

**HARRIE S. EVERETT, CARL G. CLIFFORD, ELLIS H. TEAL AND
GEORGE W. ROBINSON, PLAINTIFFS AND APPELLANTS, VS. THE ASIA
BANKING CORPORATION, NICHOLAS E. MULLEN, ERIC BARCLAY,
ALFRED ...**

G. R. No. 25241. November 03, 1926

Ponente: OSTRAND, J.

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OSTRAND, J.:

This is an appeal from a decision of the Court of First Instance of Manila, sustaining a demurrer to the complaint. The plaintiffs declined to amend and judgment was rendered dismissing the case. The complaint in question reads as follows:

"The above named plaintiffs, by Thomas Cary Welch, their attorney, complain of the above-named defendants and for cause of action against them allege:

"1st. That at all times in this complaint mentioned the plaintiffs Harrie S. Everett, Ellis H. Teal and George W. Robinson were and now are residents of the City of Manila, Philippine Islands. That the plaintiff Carl G. Clifford was formerly a resident of said City of Manila and now is a resident of the City of Washington, District of Columbia.

"2nd. That at all times in this complaint mentioned the defendant the Asia Banking Corporation hereinafter called 'the Bank,' was and now is a foreign banking corporation duly licensed to transact banking business in the Philippine Islands, having its principal office and place of business at Manila aforesaid and that said Asia Banking Corporation never has been empowered by law or licensed to do any business other than commercial banking in the Philippine Islands. That the defendants Nicholas E. Mullen, Alfred F. Kelly, John W. Mears, and Charles D. McIntosh were residents of said City of Manila and were officers, agents and employees of the said Asia Banking Corporation, the said Mullen being the General Manager thereof in said City; That: the defendant Eric Barclay is now a resident of Los Angeles, California, and the defendant McIntosh is also residing in the United States, his exact residence being unknown.

"3rd. That at all times in this complaint mentioned Teal & Company hereinafter called 'the Company,' was and now is a domestic corporation duly incorporated under the laws of the Philippine Islands and having its principal office and place of business at Manila aforesaid. That during said times the plaintiffs Everett, Clifford, Teal and Robinson were the principal stockholders in the Company owning a total of 4,478 shares therein and that the defendant Barclay "was the only other stockholder, owning one share thereof.

"4th. That in the year 1921, the said Teal & Company has become indebted to the firm of H. W. Peabody & Company in about the sum of ^300,000, being for tractors, plows and parts which had been ordered and delivered, the Bank and other banks in Manila held drafts accepted by the Company under said H. W. Peabody & Company's guarantee. That said tractors having become unsalable by reason of the financial and agricultural depression that had overtaken the Islands, the said tractors were all returned to the said H. W. Peabody & Company and as these plaintiffs are informed and verily believes were by it returned to the United States, and

while the events herein set forth were taking place the Company made payments on its indebtedness through the Bank to H. W. Peabody & Company, amounting to the sum of at least P150,000. That at about the same time the Company had ordered another lot of tractors, etc., from a business house in the United States, known as Smith, Kirkpatrick & Co., under a commercial letter of credit which the Company had had from the Bank in New York City, but that shipment of such tractors had been delayed until the credit had been rescinded by the Bank and that upon such rescission Smith, Kirkpatrick & Co., had. been advised by telegraph that the order was cancelled and not to ship the tractors. That nevertheless and contrary to such advice the said Smith, Kirkpatrick & Co. did ship the tractors doing so under D/A drafts therefor and that when said tractors arrived in Manila and in order, if possible to save Smith, Kirkpatrick & Co. from additional loss, the Company at the request and on the advice of the said Bank accepted the drafts and stored the same in a warehouse in Manila rented by it and gave receipts therefor.

"5th. That thereafter and on or about March, 1921, the Bank persuaded the Company and the said H. W. Peabody & Co. and Smith, Kirkpatrick & Co. to enter into a so- called 'creditors agreement' with itself, wherein it was mutually agreed that neither of the parties should take action to collect its debts from the Company for the term of two years after the date thereof. That these plaintiffs have no copy of said agreement but beg leave to refer to the original of same, in possession of the Bank, for greater certainty.

