

1952

Liquor Control Commission of Utah et al v. C. V. Lack and Chris E. Athas : Petition for Rehearing and Supporting Brief of Respondent Chris E. Athas

Utah Supreme Court

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Mulliner, Prince & Mulliner; Edward L. Mulliner; Attorneys for Respondent;

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

**LIQUOR CONTROL COMMISSION
OF UTAH,**

Plaintiff,

**NEW YORK CASUALTY COM-
PANY, a corporation,**

Intervenor,

Case No.
7738

VS.

C. V. LACK and CHRIS E. ATHAS,
Defendants.

**PETITION FOR REHEARING AND
SUPPORTING BRIEF OF RESPONDENT
CHRIS E. ATHAS**

FILED

**MULLINER, PRINCE & MULLINER
AND EDWARD L. MULLINER,**

Attorneys for Respondent.

Clark, Supreme Court,

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PETITION FOR REHEARING AND
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C. E. ATHAS

Comes now the respondent, Chris E. Athas, and respectfully prays for the Court to grant a rehearing in this cause for the following plain, serious and fundamental errors of both omission and commission :

This decision is the second by this Court on this appeal. The first decision was on respondent's motion to dismiss the appeal. Point I relates to the matter of a more definite statement, and Point II to the failure to state a claim.

I.

THE OPINION FIRST UPHOLDS THE TRIAL COURT'S DECISION GRANTING RESPONDENT'S MOTION FOR A MORE DEFINITE STATEMENT, AND THEN ERRONEOUSLY NULLIFIES THIS AFFIRMANCE BY ASSUMPTIONS WHICH ARE WRONG IN FACT AND LAW, AND ARE CONTRARY TO THIS COURT'S PRIOR DECISION HEREIN.

A. The Trial Court's decision and judgment of dismissal were after refusal to furnish a more definite statement, and are dispositive of this case under Rule 12(e).

B. The affirmance here of the correctness of the Trial Court's decision necessarily ends this case, for:

1. Rule 12(e) was properly applied.
2. Our motion here to dismiss this appeal squarely raised the question as to whether on appellant's refusal to plead a more definite statement the case had been finally dismissed, on that ground. If not, the appeal would have had to be dismissed.
3. On that motion, the appellant contended it had been so dismissed and asked the Court to permit

it to amend the order dismissing and its notice of appeal so as to make certain both its waiver of any right to amend, and also the final dismissal *on this ground*.

4. This Court, by allowing this amendment and denying our motion to dismiss the appeal necessarily, and in fact, held:

a. That appellant, by refusal to furnish the more definite statement when ordered, had so waived, and final dismissal had properly followed.

b. Also that the case should proceed by appeal to decision upon the merits, on this ground; as it did.

5. Thus appellant's waiver, under Rule 12(e), and this Court's first decision based thereon, and the opinion now affirming the judgment of the Trial Court must end this case.

C. The revival and sending of the case back for any further procedure on this complaint is therefore wrong, and the two off-hand assumptions indulged in the opinion have no place in the case at all, and are erroneous and confusing.

The first of these assumptions is that both the motions to dismiss for failure to state a claim and that for a more definite statement, "cannot *consistently* be granted." This is erroneous and can have no effect here, for:

1. The reasons just stated under 1-B, *supra*.

2. This Court had herein previously held contrary to this.

3. Appellant has waived herein the benefit of any such additional claim, and any right to have a reversal of the dismissal judgment, except on the merits as raised below and here, and neither party has raised or had a chance to be heard on this.

4. This Court has accepted and acted upon appellant's said waiver.

5. It is contrary to the Rules of Civil Procedure.

6. It is bad in law.

The second erroneous assumption stated in the opinion is: "We presume that appellant's election to stand upon its complaint was based *primarily* upon the ruling of the Trial Court, that the complaint did not state a claim. . . ." This, likewise, is entirely wrong, and is not available for the above and these additional reasons:

1. It is contrary to the repeated assertions of its position by appellant, itself, herein, and on which it was able to sustain its appeal.

2. It is inconsistent with and contrary to the basis upon which this Court allowed appellant to make the amendments on appeal heretofore referred to, and upon which our motion to dismiss the appeal was denied.

3. It has no basis in the record, but is plainly contrary thereto, and appellant has made no such claim, and respondent has had no chance to be heard on such.

II.

AS TO RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM, THE COURT HAS, WE BELIEVE, SERIOUSLY ERRED BY ASSERTING FOR APPELLANT A THEORY OF LIABILITY NOT PLEADED AND NOT CLAIMED, AND ALSO IN IGNORING THE ISSUES ACTUALLY FRAMED AND PRESENTED ON THE APPEAL.

