1970

Hein'S Turkey Hatcheries, Inc. v. Nephi Processing Plant, Inc. and Milton T. Harmon, and Roger D. Jorgenson : Appellant's Brief

In The Supreme
of the State of

HEIN'S TURKEY HATCHE

-vs-

NEPHI PROCESSING PLA
MILTON T. HARMON,
JORGENSON,

APPELLANT'S

On Appeal from the District
District of the State of U

Hon. C. Nelson

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Spanish Fork, Utah
Attorney for Respondents

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Clerk,

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In The Supreme Court of the State of Utah

HEIN'S TURKEY HATCHERIES, INC.,
Plaintiff,

-vs-

NEPHI PROCESSING PLANT, INC. and MILTON T. HARMON, and ROGER D. JORGENSON,
Defendants.

Case No. 11822

APPELLANT'S BRIEF

NATURE OF THE CASE

The case on appeal herein involves an action by the plaintiff foreign corporation, Hein's Turkey Hatcheries, Inc., a turkey hatchery from Portland, Oregon, against the defendant Nephi Processing Plant, Inc., a Utah corporation and turkey producer and processor, on an open account and certain promissory notes which were, subsequent to purchase, given by said Nephi Processing Plant, as a part of said purchase transaction, whereby Nephi Processing Plant, Inc. purchased turkey poults from the plaintiff. And further upon the claim that the defendants Roger D. Jorgensen and Milton T. Harmon

guaranteed a portion of said notes. The execution of personal guarantees is denied, as is plaintiffs allegation of failure of satisfaction by the individual defendants. The plaintiff does not allege compliance with Sections 4-9-2 through 4-9-6 Utah Code Annotated (1953), requiring hatcheries and their salesmen selling baby turkey poults, within the State of Utah, to comply with the Pullorum Disease control, blood testing and reporting, and licensing provisions of Utah law, and making it unlawful to sell such poults within the State of Utah without such compliance, testing and permit. Defendants asserted that plaintiff's Complaint did not state a cause of action because of their failure to state compliance with the foregoing Utah law.

DISPOSITION OF LOWER COURT

The Fifth Judicial District Court for Juab County granted plaintiff judgment against the individual defendants on the notes to which their signature was affixed and against the corporate defendant for the total account, and denied Defendants Motion for Summary Judgment (R-38) based upon corporate designation attached to the signature of the individual defendants, denied defendants Motion for Permission to enter Parol Evidence as to the meaning of the corporate designation affixed to the signatures found in the guarantee portion of said promissory notes, denied the individual defendant's motion for dismissal of plaintiff's claim against the personal defendants based upon discharge of the

notes in question by reason of chronilogical application of funds received by plaintiff as payment on account, denied defendants motion for dismissal of plaintiff's claim on account of plaintiff's failure to allege compliance with Utah law in that plaintiff did not allege nor have a license to sell turkey poults within the State of Utah, nor did they allege their participation in the pullorum disease control program or the reporting of their blood testing, denied defendants motion to file and amended complaint, (R-26) and granted plaintiff leave to amend his complaint during the hearing.

ASSIGNMENT OF ERRORS

ERROR NO. 1. The court erred in denying defendants motion for leave to file an amended answer, which motion was timely filed, while allowing plaintiffs motion for leave to amend his complaint upon oral motion made during trial.

ERROR NO. 2. The court erred in denying the individual defendants motion for Summary Judgment on account of the corporate designation of a disclosed principal affixed to their signatures found in the guarantee section of the subject promissory notes, which designation created corporate rather than individual liability.

ERROR NO. 3. The court erred in denying defendants permission to enter parol evidence to eliminate ambiguity and clarify the meaning of the corporate designation affixed to the individual sig-

natures found in the guarantee portion of the Promissory Notes sued upon.

ERROR NO. 4. The court erred in denying defendant's motion for judgment based upon satisfaction of the promissory notes sued upon by reason of application to the oldest account and promissory notes of moneys paid.

ERROR NO. 5. The court erred in denying defendant's motion for dismissal of plaintiff's action by reason of plaintiff's failure to allege in it's Complaint compliance with the Utah law requiring hatcheries and their Salesmen to obtain a license to sell and to show compliance with testing and pullorum disease control measures required by Utah Law.