"6th. That the business of said Company consisted mainly in the merchandising of automobiles, trucks, tractors, spare parts and accessories therefor, and the repairing thereof. That on the 29th day of December, 1922, said company was solvent and in the enjoyment of a large, growing, and lucrative business and in the possession of a valuable reputation and good-will. That 'since its organization in May, 1919, it had done its banking business and financing almost exclusively thru and with the Bank and by reason of such continued relations the officers of the Company had acquired trust and confidence in the integrity and good intentions of the said Bank and its officers and the other defendants in their friendliness to themselves and the Company.

"7th. That on said 29th day of December, 1922, the said Company was indebted to the Bank in about the sum of P750,000, which said sum was secured by mortgage on its personal property and the improvements upon the real estate occupied by it, which real estate was held under a ninety-nine years lease upon very favorable terms and which lease was a valuable asset and constantly increasing in value, and that the said Bank held acceptances, warehouse receipts or pledges for such other indebtedness, as was not covered by the last mentioned mortgage, which said security was ample to cover the amount of the indebtedness.

"8th. That toward the end of the year 1922, the Bank, through its manager the defendant Mullen represented to the Company and its managers that for the protection both of the Bank and the Company it was advisable for them both that the Bank should temporarily obtain control of the management and affairs of the Company in order that the affairs of the Company could be conducted by the Bank without interference or hindrance from outside, and to this end that it would be necessary for the stockholders in the Company to place their shares therein in a Voting Trust to be held by the Bank or one of its officers for the benefit of the Company and represented that if this were done the Bank would then finance the Company under its own supervision and that if and when the same were successful and in position to resume independent operation the said trust would be terminated and the stock returned to its true owners, and further represented that in case at anytime the Bank decided to discontinue operation under the said trust that then the stock also would be so returned.

"9th. That it was further represented by the Bank and the said Mullen that in order to protect the mutual interests of the Bank and the Company it was necessary to carry into effect the said proposed voting trust without the knowledge of the creditors above named and thereby place the Bank in an advantageous position with regard to them. That relying upon the previous friendly relations between the bank and the Company and between the individual defendants and these plaintiffs and relying upon the promise and representations of the defendants, these plaintiffs were induced to sign and did sign and deliver to the Bank simultaneously a so-called 'Voting Trust Agreement/ executed by the plaintiff stockholders and a 'Memorandum of Agreement' executed by the Company, both dated and executed and delivered the 29th day of December, 1922, the two

forming one document, and a copy of which is hereto attached and marked Exhibit A.

"10th. That by reason of the facts above set forth and of their reliance upon the good faith and goodwill of the defendants these plaintiffs were induced to sign the 'Memorandum of Agreement/ and 'Voting Trust Agreement,' Exhibit A, understanding from the defendants that the same were intended for the protection of all parties thereto from outside creditors, but that they were not intended to be enforced according to the letter thereof, and that they did not contain the true agreement between the Bank and the Company which was to finance the Company with- out interference from the above named creditors, to hold the voting trust as a protection to the bank as against the said creditors and for its own advances, and the further agreement that in case the Bank did not operate under the said voting trust because of the disapproval by its New York headquarters of such action, or for any other cause, the said trust would be cancelled and the stock in and control of the Company returned to its true owners.