This appears, because :

1. The recital of the opinion that the complaint states a claim of conversion of liquor by act of this respondent raises a purely moot issue.

2. There is no such allegation as a conclusion, or otherwise.

3. The appellant, in its complaint and brief, has asserted a factual basis and theory of liability entirely different from this.

4. Appellant has plainly indicated by its briefs, here and in the Court below, that it did not intend or want to allege such theory of liability; it plainly has refused to amend to so allege.

5. The decision ignores the briefs of both parties, and the issues therein supported and upon which the parties seek decision herein, namely :

a. Does respondent's partnership relationship with Lack, under facts as alleged by appellant, render respondent liable for delicts and failure to account by Lack?

b. And, where a complaint alleges facts which state a theory of conversion and liability, can a mere conclusion of conversion, if one appears, be given a different effect, or any effect?

c. Note that, if the Court had considered these two legal points and the authorities as briefed in support thereof, the Court would not have fallen into this error, and the parties would not have a different and unwanted law suit imposed upon them.

BRIEF AND ARGUMENT

The petition is quite in detail. We hope by this to make our position clearer, avoid explanation, and also, call attention to the rules of law and procedure relied upon.

Most of the rules are so well understood and uniformly applied that they need not be supported by citation of authority.

Some reference to the record here on the motion to dismiss the appeal, as well as to the record and briefs on the appeal, are necessary to correct some serious misunderstandings.

I.

THE OPINION FIRST UPHOLDS THE TRIAL COURT'S DECISION GRANTING RESPONDENT'S MOTION FOR A MORE DEFINITE STATEMENT, AND THEN ERRONEOUSLY NULLIFIES THIS AFFIRMANCE BY ASSUMPTIONS WHICH ARE

WRONG IN FACT AND LAW, AND ARE CONTRARY TO THIS COURT'S PRIOR DECISION HEREIN.

I - A and B

In first discussing what we believe is the conclusive effect of sustaining the order dismissing the complaint after refusal to furnish a more definite statement, we rely on the evident and controlling proposition, that:

THE TRIAL COURT'S ORDER OF DISMISSAL WHEN AFFIRMED ON APPEAL ENDS THE CASE.

The contrary determination here is because basic factors, of law and of fact, have been overlooked.

To plaintiff's complaint (R. 1), this respondent directed two motions (R. 16), one under Civil Rule 12(b), to dismiss for failure to state a claim, and one under Rule 12(e), for a more definite statement.

On Jan. 31, 1951 (R. 20), the Trial Court separately sustained each of these motions (R. 20) and gave the plaintiff ten days in which to amend. On Aug. 1, 1951 (R. 21), the appellant filed its Notice of "Election To Stand On Original Complaint," stating that it "hereby elects to stand upon its original complaint as against defendant Chris E. Athas and take judgment . . . as regards said defendant."

On Aug. 1, 1951, appellant moved the Court (R. 24) for, and on Aug. 7, prepared and got a judgment of dismissal. This order again recited that appellant had

“elected to stand upon its original complaint.” On this same day it filed its Notice of Appeal (R. 23), and pursuant thereto the record was filed in this Court.

Proceedings on Motion To Dismiss Appeal:

We cite now some material proceedings here in this Court on our motion filed Oct. 19, 1951, to dismiss the appeal, because the decisions of the Court, based on the position on both sides then taken, is entirely inconsistent with the opinion now. This Court's record can be cited only by dates of documents.

From the wording of the Order of Dismissal and the Notice of Appeal (R. 22, 23) just mentioned, it was not clear that appellant intended to appeal from the effect of the order of the Trial Court in sustaining respondent's motion for a more definite statement, i.e., on both motions and grounds of dismissal.

We, therefore, relied, in our motion to dismiss this appeal, upon the principle that an appeal will be dismissed where taken only on one ground of decision, or so that if the trial Judge were reversed on the ground appealed, the case would still stand dismissed on other grounds. In other words, if the decision of the matter appealed would not settle the case. On this we cited in our memo, filed Oct. 22 and Oct. 31, 1951:

Flourney v. Wiener, 321 U.S. 253, a case directly in point on the proposition, that if this was it the appeal should be dismissed; and also, among additional authority, a case in the Eighth Circuit:

Hunter v. Federal Life Insurance Co., 103 F. (2) 192, and quoted Judge Sanborn on the similar attempt there, that "It is well settled that a case may not be brought here by . . . appeal in fragments;" etc.

Hendricks v. Osman, et al, 164 P. 2d 545, holding that the defendant was entitled to the benefit of his *special* demurrer based on the ground that the complaint was "insufficient to appraise the defendants of the claim they must meet;" and also holding that the case was properly and finally disposed of by dismissal upon such special demurrer after refusal of the defendant to amend.

