

The contract between the parties required the defendant to forthwith deliver to the plaintiff an abstract of title. Had it done so, showing the property clear of incumbrance, the plaintiff could have demanded a deed to the entire property, on tendering of the balance of the purchase price, to which it would have been entitled, and received a deed therefor, subject to the option agreement held by Downs.

5. The language in question was clearly used in the sense that the sale was burdened or charged with the option, that vendor was selling all the interest it had in the land subject to Downs' privilege to purchase. This is clearly the intention as well as the equity of the situation.

In *Coffey v. Superior Court*, 147 Cal. 535, 82 P. 75, it was held that to be "subject to" is "to become subservient to" or "subordinate to."

It is ordered that the decree be affirmed.

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### MARKWELL *v.* DOWNS ET AL.

No. 2888

May 5, 1930.

287 P. 272.

1. EXECUTORS AND ADMINISTRATORS — TRUSTEE — VIOLATION OF TRUST—TRUST PROPERTY—VALUE—RECOVERY—COMPLAINT—SUFFICIENCY.

Complaint in action against administrators of trustee to recover value of trust property conveyed in violation of trust with interest *held* insufficient.

Complaint alleged, in substance, that trustee in violation of trust conveyed property, and that plaintiff beneficiary never received any consideration whatever for conveyance, and that conveyance was made without her knowledge and consent. Complaint further alleged trustee's death and appointment of executors and beneficiary's filing of verified claim against estate for value of trust property fraudulently conveyed, with interest. Verified claim recited that claim was filed to protect beneficiary's rights against trustee's estate if pending action to recover property was determined adversely to claimant. Complaint failed to allege that such action had been determined adversely to claimant.

2. ELECTION OF REMEDIES—TRUSTEE—VIOLATION OF TRUST—TRANSFER OF PROPERTY—REMEDY.

Beneficiary of trust, having elected to hold trustee personally responsible for unauthorized transfer, cannot thereafter follow trust property, and vice versa.

C. J.—CYC. REFERENCES

TRUSTS—39 Cyc. p. 535, n. 9.

APPEAL from Eighth Judicial District Court, Churchill County; *Clark J. Guild*, Judge.

Action by Margaret Markwell against Art L. Downs and another, as administrators with the will annexed of the estate of Fred M. Wightman, deceased, substituted in place of H. L. Nichols, also deceased. From an order and a judgment dismissing action, plaintiff appeals. **Affirmed.**

*G. Gunzenborfer*, for Appellant:

But one question is involved in this appeal, namely, does the complaint state a cause of action? The lower court in its written ruling on the demurrer sustained the same on the first ground specified, viz, that the complaint does not state sufficient facts, inasmuch as it fails to set out the trust with particularity.

That ground being a general demurrer, admitted as true the facts pleaded. *Van Doren v. Tjader*, 1 Nev. 380; *Levy v. Ryland*, 32 Nev. 460, 469.

The truth of the facts pleaded being conceded, do these facts, taken as a whole, state enough to be proof against the attack of a general demurrer? Plaintiff insists that they do.

As against a general demurrer, the complaint, even if scant as to the trust, is good. *Griffiths v. Henderson*, 49 Cal. 566.

A general charge or statement of matters of fact is sufficient; it is unnecessary to charge minutely all the circumstances which conduce to prove the general charge. *Dunn v. Johnson* (N. C.), 20 S. E. 390, 391.

A complaint need not set out fully all its details; it is sufficient to allege the case generally and prove the

same in detail at the trial. *Logan v. Berkshire Assn.*, 18 N. Y. Sup. 164.

Facts relied on to show the creation of a trust in favor of plaintiff need not be more distinctly alleged than the facts relied on in other civil actions. Both *v. Oakland Savings Bank (Cal.)*, 54 P. 370; *Bassick Mfg. Co. v. Davis (Colo.)*, 17 P. 294; *Swenson v. Swenson (S. D.)*, 97 N. W. 845.

See, also, *Coney v. Horne (Ga.)*, 20 S. E. 213; *Naber v. Brundage (Tex.)*, 273 S. W. 609; *Tolon v. Johnson (Okla.)*, 230 P. 865.