"11th. That shortly subsequent to the execution and delivery of the voting trust and memorandum of agreement herein-above described, in violation of the obligations and duties imposed by law upon the trustee and in pursuance of a scheme to defraud these plaintiffs here-inbelow more fully set forth, the said voting trustee, the defendant Mullen, caused and procured, by virtue of the powers delegated in the said voting trust, the displacement and removal from the Board of Directors of the Company of each and every person who was at the time of the execution of the said voting trust a stockholder in the Company and the substitution in their places as such directors, of the above named persons defendant, or of other persons at the time employees and servants of the Bank, that thereafter and at no subsequent time did the said trustee allow or permit to act as a Director of the Company any person who was in fact a stockholder in the Company; that no one of the so-called directors so placed in ostensible office, at any time has ever purchased from any stockholder of the Company a single share of the capital stock thereof, or paid to any stockholder or the Company any money or consideration whatsoever for the stock by virtue of the assumed ownership of which he has assumed to be a director of the Company, and that at all time since, the Company has been exclusively controlled and managed by the said defendants none of whom had any legal or equitable right to a voice in the control or management thereof.

"12th. That in pursuance of the above-mentioned and hereinafter described scheme to defraud these plaintiffs, the new so-called directors proceeded to remove from office the Secretary of the Company, and to discharge from employment all of the old responsible managers and foremen in the office and shops who were loyal to the Company and to these plaintiffs as the stockholders thereof and to displace them substitute for them creatures of their own choosing whose interest consisted wholly in pleasing themselves and the Bank, and who were wholly foreign to the stockholders, these plaintiffs who were and are the real owners of the Company. That thereafter said defendants conducted the business of the Company without consulting the stockholders thereof .and denied to the stockholders any knowledge or information as to their actions, or the business of the Company, and at all times thereafter carried on the business and management in all respects as if they and the Bank were the real stockholders and owners thereof and in utter and entire disregard of the rights and interests of these plaintiffs who were and are the real owners. That the said individual defendants, as such pretended stockholders and directors as aforesaid, from time to time gave new mortgages upon the properties of the Company to the Bank as it from time to time required and without regard to the interest of the Company and looking solely to the advantage of the Bank whose employees and henchmen all of them were and are.

"13th. That after excluding the real owners from voice in the management or knowledge of the affairs of the Company, the said individual defendants and or the Bank by agreement among themselves or because the individual defendants as employees were coerced by the Bank, the said defendants gave pledges and mortgages from the Company to the Bank and entered into contracts as directed by the Bank, and permitted the Bank to foreclose the same and to sell the property of the Company at such times and in such manners as to be solely to the interests of the Bank or of themselves, and wholly without regard to the best interests of the Company itself in disregard to the duties and obligations of a trustee, and permitted the Bank to bring suit or suits against the

Company, in which the Company was not represented by anyone having its interest at heart and in which by reason of the above set forth relation of the Company to the Bank, the Bank in truth occupied the position of both plaintiff and defendant and tricked and deluded the courts into giving judgments in which the rights of the real parties were concealed and unknown to the courts.

"14th. That on or about the 18th day of August, 1923, in order more effectually to plunder the Company and to defraud these plaintiffs the said defendants, Mullen, Barclay, Mears and McIntosh, made, executed and filed in the Bureau of Commerce and Industry of the Philippine Islands, articles of incorporation of a corporation called the 'Philippine Motors Corporation having its principal office in the City of Manila, a capital stock of P25,000, of which the sum of P5,000, was alleged to have been subscribed and paid as follows: the defendant Barclay P200, defendant Mears P1,200, defendant Kelly P1,200, defendant McIntosh P1,200, defendant Mullen P1,200, the treasurer thereof being the defendant Mears. And these plaintiffs beg leave to refer to the original articles of Incorporation on file in the said Bureau for greater certainty.

"That at the time of such incorporation each and every one of the last above named defendants was an officer or employee of the defendant Bank. That these plaintiffs have no information nor means of obtaining information as to whether the money alleged to have been described by them for their shares of stock was of their personal funds and property or whether it was money furnished them by the Bank for the purpose. That in case such subscriptions were of their personal moneys such incorporation was a fraud upon these plaintiffs for the reason that it was intended for the sole purpose of taking over the assets of the. Company and said defendants were enabled to effectuate such intent by reason of their positions as officers and employees of the Bank and because each and every one of them were nominally and de facto directors of the Company, by reason of their appointments as such by the defendant Mullen, the Voting Trustee, under the Voting Trust hereinabove set forth, of which facts each and every one of said defendant incorporators were at the time fully informed as these plaintiffs verily believe.