Bamberger, et al v. Certified Prod. Inc., 53 P. 2d 1153, at 1155 (Ut.), was also cited and we quoted this Court that "the remedy for uncertainty or unintelligibility in a pleading lies in a special demurrer, *which is equivalent to a motion to make more certain*, . . ."

Neither the appellant or the Court raised any question as to these settled principles. But, both set about to make certain that the judgment of dismissal *on this ground* of uncertainty was final, and the appeal from it clear and definite.

In its answer to our motion filed herein Oct. 24, 1951, the appellant, after alleging (P. 1) that the Trial Court, on the 31st day of Jan., 1951, had granted both of appellant's motions, said:

"That plaintiff elected to stand on its complaint, took judgment against it upon the order referred to above, and this appeal is taken from that judgment."

The order "referred to" sustained both our motions.

And on our contention that appellant, by moving the dismissal of its own complaint had waived the right to now appeal therefrom, appellant denied such waiver, but, admitted it had waived its *right to amend* its complaint.

Appellant alleged:

"d. Referring to paragraph 4 of defendant's (respondent's) motion, plaintiff alleges that said motion (i.e. to dismiss its own complaint (R. 24)) was made and filed at the same time and in connection with plaintiff's notice of election to stand on its original complaint, that it was made for the purpose of procuring from the court a *final appealable order*, and that it shows on its face and in connection with the record herein that it does not constitute a waiver of any right of plaintiff herein *except the right to amend its complaint.*"

Thus, it is admitted and asserted, as it must be, to sustain appellant's right to appeal, that it had waived its right to amend its complaint as to this ground; and this is clearly the legal effect of such refusal. In other words, a party cannot stand on his complaint and refuse to furnish a more definite statement after being ordered so to do, and then, after judgment of dismissal, and after the affirmance of such judgment on appeal, still amend and proceed on the complaint.

But further, and of equal or greater importance, on this is the fact that the appellant, in its said answer, and so that this Court would definitely treat the judg-

ment of dismissal as applying to both decisions of the Trial Court, also made a motion (P. 2) to amend,

“the judgment of dismissal as to Defendant Athas (R. 22), and that the words ‘and said defendant’s motion for a more definite statement’ be added.”

Having so waived right to amend its complaint and so applied to amend the judgment thereon, then appellant supported this motion to amend by a brief filed herein Oct. 26, in which its position is thus made clear (P. 1):

“From an examination of the record it is obvious that plaintiff’s objective is and has always been to have the order of January 31st reviewed by this court *in its entirety* . . . an examination of plaintiff’s brief on file herein shows that plaintiff’s statement of points and argument includes the order of the district court granting the motion for more definite statement.”

“Whether the trial court had ordered that the complaint be stricken on one motion and dismissed on the other, or whether it ordered the complaint dismissed on both motions is immaterial here. The facts are, of course, that the action was dismissed because of plaintiff’s refusal to amend on both grounds, and the appeal is based on the theory that the complaint is good as regards both motions. . . .”

“The effect of the amendments proposed by the plaintiff would be to *indicate clearly* and unequivocally that the appeal is taken to review the order of the trial court made January 31, 1951, on both the motion to dismiss *and the motion for a more definite statement.* (R. 20)”

So that when this Court, on this record, December 3, 1951, entered its order that appellant's motion for permission to amend "was granted," and on the same day entered its order that respondent's motion to dismiss appeal "was denied," it necessarily decided and settled in this case, that:

Rule 12(e) was properly applied and this case was, by the Trial Court, appropriately dismissed thereunder.

That the Court below not only could, but did, grant both motions, and that the case had been *finally dismissed* by orders applying to both.

That the appeal was from the order of dismissal as to each motion, and that it should proceed on the merits of the Court's decision as to *each*.

That appellant, by refusal to furnish the more definite statement when ordered by the Trial Court, had waived its right "to amend the complaint," as it said it had, otherwise, *the action below would not be final*.

Also that the "effect of the amendment proposed" was "to indicate clearly and unequivocally that the appeal is taken to review the order of the Trial Court on * * * the motion for a more definite statement."

How can this Court now say it couldn't be or wasn't so appealed?

Decision Upon the Merits:

The writer of the opinion here, we believe, was not on the Court when the foregoing record and decision were made here, and probably was not familiar with them.

However, the opinion does seem to consider that the Trial Court's decision upon the motion for a more definite statement was thus appealed on the merits and it affirms that decision. It says that certain of the allegations "Lead to confusion and ambiguity both in legal theory and fact," and "we believe the instant case clearly to be one where the motion was properly made and granted." So that both motions were considered on their merits and the decision of the Trial Court on this motion was approved and upheld.

