-13:

“A representative action cannot be maintained unless it appears from the allegations of the complaint that the plaintiff not only has a cause of action but that he is representative of a common or general interest of others. *Bouton v. Van Buren*, 229 N. Y. 17, 127 N. E. 477. Here there is neither community of right or interest in the subject-matter of the action nor in the questions of law or fact involved. Each plaintiff has a several right to recover, in an action at law, the damage, if any, sustained by reason of defendants’ fraud. Each plaintiff’s action is necessarily predicated upon the facts which induced him to act. The right of each individual is not derivative. It must stand on allegations and proof peculiar to itself and dissociated from the others. None has an interest in the cause of action or the damage recoverable by another. In such a case a class action may not be maintained.”

It would unduly lengthen this brief to attempt an analysis of all the authorities cited by appellants. They consist of cases like *White v. Texas Co. et al.*, 59 Utah 180, holding that officers of a corporation, like other persons, are liable for damages occasioned by their fraud; that class suits by taxpayers and depositors of the usual type are not forbidden; that all beneficiaries of a trust fund, as well as parties to a single contract, including third party beneficiaries, may properly join in any suit to protect their common rights; that where the rights of all plaintiffs are dependent

upon the same question and will be determined upon the same evidence, such plaintiffs and their causes of action may be united in one complaint.

In 114 A. L. R., beginning on page 1015, appears an annotation of numerous authorities touching the question of joinder in suits like the case at bar. At page 1016 reference is made to Mr. Pomeroy's discussion of the subject, and after quoting from Section 269, 1 Pomeroy's Equity Jurisprudence (4th Ed.), the editor seems to indicate an uncertainty as to just what the text means. He says, however:

"Whatever support the text statement above quoted may have in the cases generally, it seems that the doctrine stated by the learned author has not thus far been so applied as to permit the maintenance of a representative tort action based on similar frauds separately practiced by the same defendant upon different individuals."

Immediately following, on the same page, the editor says with reference to class suits in equity:

"Class or representative suits to obtain the rescission of transactions based on similar frauds practiced by one defendant upon various, and commonly numerous, persons, have so often been held not maintainable that one may well doubt whether under any circumstances such a suit will lie. One of the basic difficulties is not merely that the various transactions are legally distinct, but that each case is, or at least may prove to be, to some extent different. Even where the false representations were exactly the same, the various persons victimized may have acted upon different opinions and beliefs as to the facts; one may have relied upon one sup-

posed fact, another upon a different one, and some may have largely acted upon their own judgment as to business possibilities, etc. Furthermore, each has an election of remedies, all may not desire the same relief, and some may not be entitled to any relief. In some cases the interests of the various victims may be conflicting."

On page 1019 the following statement with reference to law actions is made:

"Thus far, neither under existing codes nor under general rules of law, has a representative action to recover damages for similar frauds practiced on numerous persons been upheld. In general, the objections to such suits seem to be the same as those applying to representative suits to rescind for fraud; namely, that the demands of the various defrauded parties are not only legally distinct, but each depends upon its own facts, and that a material difference in facts may exist. *Furthermore, a choice of remedies is ordinarily presented, and the plaintiff cannot know that other persons similarly situated will not elect to affirm the fraudulent transaction.*"

The annotation contains numerous citations from many jurisdictions. A vast number of other decisions fully support the text. But in view of the fact that no authority has been found by us or Mr. Walton or Mr. Pomeroy or the editor of A. L. R. which supports appellants' contention that they may unite their several causes of action in one complaint or prosecute a class suit, it would seem unnecessary to amplify our citations touching this question.

In *Linden Land Co. et al. v. Milwaukee Ry. & Lighting*

Co. et al., 83 N. W. 851 (Wis.), in refusing to permit a class suit, the court says, at page 856:

“The theory of the action, where one properly sues for all, is that the result is conclusive on all who are similarly situated, and whom the plaintiff rightfully represents; and such must be the theory, or else the plaintiff does not represent all, and the statement that he does is not only false, but absurd.”

