In the

Supreme Court of the United States

In Equity

October Term, 1934

No. [illegible], ORIGINAL

THE STATE OF NEBRASKA, *Complainant*,

vs.

THE STATE OF WYOMING, *Defendant*.

ARGUMENT OF MOTION TO DISMISS

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CAPITOL-PIONEER-CHEYENNE

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ARGUMENT OF MOTION TO DISMISS

I.

We will present the grounds of our motion in the order in which such grounds are stated in the motion.

The first ground stated in our motion is: "Said Bill of Complaint shows upon its face that the State of Colorado is a necessary and indispensable party to this suit." This ground is based upon Equity Rule No. 29 which provides that a defense based upon nonjoinder shall be made by motion to dismiss or in the answer. We construe this to mean that where the nonjoinder appears upon the face of the Bill of Complaint the proper procedure is by motion to dismiss.

The purpose of this suit, as stated in the Bill of Complaint, is to secure an equitable apportionment of the waters of the North Platte River.

The second paragraph of the Bill of Complaint alleges that, "The North Platte River is a non-navigable river which has its source in the mountains of Colorado, and drains about eighteen hundred square miles in that State". etc.

The bill does not show whether the State of Colorado claims any right to a diversion and use of the waters of the North Platte River which are produced in that State. On the other hand, the bill does not show that the State of Colorado does not claim such right and is not entitled thereto. The bill does not show how much water is produced in the drainage area of the North Platte River located in Colorado or what may be a just and equitable division of the waters produced in that State as between that State and the parties to this action.

It appears to us that before this Court could possibly be in a position to make an equitable distribution of the waters of the North Platte River, each and every party which would be affected by such distribution is an indispensable party to the suit. In the absence of any showing in the Bill of Complaint that the State of Colorado does not use or is not entitled to use any of the waters of the North Platte River produced in said State, we firmly believe that said State is an indispensable party to this suit.

The Bill of Complaint herein shows that the North Platte River and the South Platte River join at the City of North Platte, Nebraska and form the Platte River. The Bill of Complaint also seeks to charge the North Platte River with the sole burden of furnishing water for irrigation purposes for a distance of some two hundred miles beyond the junction of that river with the South Platte River, or, in other words, for a distance of some two hundred miles along the Platte River. (Paragraphs 2nd, 3rd, 4th and 6th of Bill of Complaint).

The South Platte River has its origin and source in the State of Colorado and flows from the mountains of the State of Colorado through the eastern part of that State into the State of Nebraska and joins with the North Platte River at North Platte, Nebraska, thereby forming the Platte River.

The Bill of Complaint entirely ignores the South Platte River for the purposes of this suit, although it shows, as above stated, that the South Platte River joins the North Platte River at the City of North Platte, Nebraska, and forms the Platte River.

The Bill of Complaint does not make any showing with reference to what waters may be available from the South Platte River to meet the needs of appropriators from the Platte River between the cities of North Platte, Nebraska, and Grand Island, Nebraska, although the Bill of Complaint seeks to charge the North Platte River with furnishing water for irrigation purposes to be taken from the Platte River at points between said cities.

We cannot see how a Court of equity can possibly, properly and equitably adjudicate the rights of the plaintiff and the defendants so far as the burdens of the North Platte River and the Platte River within the limits above described are concerned without a full disclosure in the bill covering the waters of the Platte River, which necessarily include the waters of the South Platte River. Certainly, the burden cannot be placed upon the defendant in this suit to furnish waters through the North Platte River for the benefit of appropriators from the Platte River if such burden should wholly or in part properly rest upon the waters of the South Platte River. To state our position in another way, we believe that in order for this Court, as a Court of equity, to properly and fairly establish and adjudicate the rights, burdens and duties of the States interested in the waters of the North Platte and the Platte Rivers, all States must be included which contribute to those streams.

If we are correct in this assumption, then the State of Colorado and the South Platte River are directly and necessarily involved in this case and a proper and equitable adjudication cannot be had in the absence of the State of Colorado and a full disclosure as to the waters of the South Platte River.

It appears to us that the Bill of Complaint in this case discloses a studied effort on the part of the complainant not to assume any responsibility for furnishing any waters for the use of its own people along the Platte River and seeks to impose the entire responsibility for this purpose upon the defendant, and that the Bill of Complaint seeks to reserve to the complainant the sole right to dispose of the waters of the South Platte River in the State of Nebraska without regard to the burdens upon the Platte

River and without giving any consideration whatever to the right of the defendant to have the South Platte River to bear its just and fair portion of the burdens of the Platte River. In this respect the complainant has entirely failed to show that it is ready and willing to do equity in this case.

The State of Colorado is within the jurisdiction of this Court, and we believe it is an indispensable party. This being true, the bill should be dismissed. (Commonwealth Trust Company of Pittsburgh vs. Smith, 273 Fed. 1, affirmed 266 U. S. 152, 69 Law Ed. 219; California vs. Southern Pacific Company, 157 U. S. 229, 39 Law Ed. 683; Williams vs. Bankhead, 19 Wallace 563, 22 Law Ed. 184; Niles-Bement-Pond Company vs. Iron Moulders' Union, 254 U. S. 77, 65 Law Ed. 145.)