RELIEF SOUGHT ON APPEAL

Defendants ask that the Trial Court's Order denying defendant's motion for Summary Judgment and for leave to enter parol evidence, be reversed, that the Trial Court's Order denying defendant's motion for judgment on account of discharge of the promissory notes by reason of chronilogical application of payments be reversed, that the Trial Court's Order denying defendant's motion for judgment, on account of plaintiff's failure to allege or comply with the Utah law relating to pullorum disease control, blood testing and licensing of hatcheries be reversed, and that the Trial Court's Order denying defendant's motion for leave to file an amended answer be reversed. That the matter be remanded

to the District Court with instructions to allow the entry of defendant's amended answer, to allow the individual defendants to introduce parole evidence regarding the meaning of the corporate officer designation by the signatures found in the guarantee section of the promissory notes, to direct the court to apply the funds paid by defendants to the oldest account items and promissory notes, to grant the individual defendants motion for Summary Judgment, to direct the plaintiff to amend its complaint to allege it's compliance with the licensing, testing and pullorum disease control provisions of Utah Law found in Section 4-9-2 through 4-9-4 U.C.A. (1953), and if plaintiff fails or cannot do so, to dismiss plaintiff's complaint.

STATEMENT OF FACTS

During the years of 1964 and 1965 the plaintiff, through it's Utah Salesmen, sold to the defendant Nephi Processing Plant, Inc. turkey poults which were hatched in its Portland, Oregon hatcheries, said turkey poults being delivered by plaintiff's trucks to the corporate defendant's farms located in the State of Utah. The sale was on open account. Subsequent to the poult deliveries in Utah, a series of promissory notes were executed in amounts shown on the open account. These promissory notes were executed by the corporate officers of the defendant corporation, and the guarantee section were executed by the same corporate officers, with an occassional additional signature, and the designation "Directors" affixed

to said signatures. The parties dispute the meaning and effect of the Director designation, the plaintiff contending it has no effect, the defendants asserting it limited the signing act to that of a corporate officer, and did not create a personal obligation. During these same years payments were made by the defendants on account of the purchases. The parties dispute the manner of application of these funds to the account and promissory notes in question. The defendants contending that payments should be applied to the account items and promissory notes which are oldest in date, the plaintiff claiming the right to apply according to its discretion. During these years it is alleged that the plaintiff did not comply with any of the provisions of Utah law relating to the control of pullorum disease found in poultry. This fact is neither admitted or denied by the plaintiff. After all payments were credited to defendant's account there remained an unpaid balance and legal action before the District Court for Juab County was initiated.

During the pleading proceedure the defendant on September 5, 1968, filed a Motion for Leave to File an Amended Answer. No disposition was made on this motion by the Court prior to Trial, which was had January 27, 1969. Court rules propounded by said Court provided that motions on file 5 days prior to the date set for Law and Motion matters are considered set for hearing without notice and there were Law and Motion days had by said Court attended by Counsel for defendant Between September 5, 1968, and January 27, 1969. On the date of

Trial the defendants presented their Amended Answer and requested that it be allowed. The motion was denied.

The individual defendants filed a motion for Summary Judgment, asserting that each of their signature carried a Corporate officer designation, and Liability was limited to their official capacity rather than personal.

On the date of trial the presiding Judge, C. Nelson Day, requested that counsel for the parties discuss the matter with him in chambers. During these discussions the defendant moved the Court to dismiss plaintiff's complaint for the reason that plaintiff failed to allege compliance with the licensing, testing and pullorum disease control laws of the State of Utah. This motion was denied. Defendant moved the Court to dismiss the plaintiff's complaint as to the individual defendants for the reason that the allegations and exhibits of plaintiff's complaint (R-1) showed on their face that the promissory notes charged to the individual defendants were paid if the funds paid by defendants were applied first to the oldest account items and promissory notes. This motion was denied. Defendants called their motion for Summary Judgment for hearing. This motion was denied. Defendants requested leave to admit parol evidence as to the meaning of the corporate designation affixed to their signatures made in the guarantee section of the promissory notes. This request was denied.

Counsel for the parties stipulated to the following, that the signatures affixed to the promissory

notes and contract entered by the plaintiff were genuine. That the amounts set forth in the exhibits (R-1) attached to plaintiff's complaint correctly showed the amounts charged on account of the turkey poults purchased, the cash amounts received by the plaintiff as payment on said account, and eventually after testimony, the amount to be credited defendant's account for feed stuffs delivered by defendants to plaintiff. During the trial plaintiff requested and was allowed to amend his complaint by inserting the judgment amount prayed for.

The only testimony given came from Lowell Hein, plaintiff's agent, pertaining to the feed stuff credit.

POINTS URGED FOR REVERSING RULINGS OF TRIAL COURT RELATING TO DEFENDANTS MOTIONS TO DISMISS, ACCOUNTING, AND INTRODUCTION OF EVIDENCE.