This, we think, ended this case just as effectively in every respect as if the granting of the first motion, to dismiss for failure to state a claim, had been approved and affirmed by this Court. There is no reason why these final orders of dismissal as to these motions stood upon any different basis.

It is true that there was no necessity for *this* Court deciding as to the Trial Court's ruling upon *both* of them, because the decision that the order of dismissal based on either was correct, would necessarily dispose of the case.

The authorities cited *infra*, show that when two motions of the character of these are presented to an Appellate Court, it may, and often does, dispose of the case, affirming the Trial Court on the special demurrer or on this kind of motion. And it appears that such affirmance does and must dispose of the case.

3 Am. Jur., Page 677

"1166. *Effect of Affirmance.* It may be stated generally that a judgment of affirmance is

a determination by the appellate court that the proceeding under review is free from prejudicial error. Such action ends the case in the appellate court and deprives such court of all power to add to, or alter, the record as certified, by rescinding the order of affirmance and dismissing the appeal. All questions raised by the assignments of error and all questions that might have been so raised are to be regarded as finally adjudicated against the appellant or plaintiff in error, and the judgment affirmed must be regarded as free from all error."

Decisions in support of this rule are necessarily those in review of lower or intermediate Courts. Because, if the highest Courts choose to disregard the rules, opinions are not generally written in correction of that.

However, in the next case, the United States Circuit Court of Appeals did reverse itself, and this was approved by the Supreme Court. It is the same rule applied in any court, when a judgment has become really final.

In Realty Acceptance Corp. v. Montgomery, 284 U.S. 547, 76 L. Ed. 476, the rule is fully discussed.

Respondent obtained a judgment in the Trial Court for breach of contract of employment and an appeal to the Circuit Court resulted in affirmance. But, in the meantime, appellant on the basis of newly discovered evidence applied to the Circuit Court to send the case back to the trial Court. So that the order of the Circuit Court also permitted the Trial Court to so proceed to hear this.

After further proceedings in the Trial Court, there was a second appeal to the Circuit Court. It then decided that having affirmed the judgment of the Trial Court previously, it could not send the case back, as it did, to the Trial Court for further proceedings.

Justice Roberts, in an opinion sustaining the Circuit Court on this, cites the statute by which the Supreme Court and also the Circuit Court of Appeals exercise authority on appeals, and like Rule 76(a) of our Civil Rules, they have the authority to "reverse, affirm, or modify." In addition to this the authority of these Federal Courts, on remand, is broader than the authority of this Court under Rule 76(a). However, on affirmance, the rule is the same. And after stating the facts, the opinion says: (479)

"But the claim is that Sec. 701 of the Revised Statutes, U.S.C. title 28, Sec. 876, which defines our appellate jurisdiction, and is made applicable to the Circuit Courts of Appeal * * * authorizes these Courts * * * to set aside a judgment and receive additional evidence, if justice so requires, and that such power may also be exercised by remanding the cause to the trial court for similar proceedings.

* * * *

"Stress is placed upon the point that in addition to mere power to affirm, reverse or modify, jurisdiction is given in the alternative to order such judgment to be rendered or such further proceedings to be had by the inferior court as the justice of the case may require * * * though there be no error upon the face of the record the section

authorizes its return to the lower court for the opening of the judgment and reception of newly discovered evidence * * *.

* * * *

“The section has been construed as applying to cases where a judgment or decree is affirmed upon appeal and further proceedings in the court below are appropriate in aid of the relief granted. And the statute warrants the giving of directions by an appellate court for further proceedings below in conformity with a modification or a reversal of a judgment where, in consequence of such action, such proceedings should be had * * *.

* * * *

*“Nothing was there said to indicate that this court would order further proceedings below to attack or set aside a judgment entered on a record which disclosed no error calling for a modification or reversal. No authority is cited in which Rev. Stat. Sec. 701, U.S.C. title 28, Sec. 876, has been construed as extending this court’s powers in the manner for which petitioner contends * * *.*

“In the present case there is a further conclusive reason why the remission of the cause to the District Court was ineffective to give authority to hear the motion to set aside the judgment. Upon the original appeal the Circuit Court of Appeals found no error in the record and affirmed the judgment * * *.

“The attempt by remanding the record with leave to the court below to take action which would otherwise have been beyond its powers left the matter precisely as if no such order had been made.”

Edwards v. Hoevet, (Or.) 200 P. 2d, 955.

