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Utah Supreme Court

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7828

In the Supreme Court of the State of Utah

CLYDE R. MURRAY and LAWRENCE L. PACK,
Plaintiffs,

vs.

MINNIE W. MILLER, Residuary Legatee of Lee Charles Miller, deceased, and LEE MILLER,

and

OLGA K. ROBERTS, Administratrix of the Estate of Floyd Roberts, deceased; JEANNE ROBERTS LABRUM and MARJORIE ROBERTS-OBERHANSLEY, heirs at law of Harry Roberts, deceased,
Defendants and Cross-Complainants;

and

DUCHESNE COUNTY, a political subdivision of the State of Utah; LAVINA S. ROBERTS, H. C. WORKMAN and THELMA WORKMAN, his wife; W. H. COLTHARP, STANOLIND OIL AND GAS COMPANY, a corporation,
Cross-Defendants

and

VERLEN V. LABRUM, Administrator of the Estate of Harry Roberts, deceased,
Applicant for Intervention

Respondents' Brief

Case No. 7828

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N. J. COTRO-MANES
Attorney for Defendants and Cross-Complainants

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STATEMENT OF POINTS

I

THE AMENDED CROSS-COMPLAINT IS SUBSTANTIALLY THE SAME AS THE ORIGINAL CROSS-COMPLAINT AND THE RELIEF SOUGHT IS IDENTICAL IN ALL RESPECTS.

II

APPELLANTS HAVING FAILED TO RAISE THE QUESTION OF THE STATUTE OF LIMITATIONS BY THEIR MOTION TO STRIKE IN THE COURT BELOW, CANNOT NOW FOR THE FIRST TIME RAISE THE QUESTION IN THIS COURT.

III

THE STATUTE OF LIMITATION WAS RAISED BY APPELLANTS BY THEIR DEMURRER TO THE ORIGINAL CROSS-COMPLAINT AND THE COURT OVERRULED THE DEMURRER.

IV

LEAVE TO AMEND SHALL BE FREELY GIVEN WHEN JUSTICE SO REQUIRES.

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V

A PLEADING MAY STATE AS A COUNTER-CLAIM AGAINST AN OPPOSING PARTY NOT ARISING OUT OF THE TRANSACTION OR OCCURRENCE THAT IS THE SUBJECT MATTER OF THE OPPOSING PARTY'S CLAIM.

VI

WHEN DEFENDANTS HAVE BEEN BROUGHT INTO COURT AND MADE TO DEFEND, AND IF THEY SHOULD FOR THE TIME FAIL TO SET UP SOME FACTS WHICH WOULD CONSTITUTE AN AFFIRMATIVE DEFENSE OR COUNTER-CLAIM, THEY SHOULD BY AMENDMENT BE ABLE TO DO SO.

VII

THE COURT BELOW PROPERLY USED ITS DISCRETION IN DENYING THE MOTION TO STRIKE THE AMENDED ANSWER AND CROSS-COMPLAINT.

ARGUMENT

I

THE AMENDED CROSS-COMPLAINT IS SUBSTANTIALLY THE SAME AS THE ORIGINAL CROSS-COM-

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PLAINT AND THE RELIEF SOUGHT IS IDENTICAL IN ALL RESPECTS. (See original Answer and Cross-Complaint (Record) Pages 21, 22, 23 and 24, and Amended Answer and Cross-Complaint (Record) Pages 132, 133, 134 and 135).

> "Generally, changes in the form of an action or in the character and extent of relief sought, in which the facts remain substantially the same, are amendments to the original pleading, and not changes in the cause of action, nor do they create a new cause of action."
>
> Finzer vs. Peter, 73 A.L.R. 1120

> "Change by amendment of the Complaint from one kind of relief to another is not a change in the cause of action if the transaction is the same, there being but one form of action."
>
> Commercial Centre Realty Co. vs. Superior Ct., 107 A.L.R. 714 59 P. 2d 978

> "In determining whether a wholly different cause of action is introduced by a proposed amendment to a Complaint, so as to make denial of the amendment proper, technical considerations or ancient formulae are not controlling, and nothing more is meant than that the defendant is not required to answer a wholly different legal liability or obligation from that originally stated."
>
> Klopstock vs. Superior Ct., 135 A.L.R. 318, 108 P. 2d 906

> "As a general rule an amendment to pleadings should be allowed at any stage of the proceedings, where it will not delay the suit nor affect the rights of the adverse party, and where the facts stated in the original and amended pleadings are substantially identical, or are germane to the issues in the case."