1. Trial Court's denial of defendant's motion for leave to file an amended answer made over 4 months prior to trial date, while allowing plaintiff to amend it's complaint during trial is a manifest abuse of the Court's decision and a departure from the spirit of the rules of Civil Proceedure.

2. Corporate officer designation by individual defendants acting for a disclosed principal as found on the promissory notes sued upon by plaintiff created liability of the principal and not on the individual and trial Court erred in denying defendant's motion for Summary Judgment.

3. Parol evidence is admissible where the intent of individual defendants executing promissory note guarantee provision was ambiguous because of the use of the word "Director" by such signature.

4. Promissory notes sued upon by plaintiff were paid in full and discharged if proper accounting proceedure originally adopted by plaintiff was continued whereby moneys received in payment were applied to first notes in series, as contrasted with application without regard to chronological sequence of execution.

5. Plaintiff's failure to allege or introduce evidence to show compliance with statute requiring licensing, testing and reporting for the control of pullorum disease renders it's complaint defective and motion for Dismissal for failure to State a cause of action should be granted, and trial Court's denial of said Motion should be reversed.

ARGUMENT

1. Rule 15 of the Utah Rules of Civil Proceedure in substance provides that when an action has been placed on the triail calendar a party may amend his pleading only by leave of Court or written consent of the adverse party, and further provides:

> **". . . and leave shall be freely given when justices so requires."**

Prior to defendant's Motion the plaintiff had filed a request for trial and had also requested that

the matter be set for trial while appearing in court upon hearing of his objections to interrogatories. The defendant filed objection to the Notice of Readiness for Trial, indicating that discovery proceedings as well as other matters of pleading had not been completed. Shortly thereafter defendant filed a Motion for Leave to File an Amended Answer. Court rules propounded by the Fifth Judicial District Court provided:

> **"Motions on file 5 days prior to motion day are considered set for hearing without notice."**

Following the filing date of defendant's motion the Court was in session for Law and Motion, but failed to grant defendant's motion. Thereafter, defendant presented his Amended Answer to counsel for the plaintiff on the date of trial, and filed the same with the Court. During the following proceedures the matters raised by the Amended Answer were discussed between counsel for the parties and the District Judge, defendant moved to be allowed to Amend his Complaint, but defendant's motion was denied. During this time plaintiff discovered that he had failed to request a money amount in the prayer of his complaint, and moved to amend the complaint by insertion of such amount. This motion was granted .

Defendant contends that the denial of his motion was a manifest abuse of the judges discretion in view of the Amendment allowed the plaintiff, and the proceedure upon which his motion was founded,

and further was not in the interest of justice or orderly judicial proceedings.

2. The designation of "Directors" appearing by the names of the individual defendants in the guarantee section of the promissory notes in question, when the same parties had executed said notes as officers of a disclosed principle, limits the liability of the parties signing to their official, as contrasted wth their personal, capacity.

The following quotation from 11 Am. Jur. 2d *Bills and Notes* § 550 (1963) page 616 is applicable and sufficient to support this conclusion:

> **"In summary, the rules under the statute may be stated that if the name of the principal appears on the instrument and if words on the instrument indicate that the agent signs for or on behalf of such principal, the principal, and not the authorized agent, is liable on such signature."**

3. Where there is doubt as to the meaning of such additional words or designation found on the subject promissory notes, then it is proper that parol evidence be introduced to clarify the point. See 11 Am Jur. 2d *Bills and Notes*, Section 555, (1963). Also *Starley -vs- Deseret Foods Corp.*, 93 Utah 577, 74 P.2d 1221 (1938). On the notes in question the signatures did have a corporate officer designation, which indicates that the affixing of the signature was different than the case where the individuals were signing for themselves only. Such designation creates a question in the mind. And such question can only be

answered by the introduction of parol evidence. By means of poral evidence the ambiguity is eliminated and the facts made certain. The defendants offered to enter such evidence. The denial of the offer prevented the trial court from correctly determining the facts, and therefore the judgment rendered was faulty.