"15th. That after the incorporation described in the last preceding paragraph the said Bank turned over to the Philippine Motors Corporation all of the business and assets of the company of every name nature and description and with the connivance and consent of the individual defendants acting in their double capacity as directors of both corporations, permitted and assisted the said Philippine Motors Corporation to enter and possess itself of the premises and good will of the Company and to continue and carry on the said business for the sole benefit of the new corporation and to collect the debts owing to the Company and convert the advantages, profits and proceeds thereof to itself. And that at all times since the said Philippine Motors Corporation has continued to conduct and advantage itself of the business of the Company to the disregard of and detriment to the rights of these plaintiffs and to their damage.

"16th. That these plaintiffs, by reason of the facts hereinabove set forth were and are ignorant of the exact relations that have existed and do exist between the Bank and the said Philippine Motors Corporation, or between the Bank and the individual defendants as ostensible stockholders thereof and that the Bank has prevented these plaintiffs from obtaining any such information by refusing after demand to return to these plaintiffs their stock in the Company or to dissolve the Voting Trust or in any wise to allow them to regain control of what is left of the Company or its records and has endeavored to forestall and prevent any action toward regaining such control or enforcement of their rights by bringing suit against one of the principal stockholders in the Company, the plaintiff Everett, based on an alteration and falsification of the books of the Company and by threat of proceedings against another principal stockholder in the Company, the plaintiff Clifford, to collect a large sum of money as and for an alleged non-payment of a subscription to the stock of the Company, which the records of the Company plainly show does not exist and has no foundation in equity or in law.

"That by reason of the ignorance, so generated and maintained, of facts wholly within the knowledge of defendants and concealed from these plaintiffs, they are unable to allege positively and therefore must charge as they do charge in the alternative;

"(a) That the said Philippine Motors Corporation is a fictitious entity brought into semblance of being by the Bank through the control of its employees the above named individual defendants acting as pretended incorporators, stockholders and directors, when in truth and in fact the said individuals had and have no personal property interest therein, and that in case of foregoing is found to be the fact the said Philippine Motors Corporation never obtained and has now no legal existence for the reason that it was and is the Bank itself operating under a disguise and because said Bank, under its license to do business in the Philippine Islands, is without power or authority to engage in the business assumed by the Philippine Motors Corporation, and because said corporation so pretendedly created by the Bank is in violation of its duties and obligations assumed by it as Trustee of the stockholders of the Company, Or

"(b) That in case the individual defendants as individuals created the said, the Philippine Motors Corporation, and the same is the property of themselves as stockholders and bona fide investors of their own 'money in the stock of the same, then such creation and all subsequent operations of the said Corporation were a fraud upon these plaintiffs because such incorporation and subsequent acts of the Corporation were caused and procured by said individual defendants, the defendant Mullen being the voting trustee of the Company and at the same time being the Manager in the Philippine Islands of the Bank, and by virtue of the power so focused and concentrated in himself together with the powers of the others individual defendants as agents and employees of the Bank, and simultaneously as officers and directors of the Company enabled the said individual defendants to take advantage of their position in respect to the Company and the Bank and to, sue the same to the de- fraudation of these plaintiffs.

"17th. That the return to the above named individual plaintiffs by the Trustee of the stock in the Company, transferred to it by said Voting Trust Agreement, has been demanded and refused.

"18th. That by reason of the facts above alleged these plaintiffs have been kept and are in ignorance of accurate knowledge of the actions of the defendants and of the amount of damage thereby caused these plaintiffs and represent to the court what accurate information can only be obtained by a discovery/by the defendants and each of them of all and every fact relevant to this cause.

"19th. That these plaintiffs are credibly informed and verily believe that the defendants are now confabulating among themselves further to conceal the facts and to damage these plaintiffs by a sale of the Philippine Motors Corporation and all its assets tangible and intangible to a new purchaser, in which new purchaser the said defendants will have interests, and that in case such sale should be made it will damage these plaintiffs in a manner for which there is no adequate remedy and will cause and produce a multiplicity of actions.