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Fleishmann Construction Co. vs. U. S. 270, U. S. 349 Garrison vs. Knewton, 165 P. 90

"There is no introduction of a new cause of action where the amendment is merely a more accurate statement, or an amplification, or an enlargement of the cause of action originally alleged. The original statement of the cause of action may be narrowed, enlarged, or fortified in varying forms to meet the different aspects in which the pleader may anticipate its disclosure by the evidence. And an amendment may be permitted whereby the plaintiff abandons a part of the cause of action originally declared upon. Allegations may be changed and others added, and averments which are implied may be made in express terms, provided the identity of the cause of action is preserved."

American Jurisprudence, Vol. 41, Page 501, Section 305

II

APPELLANTS HAVING FAILED TO RAISE THE QUESTION OF THE STATUTE OF LIMITATIONS BY THEIR MOTION TO STRIKE IN THE COURT BELOW, CANNOT NOW FOR THE FIRST TIME RAISE THE QUESTION IN THIS COURT. (Record) Motion to Strike, Pages 142, 143).

This Court in the case of Attorney General of Utah vs. Pomeroy, et al, (Oct. 27, 1937) reported in 73 P. 2d, Page 1274, stated the law to be as follows:

"The appellant's next contention is that the statutes were not pleaded as required by law because the specific sub-section of Sec. 104-2-26 was not set out as required

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by Sec. 104-13-7. This question was raised for the first time in this court. The motion to strike the amendment or the reply to the amendment did not mention it. We shall not, therefore, now consider it . . . "

"Defense of Statute of Limitations held waived, since it was not specifically referred to in demurrer to complaint."

> Thomas vs. Glendinning, 13 Utah 47, 44 Pacific 654

"A motion to strike out a pleading must be in writing specifying the grounds and pointing out the objectionable matter in the pleading attacked."

> American Jurisprudence, Vol. 41, Page 531, Sec. 352

III

THE STATUTE OF LIMITATION WAS RAISED BY APPELLANTS BY THEIR DEMURRER TO THE ORIGINAL CROSS-COMPLAINT AND THE COURT OVERRULED THE DEMURRER. (Record) Pages 42-70.

The court's memorandum in overruling the demurrer is as follows:

Title, Court and Cause—Order

"The court having taken under advisement the demurrer to the Answer and Cross-Complaint between the defendants filed herein by H. C. Workman and Thelma Workman, his wife; and

"The court having heard the arguments of counsel for respective parties, and having carefully considered

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the briefs filed herein, and the court being fully advised in the premises.

"It is now ordered that said demurrer be and the same is hereby overruled. Said defendants H. C. Workman and Thelma Workman are allowed twenty days after notice in which to further plead.

"Dated this 7th day of July, 1948.

/s/ Joseph E. Nelson
Judge"

(Record) Page 70

It will be observed that the defendants by their demurrer raised the question of Statute of Limitations and the court properly after "having carefully considered the briefs filed herein" overruled said demurrer.

IV

LEAVE TO AMEND SHALL BE FREELY GIVEN WHEN JUSTICE SO REQUIRES.

Rule 15, Paragraph A, Utah Rules of Civil Procedure, provides inter alia—

" . . . and leave shall be freely given when justice so requires."

The word "freely" in Rule 15(A), was used with deliberate intention to obviate the technical restrictions on amendments, and it was so held in Freidman vs. Trans American Corp., D. C. Del, 1946, 5 F.R.D. 115.

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Under Rule 15(B) a pleading may be amended "even after judgment to conform to the evidence," and the Federal court so ruled in interpreting Rule 15 of Federal Practice and Procedure which rule is identical with the Utah Rule.

Cabell vs. U. S., C.C.A. 1st 113 F. 2d 398

Rule 15 (C) provides:

> "Whenever the claim or defense inserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

The right to plead a new claim by amendment is "inferentially recognized by subdivision 'C' of this rule."

Kuhn vs. Pac. Mutual Life Ins. Co. of Calif., D.C. N.Y. 37 Fed. Supp. 102

V

A PLEADING MAY STATE AS A COUNTER-CLAIM AGAINST AN OPPOSING PARTY NOT ARISING OUT OF THE TRANSACTION OR OCCURRENCE THAT IS THE SUBJECT MATTER OF THE OPPOSING PARTY'S CLAIM.

Rule 13, Subdiviison (B) of the Utah Rules of Civil Procedure provides:

> "PERMISSIVE COUNTER-CLAIM. A pleading may state as a counter-claim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

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This rule is identical with Rule 13(B) of the Federal Practice and Procedure.