II.

The second ground of the motion to dismiss is: "Said Bill of Complaint shows upon its face that the Secretary of the Interior of the United States is a necessary and indispensable party to said suit."

The eighth and ninth paragraphs of the Bill of Complaint show that the Secretary of the Interior of the United States by and through the Bureau of Reclamation of the United States Department of the Interior is directly interested in and will be directly and adversely affected should the complainant obtain the relief sought in this suit.

Section 9 of the Bill of Complaint alleges that the complainant has repeatedly protested against the administration of the waters of the North Platte River by the State of Wyoming and also to the administrative officers of the United States Bureau of Reclamation and to the Washington office of the United States Bureau of Reclamation and alleges that the United States Bureau of Reclamation is wrongfully, illegally and unjustly impounding the flow of the waters of the North Platte River and thereby depriving Nebraska appropriators of many thousands of acre feet of water from said river. The Bill of Complaint shows that the

Bureau of Reclamation has constructed reservoirs for the purpose of impounding the waters of the North Platte River, and the complainant seeks to enjoin the use of said reservoirs for such purpose and to require the Bureau of Reclamation, as the agent of the Secretary of the Interior, to release such waters to the complainant. Therefore, it seems clear that the Secretary of the Interior is an indispensable party to this suit. In support of this argument, we refer to the cases cited under the first division of this argument. (Moody v. Johnston, 66 F. 2nd, 999, Moore et al v. Anderson et al. 68 F. 2nd, 191.)

III.

We will now briefly present one other point with reference to the failure of the plaintiff to comply with Equity Rule 25. The Fourth paragraph of that rule is as follows:

> "Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not within the jurisdiction of the court or can not be made parties without ousting the jurisdiction."

We have heretofore shown that the State of Colorado and the Secretary of the Interior are necessary parties to this suit. They are both within the jurisdiction of this Court and the making of both or either of them parties to this suit would not oust this Court of jurisdiction.

We believe that we have shown that the matters involved in this suit cannot be disposed of by a final decree without affecting the interests of both the State of Colorado and the Secretary of the Interior. If such a decree should be entered, we are clearly of the opinion that it would leave the controversy in an unsettled condition and could not properly and effectively accomplish the purpose of the suit. (Shields vs. Barrow, 17 How. 130-139, 15 Law Ed. 158; Barney vs. Baltimore, 73 U. S. (6 Wall.) 280, 18 Law Ed. 825; Greeley vs. Lowe, 155 U. S. 58, 39 Law Ed. 69)

IV.

The third ground on which the defendant asks the dismissal of the Bill of Complaint is: "Said Bill of Complaint fails to state facts sufficient to constitute a valid cause of action in equity against this defendant and does not state any matter of equity entitling the complainant to the relief prayed for."

At the outset of our argument, upon the third ground of the motion to dismiss, we wish to direct attention to the rule that "Allegations of a complaint by way of argument, assertions as to questions of law, together with inferences and conclusions of the pleader as to matters of fact are not deemed admitted by motion to dismiss". (Missouri Pacific Railroad Company vs. Norwood et al., 283 U. S. 249, 75 Law Ed. 1010) In that case this language is used by the Court which we deem applicable to the Bill of Complaint in the present case:

> "The complaint contains much by way of argument, assertions as to questions of law together with inferences and conclusions of the pleader as to matters of fact. These are not deemed to be admitted by motion to dismiss. Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 43, 53 L. ed. 682, 689, 29 S. Ct. 404; Southerns R. Co. v. King, 217 U. S. 524, 536, 54 L. ed. 868, 872, 30 S. Ct. 594; Pierce Oil Corp. v. Hope, 248 U. S. 498, 500, 63 L. ed. 381, 382, 39 S. Ct. 172. The state laws are presumed valid. Moreover, in the cases here decided they were held not repugnant to the commerce clause of the Constitution or the due process or equal protection clause of the 14th Amendment. The burden is on the plaintiff by candid and direct allegations to set forth in its complaint facts sufficient plainly to show the asserted invalidity. Aetna Ins. Co. v. Hyde, 275 U. S. 440, 447, 72 L. ed. 357, 364, 48 S. Ct. 174, and cases there cited. New Orleans Pub. Service v. New Orleans, 281 U. S. 682, 686, 74 L. ed. 1115, 1118, 50 S. Ct. 449; Beaumont, S. L. & W. R. Co. v. United States, 282 U. S. 74, 88, ante, 221, 51 S. Ct. 1."

We are of the opinion that the Bill of Complaint in this case is entirely too indefinite and uncertain in its allegations of facts to

be sufficient to state a cause upon which the complainant may recover. Taking all of the facts which are admitted by the motion to dismiss, we do not believe that the Bill of Complaint states a basis upon which a decree in this case could be formulated and relief granted to the complainant.