"Wherefore these plaintiffs demand the decrees and judgment of this court:

"1st. Enjoining and restraining the defendants and each of them from transferring the corporation, called Philippine Motors Corporation or any of the capital stock therein to any person or corporation during the pendency of this action.

"2nd. Ordering the said defendants at once to cancel the said Voting trust and to return to these plaintiffs their shares of the stock of Teal & Company, taken under said trust and to return to them all the books and records of every kind and nature of said Teal & Company, and to regain to these defendants their pretended positions in and control of Teal & Company.

"3rd. Decreeing that the defendants and each of them make full and true discovery of all the facts in relation to the formation, incorporation, and ownership of the Philippine Motors Corporation and of all dealings and transactions between the defendant Asia Banking Corporation and said Philippine Motors Corporation to the end that the court and these plaintiffs shall have information whether said Philippine Motors Corporation is in fact the Asia Banking Corporation operating under a disguise or is the creation of the individual defendants availing themselves of their connections with and positions in the said Bank in order to take advantage of these plaintiffs and of Teal & Company.

"4th. Decreeing that the said defendants make discovery of all and every one of their acts and transactions with respect to Teal & Company since the same was taken by them adding and including a full and true discovery of all sales of the property of Teal & Company of every kind and nature with the full and true consideration received in every case, the amount received from any compromise entered into by them in the name of Teal & Company and the true consideration therefor.

"5th. In case it be found that the said Philippine Motors Corporation is in fact the Asia Banking Corporation that a decree be entered ordering the said Bank immediately to dissolve the same and to account to these plaintiffs for all profits made thereby since its organization.

"6th. For judgment against said defendants jointly and severally for the damages caused by their acts aforesaid which the plaintiffs charged to be not less than P500,000.

"7th. For such other or further relief, or both, in the premises as to this court may seem just and equitable."

To this complaint the defendants demurred on the grounds (1) that it is ambiguous, unintelligible and uncertain; (2) that the plaintiffs have not the legal capacity to bring this action; (3) that the complaint does not state facts sufficient to constitute a cause of action, and (4) that there is a defect or misjoinder of parties defendant.

The court below sustained the demurrer on all four grounds and held that the complaint, especially in its paragraphs 4 and 5, is ambiguous, confusing, unintelligible and vague; that Teal & Company should have been joined as a party plaintiff; that, as far as the Philippine Motors Corporation is concerned, the plaintiffs, not being stockholders in that corporation, had no legal right to proceed against it in this case; and that the court could not be called upon to act as investigator of the facts referred to in paragraphs 3 and 4 of the complaint, but that such investigations fall within the duty of the interested party, the Attorney-General, the Insular Auditor or the Insular Treasurer.

I

If this were an ordinary action at law, the ruling of the court below would be correct in most respects; it must be conceded that the complaint violates at least three of the four principal rules as to the manner of stating facts in complaints in such actions. It suffers from duplicity, the facts are not stated with certainty, and the statement is sometimes indirect and partly in the alternative. But we are not here dealing with a complaint in an action at law; this is in effect a bill of discovery and the proceeding is primarily one for equitable relief, though it may eventually develop into an action at law. In such proceedings considerable latitude in the manner of stating facts in the pleadings is allowed. "The minute and varied statements of the probative facts, the charges to anticipate a defense, and the interrogatories, become necessary in the equity practice, because bills are for discovery as well as for relief, and in order to search the conscience of the defendant, he is treated, in the pleading, somewhat as though placed upon the stand and examined as an unwilling witness." (Bliss on Code Pleading, 3rd edition, section 319.)