This is a more recent case cited under the above quotation from AM. JUR. In it the Trial Court entered a judgment granting defendant's motion for a judgment notwithstanding the verdict of the jury. And then also granted a new trial. The case went to the Supreme Court of Oregon which approved the judgment, and the opinion by Chief Justice Rossman after disposing of this affirmance, considered the order granting a new trial, and said : (962)

“We believe that under the circumstances the award of a new trial should be deemed nothing more than a statement of the trial judge's appraisal of the record. It was entirely proper to make the award, but since the judgment, which was entered notwithstanding the verdict, must be affirmed, the award of the new trial becomes *functus officio*.

Rapalje and Lawrence's Law Dictionary, Vol. I

“FUNCTUS OFFICIO. An expression applied to an agent or donee of an authority who has performed the act authorized, so that the authority is exhausted and at an end.”

So it would seem that when this Court had affirmed the final judgment of dismissal, there was nothing further to be done in the Trial Court. It was as if there had been no appeal taken.

Erroneous Revival of Case :

We refer the Court to this section 1-C of the motion for a statement of the assumptions now referred to.

Notwithstanding, the disposition of the motion to dismiss the appeal in this case on this clear record that the appellant's "objective is and always has been * * * to indicate clearly and unequivocally that the appeal is taken to review the order on both the motion to dismiss and for *a more definite statement*." The opinion now says that the appellant's election to stand on its complaint was not based on the Trial Court's decision on this latter matter, but "primarily" on the other ground. A presumption could be no more erroneous, or out of place. We also attempted to "presume" that the appeal was based on the other motion, and tried to get it dismissed on that presumption, and we were promptly challenged by the appellant, and then corrected by this Court.

And, when this Court entered its order based on the foregoing record, it necessarily recognized the right of the Trial Court to rule on and grant both these motions, and the necessity and propriety of the appeal on both. This opinion now seems to reverse this, in saying, "both motions cannot consistently be granted." Because it is very obvious that this Court, in granting appellant's amendment and denying our motion to dismiss the appeal, was *not* then of the opinion that "both motions cannot consistently be granted." If so, it would have made quick disposition of our motion to dismiss the appeal.

Unless this statement in the opinion and the intent of the Court as to the effect of this are here clarified, both

the Trial Court in this case, and the bench and bar in every case involving Rule 12, will be in hopeless confusion.

How can the Trial Court proceed? Is it to assume that because it may have not acted "consistently" it didn't act at all on this matter? Also, that this Court, in affirming this judgment of dismissal, didn't act at all? This statement, if taken as the decision in this case, certainly will change the established practice, and we believe it is plainly contrary to intent of Rule 12, itself.

This rule not only permits, but requires, that these two motions, if made, be made together or the right to make one is waived.

2 Moore's *Federal Practice*, (2d Edition) Section 12.19:

"If any other motion under Rule 12 is made before serving a responsive pleading, the motion for a more definite statement must be consolidated with it or it is waived."

This Rule so applies, not only to these two motions, but to all of the motions provided under (b), (c) and (e) of the Rule, and (g) says that he must make all "objections then available to him which this Rule permits to be raised by motion" and unless he does so "he shall not thereafter make a motion based on any of the defenses."

There are two exceptions, but neither of these affects the motion under consideration now.

There are, in (b), (c) and (e) of this Rule, nine different motions that could all be available, and if relied

upon, all must be made in the one motion, and seven of them would be waived if not included in the one motion.

The rule of procedure indicated by this statement in the opinion here, would appear to make it erroneous for the Court, in then acting upon the motion so consolidated, to grant more than one of these motions at a time because each of them, if granted, would dispose of the case. For example, the ruling on one, "lack of jurisdiction of the subject matter," would then dispose of the case. And in the language of the opinion, it is only when the Court has jurisdiction, "that a (any) motion under Rule 12-e (or 12-b) can be properly considered."

So the question now is whether the Court should rule on as many of these as are made, so that one order, and one appeal, would enable the Appellate Court to dispose of all the defenses raised by motion, or whether the Trial Court should simply rule upon one, because if it should grant that one "no responsive pleading is required and any further attack upon the pleading is useless." We have shown *supra*, in reviewing our motion to dismiss the appeal, that an Appellate Court would not hear such appeal, because it may not settle the case.

And, there is no difference in ranking here as between the motion for a more definite statement and any of the other motions, so far as disposing of the case is concerned. In fact, 12(e) makes the disposition of the case mandatory if the order for a more definite statement "is not obeyed within ten days." On this, the parties have agreed here. So that there is absolutely no difference,

as we have already indicated, between this Court's refusing to dispose of this case upon affirming the judgment as to this motion, and its so refusing to dispose of the case if it had affirmed the Trial Court on the other motion, for failure to state a claim.