Even were it possible to assume that the *named* plaintiffs in this suit have a clear right to join and recover a money judgment for breach of contract and/or damages for fraud and/or rescission and to prosecute for “the use and benefit of defendant” Association the alleged cause of action for fraudulent conveyance of assets to Colonial Corporation and to obtain the appointment of a receiver of the assets of both the Association and Colonial Corporation because of insolvency and to obtain a liquidation of the Association and a distribution of its assets, would such manifold adjudication or any part of it be “conclusive on all who are similarly situated”?

Perhaps, in at least some instances, the “various property” for which others alleged to be similarly situated sold or traded their stock is now worth much more than the face value of their certificates. Especially if the financial condition of the Association is as bad as that painted in the complaint, there may be many “others similarly situated” who would much prefer to retain the “various property” by them received than be reinstated as stockholders. But however this may be, they and not the named plaintiffs have the right to decide whether they wish to rescind or abide by the transaction pursuant to which they disposed of their

stock. As expressly held by this Court in the *Cook* case, *supra* (69 Utah 161), this right of decision is vested in the defrauded party. It may not be exercised by any other person, however benevolent his purpose may be.

If funds of the Association have been wrongfully disbursed and its assets fraudulently conveyed as alleged and were the absurd statement of its insolvency true, would appellants' claimed right to prosecute a class suit and make the necessary election for "others similarly situated" be thereby fortified? Would not the alleged financial misfortunes and difficulties of the Association be an added reason why "others similarly situated" would have the exclusive right and authority to make their own decision?

Among other conclusive reasons why appellants may not be permitted to speak for "others similarly situated" is that they do not allege and cannot possibly know whether such "others" believed or acted in reliance upon any alleged false representation or when any alleged fraud was discovered by such "others" or the circumstances surrounding such discovery.

Another reason why there is a fatal misjoinder of causes of action will be discussed in the subtitle next below appearing.

The Association Is Made Both a Plaintiff and a Defendant

In their complaint appellants allege that the "defendants have wrongfully misappropriated and diverted from the treasury of said Building and Loan Association large sums of money for excessive salaries to the said Dyes and

illegitimate expenses in the commission of said frauds" and pray for an accounting therefor by the defendants. A fraudulent conveyance by the Association to Colonial Corporation is alleged (R. 6) and judgment is sought against Colonial Corporation to the use of defendant Association for an accounting and return to the treasury of assets thus conveyed. Insolvency of said two corporations is alleged, and a receiver to take charge of their assets is demanded, a liquidation and distribution of the assets of the Association being also prayed (R. 7).

These demands may not be joined in a single suit brought by one plaintiff or by any number of plaintiffs.

In *Blake et al. v. Boston Development Co. et al.*, 50 Utah 347, 167 Pac. 672, suit was brought by stockholders against a corporation and its officers and directors. It was alleged: that the corporation was dominated by one of the directors, to wit, Vahrenkamp; that at the time of its incorporation all of defendant corporation's stock was transferred to Vahrenkamp in consideration of the conveyance by him to the company of three worthless mining claims; that company affairs had been grossly mismanaged; that various property and funds of the company had been fraudulently taken over by Vahrenkamp without consideration; that defendant officers and directors had permitted Vahrenkamp to take large blocks of company stock without any payment therefor and had permitted him by false credits on the books to avoid payment of assessments that had been levied upon outstanding stock which outsiders, including plaintiffs, had been compelled to pay; and that certain assessments had been unlawfully and fraudulently levied. Unlike the com-

plaint in the case at bar, it was alleged due effort had been made to secure corporate action in the premises. In their prayer plaintiffs asked: that the corporation and defendant officers and directors be enjoined from selling stock to pay a recent assessment improperly levied; that defendants be required to show cause why a receiver should not be appointed; that certain former assessments alleged to be unlawful be declared fraudulent and void; that the individual defendants be required to make a full accounting in the premises; and that they might have general relief. The complaint was attacked upon the following grounds: "that separate and independent causes of action are commingled; that there are several causes of action improperly united in the complaint; that there is a cause of action stated in favor of the corporation and against the officers and directors of the corporation; and another alleged cause of action is stated against the incorporation for an injunction, and still another to annul and set aside certain assessments, and a further cause of action on behalf of the plaintiffs for personal relief" (pp. 352-3 of the Utah report). The trial court sustained the motion and demurrers based upon the foregoing grounds, and upon plaintiffs' refusing to plead further entered judgment dismissing the action.