> "It is the court's duty to bring in for adjudication all controversies which exist or may arise in a case, so that all questions may be settled regardless of technical advertments."
>
> Dairy Engineering Corp. vs. Dee-Raef Corp., D.C. Mo., 2 Fed. 3d 374

The purpose of Rule 13 is 't'o avoid multiplicity of suits and to dispose of the whole matter in controversy in one action. An adjustment of defendant's demand by counter-claim rather than by an independent suit is favored by Rule 13."

> Louisville Trust Co. vs. Glenn D.C. Ky. 66 F. Supp. 872
>
> Ohio Casualty and Surety Co. vs. Maloney, D.C. Pa. 3d F.D. 341

> "The determination of defendant's demand by counter-claim in plaintiff's action rather than by independent action is favored as serving to avoid circuity of action, inconvenience, expense, consumption of court's time and injustice."
>
> Parmelee vs. Chicago Eye Shield Co., 157 Fed. 2nd 582.

> "It is a general rule that amendments to pleadings are favored and should be liberally allowed in furtherance of justice, in order that every case may so far as possible be determined on its real facts and in order to speed the trial of causes, or prevent circuity of action and unnecessary expense, unless there are circumstances such as inexcusable delay or the taking of the adverse party by surprise, or the like, which might justify refusal of permission to amend. It is, therefore, the usual

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practice of the courts to allow rather than refuse amendments, and liberally to construe a statutory provision giving power to permit amendments in furtherance of justice."

American Jurisprudence, Vol. 41, Sec. 292, Page 490

VI

WHEN DEFENDANTS HAVE BEEN BROUGHT INTO COURT AND MADE TO DEFEND, AND IF THEY SHOULD FOR THE TIME FAIL TO SET UP SOME FACTS WHICH WOULD CONSTITUTE AN AFFIRMATIVE DEFENSE OR COUNTER-CLAIM, THEY SHOULD BY AMENDMENT BE ABLE TO DO SO.

Honorable Justice Wolfe, in an exhaustive decision in the case of Hayden, et al, vs. Collins, reported 63 P. 2d, Page 223, held, inter-alia:

"The person who brings an action, as distinguished from he who defends, has control of the action in the sense that he may choose the underlying set of facts which he thinks constitutes a cause of action against the defendant. There is reason then for saying that, after he so chooses a set of facts which he believes constitutes a cause of action, he should not be permitted to shift to another set of facts by an amended complaint as the basis for another cause of action. Not so with the defendant. The defendant has been brought into court and made to defend. Any set of facts which he may set up, whether sounding in contract or in tort and which would tend to defeat the claim of the

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plaintiff, is permitted. And if he should, for the time, fail to set up some facts which would constitute an affirmative defense or counter-claim and then later conclude that these facts would constitute a good counterclaim or defense, he should be able to do so as long as they are not advanced at such a late day as to make the tardiness prejudicial to the plaintiff. And if one affirmative defense relates to parties which she joins and they later drop out of the suit, an amendment setting up a counterclaim or defense against remaining parties is allowable just as if the parties remained the same throughout the suit. It will be noted that we confine this principle, that amendments of such nature may be made, to those counterclaims which, if proved, would defeat plaintiff's cause of action."

VII

THE COURT BELOW PROPERLY USED ITS DISCRETION IN DENYING THE MOTION TO STRIKE THE AMENDED ANSWER AND CROSS-COMPLAINT.

"A motion to strike is addressed to the sound discretion of the court, and ordinarily, the refusal to grant it will not be disturbed unless it clearly appears that the trial court's discretion has been abused. However, it is recognized that striking a pleading is a severe remedy and should be resorted to only in cases palpably requiring it for the administration of justice."

Randall vs. Mickle, 86 A.L.R. 804
Amer. Jurisprudence Vol. 41, P 532, Sec. 354

"An application for leave to amend is ordinarily addressed to the sound discretion of the trial court, and, as a rule, this discretion will not be disturbed on appeal

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except in case of an evident abuse thereof, or unless the appellant shows affirmatively that he was prejudiced by the ruling."

American Jurisprudence, Vol. 41, Sec. 293, Page 492.

CONCLUSIONS

Counsel desires to state that appellants are in error in stating as a fact, on Page 4 of their brief, "The estate of said Harry Roberts was never probated." Their brief shows on the front page that Verlen V. Labrum is the Administrator of the Estate of Harry Roberts, deceased.

Further, the court's attention is called to the fact that the plaintiffs in this case, Clyde R. Murray and Lawrence L. Pack, are not parties to this appeal.

Respectfully submitted,

N. J. COTRO-MANES

Attorney for Defendants and Cross-Complainants

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