We believe this statement in the opinion will introduce a new system of successive appeals, contrary to the intent of Rule 12. No authority is cited in the opinion in support of the statement, and we can find none.

It is plainly contrary to the rules and practice of this Court to inject these assumptions into this case and then give them the full effect of reversing the case.

No such matters were presented to the Trial Court.

Appellant has made no such claim or contention.

These are contrary to the claims that appellant did make in this Court.

They are contrary to the position this Court took in its first decision herein.

We never have had a chance to defend as to either of these.

In *Lepasiotes v. Dinsdale, et al*, 242 P. 2d 297 (Mar. 25, 1952), this Court has ruled squarely that it would not consider such things, even if claimed on appeal, because,

“We feel constrained not to review those matters which plaintiff cannot defend against because not called to attention by her opponents.”

The only consistent conclusion on the entire record is that appellant did not want to, and would not amend, to make the complaint more certain, because they have continued to claim that the one theory they relied upon and wanted to plead was sufficiently clear. This was a partnership liability theory.

Why can't the parties choose their own theories of claim and defense in this case, like any other case?

3 *Am. Jur.*, P. 372:

830: "*Limitation to Theory Presented Below.* The well-settled rule which requires the parties to adhere on appeal to the theory upon which they presented the case in the trial court operates to limit the scope of the review, since the authorities are agreed on the proposition that the case, on appeal, must be reviewed and decided on the theory on which it was tried in the court below, and that the theory upon which the case was submitted in the trial court should be treated as the law of the case on appeal.

* * * *

831: "The reviewing court will treat the pleadings as the parties elected to treat them in the court below and will adhere to the construction given them by the trial court."

Affirmance of Judgment of Dismissal Ends Case:

We cite now some additional authorities on this axiomatic proposition, and also holding that the two motions should be presented together and decided together, as the rule indicates.

The law has been so firmly settled on this in decisions dealing with general and special demurrers, that apparently few cases have been presented under the later Rules where these objections are taken by motions.

In *Bamberger, et al, v. Certified Productions, Inc.*, 53 P. 2d at 1155 (Utah 1936), this Court said:

“Ordinarily the remedy for uncertainty or unintelligibility in a pleading lies in a special demurrer which is equivalent to a motion to make more certain, and not in a motion to strike.”

See also, *State v. Rolio*, 262 P. 987 (Ut. 1927).

1 Bancroft, *Code Pleading Practice and Remedies* (1937 Ed.)

“Section 207 (Ambiguity, Unintelligibility and Uncertainty). *In General.* In some jurisdictions the objection that a pleading is ambiguous, unintelligible, or uncertain, is one to be taken by special demurrer, not by a motion to strike. *The demurrer is equivalent to a motion to make more certain.*”

Herman v. Mutual Life Insurance Co. of N. Y., 108 F. (2) 678, 682 (C.A. 3rd 1939), cited at Page 54 of our original brief, seems to be a case where the propriety of deciding both motions together was assumed. The lower Court sustained a motion to dismiss for failure to state a claim. The upper Court affirmed after discussing in elaborate detail several possible or conceivable claims suggested by the complaint. The Court said at the end of the opinion:

“In conclusion we might call counsel’s attention to Rule 12(e) of the new Rules. We have been constrained to attempt a rather elaborate opinion largely because the complaint seemed capable of varied interpretations. A resort to Rule 12(e) would, by definition, have resulted in the necessary certainty.”

Thus the Court intimates that it would have been proper for the Court below to have sustained a motion for a more definite statement also.

Hendricks v. Osman, et al, (Cal.) 164 P. 2d 545 (1946), *supra*. This case is almost identical with the case at bar. To the complaint the defendants filed a general demurrer charging that it “failed to state facts sufficient to constitute a cause of action,” and also a special demurrer charging that the complaint “was uncertain and unintelligible in certain alleged particulars.” The Trial Court sustained both these demurrers and gave Plaintiff ten days to amend. Plaintiff elected to stand upon his complaint rather than amend. The Court sustained the ruling of the Trial Court on the special demurrer and thereupon affirmed the judgment. The opinion (546) says:

“It is clearly the law that one who declines to avail himself of leave to amend his complaint after a demurrer thereto has been sustained, which demurrer is both general and special, thereby must stand upon his pleading as against both grounds of demurrer, and if the complaint is objectionable on any ground the judgment of dismissal must be affirmed.”

Powell v. Lampton, 85 P. 2d 495, 496 (Cal. App. 1938). The lower court entered a judgment of dismissal rendered after a general and special demurrer were interposed, the special was sustained for uncertainty. The upper Court affirmed holding, "The demurrer was properly sustained. The allegations of the complaint are clearly uncertain." The case stood dismissed.