At page 354 this Court concurs in the holding of the Alabama decision there cited that although a stockholder may sue to protect the rights of the corporation where it fails to do so itself "that will not justify the joining of causes of action for and against the corporation." At pages 355-6 this Court says:

"The fact, however, that the corporation does

not bring the action for itself in its own name does not give the plaintiffs, who are acting on behalf of the corporation, the right to join causes of action in one complaint that the corporation could not have joined, and of course, they, under no circumstances, have the right to commingle several causes of action in one statement. The attempt, therefore, to join a cause of action to enjoin the corporation from collecting certain assessments, which we have seen is a cause of action against the corporation, with one for an accounting against the officers and directors of the corporation, which is a cause of action in its favor, cannot be sustained."

In *Beal v. United Properties Co.*, 189 Pac. 346 (Cal.) (a case very pertinent to other phases of misjoinder earlier discussed), after stating that assets of a corporation illegally dissipated should be returned to it as claimed by plaintiff in the complaint, the court says:

"It is manifest, however, that he cannot join such an action (wherein he is suing as a trustee of the corporation and in the nature of a guardian) with an action in his own behalf wherein he is seeking personal relief."

Also see: *James v. Steifer Mining Co.*, 171 Pac. 117 (Cal.).

The causes of action for an accounting and to set aside the claimed fraudulent conveyance to Colonial Corporation as alleged could, of course, be only derivative. Pursuant to the allegations and prayer of the complaint, title to such causes of action is in defendant Association. That appellants sue as stockholders and not as creditors conclusively appears from various allegations of the complaint, including

the emphatic statements in paragraph 13 thereof (R. 4) that the alleged claims of the Association that appellants' stock has been retired, paid and canceled and that they have no rights or interest therein "are wholly without right" and the prayer of the complaint (R. 7) "that it be adjudged that they are still the owners of said certificates." Any possible question as to the status in which they sue is further removed by paragraph 5 of the prayer (R. 7) wherein they expressly seek judgment against Colonial Corporation "for an accounting and return to the treasury" of the Association of assets alleged to have been turned over to Colonial Corporation. Such a judgment would, of course, be entirely foreign to a suit by a creditor seeking to set aside a fraudulent conveyance; he seeks and, if successful, is granted direct recourse against the conveyed property to the extent necessary to satisfy his claim. On page 15 of appellants' brief "the main contention of the plaintiffs" is stated to be "that they are entitled to be regarded as still members and shareholders of the building and loan association."

At various places in appellants' brief mention (without argument) is made of "insolvency," "trust fund," "prorating," and other subjects often pertinent in cases where numerous parties may properly be joined. But insolvency of one or more defendants or the existence of a trust fund or a necessity for prorating are not specified in 104-7-3, U. C. A. as reasons for avoiding its mandate that all causes of action sued on "must all belong to one" of the specified classes and "must affect all the parties to the action." In a large percentage of equity suits similar to the case at bar,

the complaint contained some or all of the following allegations: insolvency of a corporate defendant primarily liable to plaintiff, with demand for a receiver of its assets; right of recourse against a trust fund and a necessity for prorating. Among such cases (each of which is very pertinent to the questions of misjoinder here involved) are the following:

Ballew Lumber & Hardware Co. et al. v. Missouri Pac. Ry. Co. et al., 232 S. W. 1015 (Mo.);

Rural Credit Subscribers' Ass'n. et al. v. Jett et al., 266 S. W. 240 (Ky.);

Brown v. Werblin et al., 244 N. Y. Supp. 209, *supra*;

Stewart et al. v. Ficken et al., 149 S. E. 164 (S. C.);

Spear et al. v. Greene Co. et al., 140 N. E. 795 (Mass.);

Lile et al. v. Kefauver et al., 51 S. W. (2d) 473 (Ky.), *supra*.