As we understand the Rules of Equity Pleading, they require that the Bill of Complaint shall state ultimate facts in a short and simple manner sufficient to establish the plaintiff's cause and sufficient to enable the Court to enter a decree granting the relief which complainant prays if the Bill of Complaint be admitted. (21 C. J. 392, Section 405)

In Whitehouse, on Equity Practice, Vol. 1, Page 176, the following rule is stated:

> "Besides the necessity for alleging a case within the jurisdiction of a court of equity, in the proper meaning of the word, i. e. a case which a court of equity has the power to consider, —it is also indispensable, obviously, to present a case which will justify a decree for relief by the court after it has considered it. However strong a case the plaintiff may be able to establish by his evidence and whatever the real facts may be, all the facts essential to justify relief must appear on the face of the bill, otherwise it will be dismissed for want of equity."

The same author, at Page 169, Vol. 1, says:

> "As a general statement it may be said that in order to prevail in his suit, the plaintiff has three fundamental points to establish by his allegations and proof. He must show, first that he is the person in interest entitled to relief, provided the facts justify any relief; secondly, that the facts do justify the relief prayed for against some person; and third, that the defendant is the person against whom the relief is justified. Unless the plaintiff's bill contains sufficient allegations to cover these points, it must be dismissed without any consideration of the evidence. 'Good pleading is as essential upon the equity side as upon the law side of the court. Evidence without allegations is as futile as allegations without evidence.' In other words, relief in equity no matter what the evidence may be, can only be granted in

accordance with some one or more allegations in the bill. The decree of the court is rendered secundum allegata et probata. Variance is fatal."

In the case of the St. Louis and San Francisco Railway Company vs. Walter S. Johnston, 133 U. S. 566, 33 Law Ed. 683, this language is used:

"The circuit court did not, in the present case, express any different view but held that the bill was not properly framed to present the question. Certainly, there must be sufficient equity apparent on the face of a bill to warrant the court in granting the relief prayed; and the material facts on which the complainant relies must be so distinctly alleged as to put them in issue. (Harding vs. Handy, 24 U. S. 11 Wheat. 103 (6:429) And if fraud is relied on, it is not sufficient to make the charge in general terms. 'Mere words, in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisdiction, unless the transactions to which they refer are such as in their essential nature constitute a fraud or a breach of trust for which a court of chancery can give relief.' (Van Weel vs. Winston, 115 U. S. 228, 237 (29:384); Ambler vs. Choteau, 107 U. S. 586, 591 (27:322, 324) The defendant should not be subjected to being taken by surprise, and enough should be stated to justify the conclusion of law, though without undue minuteness."

In the case of Garrett vs. L. & N. Railroad Company, 235 U. S. 308, 59 Law Ed. 242, the following language is used with reference to equity pleading:

"Although the same precision of statement is not required as in pleadings at law, nevertheless it is held to be absolutely necessary that in bills of equity such a convenient degree of certainty should be adopted as may serve to give the defendant full information of the case which he is called upon to answer. Every bill must contain in itself sufficient matters of fact, per se, to maintain the plaintiff's case; and if the proofs go to matters not set up therein the court cannot judicially act upon them as a ground for decision, for the

pleadings do not put them in contestation. (Harrison vs. Nixon, 9 Pet. 483, 503, 9 Law Ed. 201, 208; Dan. Ch. Pl. & Pr. 368)"

If we apply these rules to the allegations of the Bill of Complaint in the present case, we submit that such allegations are insufficient to establish any standard for relief or measure of relief to which the plaintiff is entitled if the plaintiff has any cause of complaint at all. We do not believe that it would be possible for the Court to take the Bill of Complaint and treat each and every allegation therein as admitted to be true and upon such Bill of Complaint formulate a decree in favor of the complainant. The facts alleged in the Bill of Complaint might be held sufficient to show some equities in the complainant, but they certainly are not sufficient to show what, if any, relief the alleged equities entitle the complainant to receive.

The Bill of Complaint sets forth many facts concerning the district in Nebraska which is alleged to be subject to irrigation and a portion of which at least is actually irrigated. It shows the storage of waters in Wyoming in large quantities. It shows that some at least of this water which is stored in Wyoming is used upon lands in Nebraska. It makes a showing of many thousands of acres of land in Nebraska which are irrigated or subject to irrigation. It is wholly silent on the question of what lands in Wyoming are irrigated and are entitled to receive water for irrigation purposes from the North Platte River. As a matter of fact, the Bill of Complaint fails to show that the water supply of the North Platte River, if it were all donated to the State of Nebraska, would be sufficient to meet what the Bill of Complaint alleges are the legitimate demands of the State of Nebraska.

So far as the Bill of Complaint shows, the State of Nebraska might take the entire flow of the North Platte River and all of the stored waters which are in Wyoming and not leave any water for irrigation purposes in the State of Wyoming, and yet the Bill of Complaint would make it appear that this would be an equitable apportionment of the waters of the North Platte River.

The Bill of Complaint, as we read it, does not state facts sufficient to constitute a cause of action in equity against the defendant. It does not state any equities which are apparent at least from the bill as between the water users of Wyoming and the water users of Nebraska.

Respectfully submitted,

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