California Trust Co. v. Cohn, 7 P. 2d 297 (Calif. 1932). This is an appeal by the defendants from a judgment of dismissal entered when a demurrer to their second amended cross-complaint was sustained. The defendants were given leave to amend and refused to do so. The Court stated the rule as follows:

"A plaintiff, or cross-complainant, who declines to avail himself of leave to amend his pleading after a demurrer thereto is sustained, which demurrer is both general and special, must stand upon his pleading as against *both grounds* of demurrer."

Aalwyn v. Cobe, 142 P. 79 (Calif. 1914). The lower Court sustained a general and special demurrer to the complaint. The complaint was subsequently dismissed. The ground for special demurrer was that the complaint was "uncertain, ambiguous, and unintelligible." The Court held:

"For this uncertainty and the ambiguity of the allegations, the special demurrer was properly sustained."

Also,

“A plaintiff who has declined to amend his complaint after a demurrer sustained, which is both general and special, must stand upon his pleading as against *both* grounds of demurrer.”

Martinovich v. Wooley, 60 P. 760 (Calif. 1900). To the complaint of plaintiff a general and special demurrer was interposed. The demurrer was sustained, and plaintiff, declining to amend, appealed from the order of dismissal subsequently entered. The Court affirmed, saying:

“Plaintiff, having declined to amend, must stand upon his pleading.”

Winchell v. Strawbridge, 266 P. 539. An appeal from a judgment for defendants, based upon an order sustaining both general and special demurrers to the amended complaint, plaintiff having declined to amend the complaint. The court affirmed holding that “numerous grounds of uncertainty and ambiguity exist in the pleading.”

Rule 12(e) directly requires dismissal for refusal to amend here, and the most serious effect of the opinion is that IT COMPLETELY NULLIFIES RULE 12(e).

II.

AS TO RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM, THE COURT HAS, WE BELIEVE, SERIOUSLY ERRED BY ASSERTING FOR APPELLANT A THEORY OF LIABILITY NOT PLEADED AND NOT CLAIMED, AND ALSO IN IGNORING THE ISSUES ACTUALLY FRAMED AND PRESENTED ON THE APPEAL.

On this division, we again refer the Court to II of the motion for a full statement of our position, as now discussed.

The principal error as we see it here is that the Court has asserted a theory of liability that is neither alleged, claimed, or relied upon, and has refused to decide the issue alleged and presented.

The Court's Theory of Liability:

The opinion states that a "conclusion of conversion" by respondent is alleged. That the appellant has done this "by alleging in substance a conversion by both defendants after delivery of the *liquor* to a single defendant, Lack, * * *" We pointed out in our brief (P. 13, 22-27) that we found in the complaint no allegation of conversion of *liquor* at all, and particularly no allegation of any possession or handling or conversion of liquor by respondent at all. Appellant did not question this or assert that there was such. It asserted a completely different factual theory. So this seems to end the Court's conclusion theory, so far as the parties are concerned.

And, the complaint doesn't say, as asserted in the last line, second paragraph of the opinion, that "defendants failed to account *and* have converted," etc.

What it alleges is the delivery of a million dollars worth of liquor to "the possession of" Lack, its agent, for purpose of sale as agreed. It then alleges its sale, and then says that for part of the liquor sold, "defendants failed * * * to account * * * and that, *THERE-*

FORE, (i.e. “for that reason, because of that, on that ground”) the * * * defendants wrongfully converted the *value thereof*.” This is different from saying that they failed to account for the value “and” also that they converted.

But, in any event, both parties here have tried to convince the Court that the appellant didn’t attempt or want to allege that *respondent, himself*, personally ever possessed or converted any *liquor*. If appellant had wanted to plead that, it certainly *would* have done so. The Rules provided a form, Rule 84, Form 11, Page 165, whereby this could have been alleged in twenty-five words.

So that the theory of liability asserted in this opinion is imposed upon the parties here without claim or support by appellant, or chance for defense by respondent.

Appellant’s Real Claim of Liability:

And there should be no confusion or doubt as to appellant’s sole theory of liability against respondent. It is presented by elaborate allegations of contract relationship between Lack and the appellant to operate a package agency, and also allegations of Lack’s partnership with respondent in the conduct of a pharmacy in the same premises on which the liquor agency was operated. Then the allegations of the delivery there of a million dollars worth of liquor, to the possession of Lack for sale, and then the sale and failure to account for part of this.

From these, appellant claimed conversion by Lack, and then liability for his acts, on the part of respondent, because of this related partnership business. Cases and authorities were cited upon this theory of partnership liability, and none on any other theory.