Counsel for the defendants argue that there is no express provision in the Code of Civil Procedure for a proceeding such as the present, and that, therefore, proceedings for discovery must be considered limited to the taking of depositions under subsection 1 of section 355 of the Code and the compulsory attendance of witnesses by means of subpoena. But, upon a moment's reflection, it becomes evident that the means of discovery suggested by counsel are not always available or adequate. Before they can be utilized there must be an action pending, or, in other words, a complaint must have been filed and summons served upon the defendants. Now, there are cases where facts, essential to the plaintiff's cause of action, are within the knowledge of the defendants, but of which the plaintiff is so imperfectly informed that he cannot state them with certainty, even on information and belief. He may, however, know that one out of two or more sets of fact is true without knowing which of

them is true. In such circumstances the plaintiff cannot, of course, state any of the facts with certainty and it stands to reason that he cannot be required to plead with certainty facts which he does not definitely believe to be true. But the facts being essential to this cause of action, he must state them in one form or another and cannot very well file his complaint before so doing. And if he cannot file his complaint, he cannot, as we have already stated, avail himself of the remedy, provided for in subsection 1 of section 355, *supra*. It seems clear that, in such a case, the proper procedure is for the plaintiff to state the facts within his knowledge with certainty, but to plead in the alternative the, to him, doubtful facts, which are wholly within the defendant's knowledge and call upon the defendant to make a full disclosure of these facts. That is exactly what the plaintiffs have done in the present case, and bearing in mind the purpose of the action, their complaint seems sufficiently intelligible and free from ambiguity.

The fact that there is no special or express provision in the Code of Civil Procedure for bills of discovery of this character, does not necessarily signify that the remedy does not exist in this jurisdiction. The maxim of equity that "Equity will not permit a wrong without a remedy" still holds good, and our liberal Code of Civil Procedure is, if properly interpreted, sufficiently broad and flexible to enable the courts to apply all necessary remedies, both legal and equitable.

II

Invoking the well-known rule that shareholders cannot ordinarily sue in equity to redress wrongs done to the corporation, but that the action must be brought by the Board of Directors, the appellees argue—and the court below held—that the corporation Teal & Company is a necessary party plaintiff and that the plaintiff stockholders, not having made any demand on the Board to bring the action, are not the proper parties plaintiff. But, like most rules, the rule in question has its exceptions. It is alleged in the complaint and, consequently, admitted through the demurrer that the corporation Teal & Company is under the complete control of the principal defendants in the case, and, in these circumstances, it is obvious that a demand upon the Board of Directors to institute action and prosecute the same effectively would have been useless, and the law does not require litigants to perform useless acts. (*Exchange Bank of Wewoka vs. Bailey*, 29 Okla., 246; *Fleming and Hewins vs. Black Warrior Copper Co.*, 15 Ariz., 1; *Wickersham vs. Crittenden*, 106 Cal., 329; *Glenn vs. Kittanning Brewing Co.*, 259 Pa., 510; *Hawes vs. Contra Costa Water Company*, 104 U. S., 450.)

III

The conclusion of the court below that the plaintiffs, not being stockholders in the Philippine Motors Corporation, had no legal right to proceed against that corporation in the manner suggested in the complaint evidently rest upon a misconception of the character of the action. In this proceeding it was necessary for the plaintiffs to set forth in full the history of the various transactions which eventually led to the alleged loss of their property and, in making a full disclosure, references to the Philippine Motors Corporation appear to have been inevitable. It is to be noted that the plaintiffs seek no judgment against the corporation itself at this stage of the proceedings.

IV

The court below also erred in holding that the investigation of the transactions referred to in the complaint is not within the province of the courts, but should be conducted by some other agency. That discovery, such as that demanded in the present action, is one of the functions of a court of equity is so well established as to require no discussion.

In our opinion the plaintiffs state a good cause of action for equitable relief and their complaint is not in any

respect fatally defective. The judgment of the court below is therefore reversed, the defendants demurrer is overruled, and it is ordered that the defendants answer the complaint within ten days from the return of the record to the Court of First Instance. So ordered.

Avanceña, C. J., Street, Villamor, Johns, Romualdez, and Villa-Real, JJ., concur.

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