THE DEMURRERS FOR UNCERTAINTY

Even the author of appellants' brief will doubtless concede that the four and a half pages devoted to the special demurrers are somewhat sketchy. Replying in kind we might simply refer to the demurrers with no further comment than our statement that they were properly sustained. Of the two pages of appellants' brief on this question which do not consist of mere dogmatic statement, one and a half pages are directed to Ground 24 of the demurrer, which attacks the complaint because it contains no explanation of why the alleged frauds or the facts constituting same were not earlier discovered. On page 16 of their brief

appellants say that this "demurrer raises a question which deserves and demands the consideration of the court." Two Kansas cases with one from New Mexico and another from Washington are cited in support of the complaint's allegation. Here at last appellants have been able to discover pertinent authority adverse to a ruling of the trial court. We believe their discovery "deserves and demands the consideration of the court." But unfortunately the better reasoning and the overwhelming weight of authority are against them even on this point. That a plaintiff commencing suit for fraud after the limitation period has elapsed, in order to avoid the statute, must not only set forth in his complaint the time when he discovered the fraud but also the circumstances attending such discovery is announced without qualification in the following texts:

37 C. J., pp. 1200 et seq.;

34 Am. Jur., Sec. 425;

4 Sutherland Code Pleading, Practice and Forms,
Sec. 6888.

Among the numerous decisions following the doctrine announced in the above cited texts are the following:

Wood v. Carpenter, 101 U. S. 135;

Hardt v. Heidweyer, 152 U. S. 547;

Lady Washington Consolidated Co. v. Wood et al., 45 Pac. 809 (Cal.)—a leading and frequently cited case;

Davis v. Rite-Lite Sales Co. et al., 67 Pac. (2d) 1039 (Cal.), at 1041-2.

The action of the trial court in sustaining the general demurrer to the alleged cause of action of "others similarly

situated" (Ground 8) is not assigned as error. On page 14 of their brief appellants refer to this demurrer as Ground 12 and say that it became wholly immaterial because the court sustained the motion to strike the various references in the complaint to "others similarly situated." It seems to us that this statement in the brief puts the cart before the horse. Of course the sole reason for striking out the language specified in the motion was because the court found that no cause of action was stated in favor of such other persons.

This brief is already longer than we had intended. Because our grounds of uncertainty necessarily indicate the precise subject of attack and require little if any elucidation, and because appellants have been so sparing of argument and citation touching the trial court's rulings on the questions thus presented, we shall leave this phase of the case after inviting attention to a few of the obvious defects found by the trial court of so grave a nature that, as we believe, no court would approve them.

On page 15 of their brief appellants dispose of Grounds 13, 15, 17 and 23 with the statement that the uncertainties there complained of are peculiarly within the knowledge of the defendants. We invite attention to those subdivisions of the demurrer (R. 27-30) and the uncertainties there indicated. For example, the statement of the complaint that during the years 1934, 1935 and 1936, through its agents, defendant Association came into possession of appellants' certificates which had been parted with by plaintiffs without receiving anything but "various property" having no "substantial value" is attacked as uncertain

because the complaint contains no allegation of the nature, identity or value of said "various property" or of the meaning or intended meaning of the words "substantial value" or of the manner in which or from whom defendant Association came into possession of the certificates (Ground 13), or what officer or agent of corporate defendants or any of them took part in the alleged transactions with appellants (Ground 14), or how or in what manner the alleged fictitious and sham market was created or manipulated or depressed or when or where such action occurred, or what if any officer or agent of any corporate defendant thus acted in its behalf (Ground 15), or what consideration was actually paid to plaintiffs or any of them for their certificates (Ground 17), or the occasion, identity or nature of any transaction or transactions pursuant to which plaintiffs or any of them parted with possession of their certificates (Ground 23).