And again we commented that apparently no other theory of conversion was intended to be pleaded and presented (P. 28), also reasons and some authorities to show that none other was actually pleaded. Appellant made no contrary claim as to this. On the contrary, in its brief it especially emphasized that this was its sole theory. Thus it said (P. 5) :

“‘The *theory* of plaintiff is that where a conversion occurs in the course of operation of a partnership, each partner may be held liable * * * regardless of knowledge * * *.’ And, again (P. 6): ‘Plaintiff’s *position* is * * * if one partner converted a portion thereof, then all partners may be held * * *’; and (P. 6): ‘This *theory* is *fundamental* to plaintiff’s position so far as defendant Athas is concerned.’”

The appellant’s position could hardly be clearer. Its persistence in claiming this was its theory, and that it was sufficiently pleaded, and its refusal to amend below and throughout the proceedings on the motion to dismiss the appeal, was repeated on the argument on the appeal. So it is difficult for us to understand the reluctance on the part of this Court, in this case, to believe that the parties know what they want to plead and present here.

There are particular reasons in this case why the respondents didn't, and would not want to, plead the theory suggested by the Court and would insist upon their theory as we pointed out in our brief (P. 29). The facts of this loss had all been developed through two long trials and presented before the judges of this Court, establishing that the loss was not due to acts of respondent. But, this nevertheless left open and did not conflict with the possibility of partnership liability which the appellants presented and wanted to have decided.

Issues Presented By the Parties Ignored:

So that the parties here on both sides extensively briefed and argued this partnership theory of liability, and yet it is not even adverted to in the opinion. In fact, there was only one other legal question that was briefed at all, and it was not contested by appellants.

This has very little materiality now, but we advert to it briefly because of a misunderstanding in the opinion on it.

The opinion says that our principal contention is "that the conclusion of conversion by Athas is nullified by the specific facts alleged." There may be some basis for this misconception in our brief, but it misses the actual point of our contention.

We have never thought, or contended that any conclusion of conversion by respondent Athas was alleged, so we have never tried to nullify that. We did contend in our brief (P. 22-27) that the language quoted above, that defendants had refused "to account, and that, *there-*

fore, * * * had converted the value thereof" was not an allegation of conversion at all, as it plainly isn't.

We also contended and cited this authority for the proposition that where facts were alleged and asserted as constituting a conversion, that no different theory of conversion could be based on the mere use of the word "converted" or "conversion."

We still think the law cited is good sound law, which makes appellant's theory of vicarious partnership liability the only one available here. It also limits the language above quoted, in which the term "converted" was used, to the basis pleaded.

We come again to the application of the law quoted hereinabove, on "Limitation to the Theory Presented below" as applied by this and other appellate courts. And we come also to the application of the principle that Appellate Courts will not decide, or even enter into, matters which have not been raised and presented.

3 Am. Jur. 361:

"820. *Limitation to Matters Presented to, and Passed upon by, the Lower Court.* An appellate court will decline to enter upon a discussion of questions which have not arisen in the case and probably never will arise. It will not, ordinarily, consider matters which were not presented to the trial court or passed upon therein, even for the purpose of advising the trial court of the action it ought to take on their being subsequently presented for consideration."

This Court not only in *Lepasotis v. Dinsdale*, 242 P. 2d 297, *supra*, but in about a hundred other cases, has said, in different ways, that it would not consider or review claims which opposing parties had not had the opportunity, or “cannot defend against,” or which were not by proper assignment or statement of error presented.

We do not repeat the authorities cited at our brief (P. 22-27) but we think there is no escape here from the rule there supported, that:

“Where a pleading contains both general and specific averments * * * a conclusion and also the facts from which it is drawn, * * * the specific averments or special facts are controlling, and the general allegations will be disregarded as immaterial.”

CONCLUSION

We have shown, we believe, that the opinion does not follow the Rules.

That the failure to hold that affirmance of the Trial Court’s decision and the judgment of dismissal after refusal to amend, pursuant to Rule 12(e), ends this case, *is a complete nullification of that Rule.*

The opinion on this point also by the statement that the Trial Court could not consistently decide this motion sets up a rule of practice as to all motions covered by Rule 12, which appears to be contrary thereto, and is clearly contrary to the settled law as heretofore applied.

The other statement as to appellant's lack of reliance on its appeal on this ground is wrong by the record above quoted.

As to Division II of our motion, the opinion seems to us to impose an unwanted theory of liability, and that this theory is contrary to the factual claim asserted by appellant, and is, therefore, contrary to the law applicable here.

Wherefore, respondent respectfully asks that his petition for a rehearing be granted.

Respectfully submitted,

MULLINER, PRINCE & MULLINER
AND EDWARD L. MULLINER,
Attorneys for Respondent
CHRIS E. ATHAS