4. Good accounting practice and equity requires that payments made by the defendants be applied in order of time to the first account items incurred and to the first promissory notes executed. This principle was initially followed by the plaintiff, but abandoned by the plaintiff without the knowledge of defendants, and thereby the plaintiffs claim the amounts due on the promisisory notes in question. In reality the notes in question have been paid in full and an application of proper accounting proceedures clearly demonstrates the fact. During the years 1964 and 1965 the plaintiff maintained the running accounting record shown on their exhibit, and which can be summarized and illustrated as follows:

Charges to Defendant's Account:

No. 1	Note	April 1, 1964	$ 7,700.00
No. 2	Note	April 14, 1964	10,488.00
No. 3	Note	April 30, 1964	9,176.50
No. 4	Note	June 1, 1964	12,340.00
No. 5	Note	June 18, 1964	9,276.00
No. 6	Note	July 1, 1964	10.472.00
No. 7	Note	March 8, 1965	5,586.00
No. 8	Note	March 11, 1965	5,506.00
No. 9	Note	March 15, 1965	6,019.00
No. 10	Note	March 18, 1965	5,785.00

No. 11	Note	March 22, 1965	5,871.00
No. 12	Note	March 25, 1965	5,700.00
No. 13	Note	March 29, 1965	5,443.00
No. 14	Note	April 1, 1965	5,031.00
No. 15	Note	April 5, 1965	5,415.00
No. 16	Note	April 12, 1965	5,415.00
No. 17	Note	May 3, 1965	5,358.00
No. 18	Note	May 7, 1965	5,215.00

On the foregoing charges, payment was made as follows:

November 14, 1964	$10,000.00
December 30,1964	25,000.00
December 22, 1965	35,888.85
December 22, 1965	8,000.00
January 21, 1966	2,541.400

In the initial application of these payments plaintiff paid and discharged notes numbered 1, 2, 3, and 4, and then applied the balance of all other payments made to the items in 1965, failing to continue to follow the correct proceedure as adopted initially by themselves. If this proceedure had continued, as it rightfully should have, the following notes would have been paid and discharged, notes numbered 5, 6, 7, 8, and 9. With a balance to apply in partial payment on note number 10. Notes numbered 4, 5, and 6 are those sued upon by the plaintiff. The simple application of the foregoing accounting clearly demonstrates that these notes were discharged in full. It should be noted for the court that the notes shown on the accounting were not numbered in the original transaction, the numbers being supplied

here for convenient reference and being applied according to the chronological execution of the notes. With the note bearing the oldest date being No. 1 and following in like manner.

5. In order for the plaintiff, a foreign Hatchery, to state a cause of action on account of its turkey poult sales in the State of Utah, or any contracts or promissory notes arising from such sales, it's complaint must specifically allege compliance with Utah law requiring compliance with the Pullorum disease control program, blood testing, and the acquisition of a license to so sell and engage in such business.

Plaintiff utterly failed to allege such compliance, and when the question was raised and the opportunity to offer proof of compliance given, plaintiff failed to introduce such evidence. The court's failure to grant the demurrer and motion to dismiss made by the defendants based upon this point rendered the Utah law without effect and clearly was error. This can be adequately determined from a reading of the law. Sections 4-9-2 through 4-9-6 Utah Code Annotated (1953) read as follows:

4-9-2. Importation of chickens or turkeys — Labels —Chickens or turkeys for breeding purposes shall not be imported into the state of Utah unless they originate from flocks authoritatively participating in the pullorum control and eradication phase of the National Poultry Improvement Plan, as provided in the latest revised issue of the United States department of agriculture miscellaneous publication No. 300, as amended in June, 1942, or have passed a

negative agglutination blood test for pullorum disease under the supervision of a state livestock sanitary authority within thirty days of date of sale. Baby chicks or poults or hatching eggs shall not be shipped into the state of Utah or sold by hatcheries or others within the state unless they originate from flocks authoritatively participating in the pullorum control and eradication phase of the National Poultry Improvement Plan, as provided in the latest revised issue of the United States department of agriculture miscellaneous publication No. 300, as amended in June, 1942, or from flocks that have met comparable requirements under the supervision of a recognized state livestock sanitary authority.

Each crate, package, or container of hatching eggs, baby chicks, poults, started chicks, started poults, or chicken breeding stock must carry an attached label showing authority for the testing and the pullorum control and eradication class of the product.

4-9-3. Licenses and fees. — All salesmen or sales agencies and hatcheries operating in the State of Utah and selling baby chicks, poults, or hatching eggs that originate either within or outside of the state of Utah must register with and be licensed by the Utah State board of agriculture. The fee for issuing such a license shall be $10.00.

4-9-4. Blood test report to be filed. — Any hatchery selling any of the above named products within the state of Utah shall file a certified copy of each blood test report with the state board of agriculture.

4-9-5. Administration and enforcement of chapter — Confiscation of chicks or eggs. — The state board of agriculture shall administer and enforce the provisions of this act, and to prevent the spread and introduction and to otherwise control and eradicate the pullorum disease within the boundaries of the state. The state board of agriculture may confiscate all chicks, poults, and eggs not entering the state in compliance with this act and may either destroy said chicks, poults, or eggs, or return the same to the shipper at the shipper's expense.