If appellants' idea of what constitutes a good and sufficient pleading is correct, A's complaint for an alleged breach of contract by B would be a model of perfection if it merely set forth: that B through some unnamed agent on some unnamed occasion entered into a contract with him; that B breached the contract; and that as a result of such breach A had been damaged. When asked by special demurrer to disclose the identity of the alleged agent and the agreed consideration and other terms and provisions of the alleged contract A might, with just impatience, reply that those minor details were all peculiarly within B's knowledge. If the demurrer were sustained A would, of course, refuse to amend and would appeal to this Court.

If instead of being thus wronged by breach of contract A alleged that sometime, somewhere B's agent had fraudulently induced him to exchange his cow for "various property," any inquiry as to the identity of the alleged agent or as to the "various property" or the facts and circumstances surrounding and identifying the alleged transaction would, as appellants contend, be as to matters peculiarly within B's knowledge. In the illustrations given, as in the case at bar, A and not B was present on the occasion complained of. A certainly had first hand knowledge of the alleged transaction; he knew the person with whom he dealt and the identity of the "various property" by him received. B's knowledge would necessarily be based upon hearsay. In the case at bar is there some undisclosed reason why appellants do not wish to reveal the names of the alleged agents with whom they dealt or the nature and identity of the "various property"?

In support of their contention that the demurrers for uncertainty were improperly sustained, appellants cite *Industrial Commission v. Wasatch Grading Co.*, 80 Utah 223, on page 19 of their brief and there say: "Less certainty is required where the facts are peculiarly within the knowledge of the adversary." We agree with that statement and with the cited case from which it was apparently taken. On page 235 of 80 Utah, immediately preceding such statement, this Court says that a complaint should contain "an averment of facts with such certainty as will reasonably inform the defendant what is proposed to be proved so that he may have a fair opportunity to meet the alleged facts and prepare his defense." We earnestly

intend that the yardstick thus fixed should be applied in this case.

**IF ANY GENERAL OR SPECIAL DEMURRER WAS
PROPERLY SUSTAINED, THE JUDGMENT
MUST BE AFFIRMED**

Pursuant to the elementary rule that a judgment of a lower court will be affirmed if there is any ground upon which to sustain it, the judgment of dismissal here appealed from must be affirmed if the trial court was right in any of the rulings complained of.

Further citation than the three cases next below cited would seem to be unnecessary.

In *Davie v. Board of Regents*, 227 Pac. 243 (Cal.), the court says at page 247:

“If the complaint is insufficient upon *any ground properly specified in the demurrer the order must be sustained*, though the lower court may have deemed it sufficient in that respect and may in its order have declared it defective only *in some particular in which we hold it to be good.*”

In *Haddad v. McDowell et al.*, 3 Pac. (2d) 550 (Cal.), demurrer was filed for uncertainty, misjoinder of parties defendant, joinder of several causes of action without stating them separately, and failure to state facts sufficient to constitute a cause of action. At page 551 the court says:

“If the demurrer is well taken as to any of the grounds stated therein, then the order of the court sustaining the demurrer must be affirmed by the reviewing court.”

In *State v. Oklahoma City et al.*, 168 Pac. 227 (Okla.), in harmony with the well-settled rule with respect to judgments appealed from, the court says at page 230:

"The order sustaining the demurrer expressly states that it was based upon the second ground thereof, which we have discussed. However, in passing upon the correctness of the court's ruling, we are not confined to the reasons given for sustaining the demurrer and dismissing the plaintiff's cause of action or to the particular grounds of the demurrer, but will consider all of the grounds assigned and sustain the order *if any of such grounds are well taken.*"

After having obtained many extensions of time within which to file an amended complaint, appellants elected to stand on their pleading. As stated in the *Davie* case, *supra* (p. 247): "Having done so, the judgment on demurrer will not be reversed merely in order to allow an amendment."

Respectfully submitted,

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