4-9-6. Violation or noncompliance — Misdemeanor. — Any person violating the provisions of this act, or any person, firm association, or corporation selling, or offering for sale, or causing to be sold, or offered fr sale, any chicks, pults, or eggs, which have not originated from flocks authoritatively participating in the pullorum control as provided for herein, or fails in compliance with any other requirements herein, is guilty of a misdemeanor.

These provisions were clearly adopted for the preservation of the good health of the people of the state of Utah, and to provide protection against the spread of pullorum disease. With adequate measures for the control of the entry of poultry from without the State. This is not a revenue measure.

The law of this state is well settled in such cases. It has been clearly defined by a series of cases decided by this court. And reference is made to the following: *Olsen -vs- Reese,* 114 Utah 411, 200 P. 2d 73 (1948), *Chase -vs- Morgan,* 9 Utah 2d, 125, s 339 P. 2d

1019 (1959), *Platt -vs- Locke*, 11 Utah 2d, 273 358 P.2d 95 (1961), *Lyman -vs- Taylor*, 14 Utah 2d. 362, 382 P. 2d 401 (1963), and *Mosley -vs- Johnson*, 22 Utah 2d. 348, 453 P. 2d 149 (1969). Based upon the foregoing cases it can be generally stated that:

a. Contracts, verbal or written, or other related legal instruments, including promissory notes, arising from transactions requiring a party to first comply with state licensing provisions which were implimented for the protection of the public, are void and unenforceable if there has not first been a proper compliance with the appropriate state law.

b. In order for a good cause of action to be stated, when the cause of action is based upon contracts arising from transactions requiring a party to first comply with state licensing provisions which were implimented for the protection of the public, the moving party must plead compliance with the state licensing provisions, and failure to so do is a fatal defect in any such complaint.

In the *Olsen -vs- Reese* (supra) decision the Court said at page 736 of 200 P.2d:

> **"In accordance with our holding in the previous case, in order to state a cause of action, it was necessary for plaintiff to allege he was a licensed contractor at the time the contract was entered into."**

The fact that we are here involved with promissory notes, or negotiable instruments which are still in the hands of the original payee, does not avoid

the effect of this law. To allow the law applicable to Bills and Notes to avoid the effect of settled Utah law would fly in the face of the ruling of the court, in *Lyman -vs- Taylor* (supra.) at page 402, the Court said:

> "Taylors countered on the ground that Lyman was not a licensed contractor, — an admitted fact, — that the construction contract, therefore, was against public policy and hence not such as was enforceable, and that any agreement resulting therefrom equally was tainted. With this contention we agree, otherwise an enforceable contract could rise from the funeral pyre of one that was void, resulting in complete contravention of the letter and spirit of the legislation which renders unenforceable contracts by unlicensed contractors subject to regulation, — all in the public interest."

This position was further strengthened and established by the Court's decision in the case of *Mosley -vs- Johnson* (supra.) involving the question of recovery on the basis of the doctrine of quantim meruit. In denying such recovery the court said:

> "We are unable to see why this plaintiff, whose contract is void, should be able to recover on the theory of quantum meruit. To permit him to do so would permit him to evade the law and recover for work which he is forbidden to do.

To allow the decision of the lower court to stand in the instant case would allow the plaintiff,

a foreign corporation doing business through a local agent, without obtaining a permit for the corporation or the agent, or complying in any manner with the disease control provisions of Utah law as they relate to the disease of Pullorum, to enter this state, engage in unlawful conduct, and profit therefrom. Failure to require a pleading of compliance with state law by the plaintiff would involve the judiciary in a proceedure contrary to state law and good practice. Consistency with the law and former decisions of this court requires a reversal of the lower court's ruling on this matter.

CONCLUSION

Defendants conclude that the Trial Court's Orders denying the several motions of the defendants assigned as error were not correctly made and should be reversed by this court, that the matter should be remanded to the Trial Court with instructions requiring the Trial Court to allow the entry of Defendant's Amended Answer, to allow the individual defendants to introduce parol evidence regarding the qualifications of their signatures on the promissory notes, to direct the court to apply the moneys paid by defendants to the oldest account items and promissory notes and thereby discharge the notes in question, to require the plaintiff to file an Amended Complaint wherein it alleges compliance with the Utah Pullorum Disease control program and licensing provisions therein contained, and in the event of its failure to so do, dismissal of

plaintiff's complaint as void; that costs be awarded to Defendants.

Respectfully submitted,

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