The complaint must be considered as a whole, particularly in the face of a general demurrer. Thus considered, it musters sufficient facts to meet the challenge of such a demurrer. *Bernard v. Metropolis L. Co.*, 40 Nev. 89; *Lewis v. Mohr (Ala.)*, 11 So. 765.

Plaintiff's claim, as filed in the Wightman estate, is made by proper reference a part of the complaint (*Savings Bank v. Burns*, 38 P. 102). Hence, to attack the character of the claim it was necessary for defendants to demur to it specially. They cannot question it under a general demurrer.

The fact of the pendency of another or former action, the nature of which is not shown by the complaint, nor that if and when finally determined would be *res judicata*, is not a bar to this action for damages. Moreover, this point cannot be made under either a general or special demurrer, for nothing appears upon the face of the complaint or claim which reveals any election of a remedy or that such remedy has been exhausted and has definitely determined for all time the rights of plaintiff.

*Andrew L. Haight*, for Respondent:

This action is based upon a claim presented to, and rejected by, the executor of the Wightman estate. The statute (sec. 5965, Rev. Laws) clearly contemplates that no claim may be filed unless the same is justly due at the time of filing or that the amount claimed as actually owing and the due date can be definitely ascertained

and stated. In this case the claim as filed admits and shows upon its face that the present appellant then had an action pending to recover the specific property claimed to have been conveyed to Wightman as her trustee, and that she would have no claim for damages against Wightman unless the then pending action should be finally decided against her. It is not even recited in the complaint that the litigation to recover the specific property had been decided adversely to her or otherwise, and therefore the complaint shows upon its face that she has no cause of action against Wightman or his administrators. This conclusion is not based upon the demurrable ground that there is another action pending between the same parties covering the same subject matter, but rather upon the ground above stated, namely, that the complaint actually shows that the plaintiff cannot maintain the present action, because her complaint at best is founded upon a contingency which is not shown to have occurred.

The claim filed (and consequently the complaint) also shows clearly upon its face that the appellant elected her remedy, if any she had, against Wightman at the time of the filing of the former action. In other words, she chose to pursue the trust property rather than to hold Wightman personally responsible. 39 Cyc. 535.

## OPINION

By the Court, DUCKER, C. J. :

1. This is an appeal from an order and judgment of the district court dismissing the action. The court had sustained respondents' demurrer to the complaint, and appellant had declined to amend. While there were other grounds of objection designated in the demurrer, there is but one question presented for determination, and that is as to whether a cause of action is stated in the complaint. The allegations of the complaint which need to be mentioned are as follows:

"That on the 23rd day of March, 1917, plaintiff (appellant here) and her now deceased husband, Paris T. Markwell, were the owners of certain lands and premises and water rights situate in the County of Churchill, State of Nevada, which lands and premises are described as follows, to wit: \* \* \*

"That pursuant to an agreement made and entered into between this plaintiff and her said husband, Paris T. Markwell, and said Fred M. Wightman, a deed of conveyance of said land and premises was, on the 23rd day of March, 1917, made to said Fred M. Wightman in trust to and for the use and benefit of this plaintiff; that said Fred M. Wightman held the mere legal title to said lands and premises and water rights under said deed, and that this plaintiff was at the date of the making and delivery of said deed to Fred M. Wightman, to-wit: on the 23rd day of March, 1917, and at all times thereafter continued to be the sole and real and beneficial owner thereof; that on or about the 14th day of April, 1926, said Fred M. Wightman, in violation of said trust and his duty thereunder and of said agreement, as aforesaid, without notice to plaintiff and without her knowledge or consent and without any authority or right so to do, granted, bargained, sold and conveyed the said lands and premises together with the water rights thereof and the improvements thereon to Gray, Reid & Co., a corporation, which corporation thereupon entered into possession thereof and has since held said lands and premises, water rights and improvements; that plaintiff was not paid and has never been paid nor has she ever received any sum of money or other consideration whatever for her said property, conveyed as aforesaid by said Fred M. Wightman to said corporation; that the actual value or worth of said lands and premises together with the water rights thereof and the improvements thereon was on the said 14th day of April, 1926, and at all times since has been and now is the sum of \$15,000."

Then follows allegations as to the death of Fred M. Wightman on or about the 25th of September, 1927, and

the appointment of one H. L. Nichols on the 8th day of November, 1927, as the executor of his last will and testament, the publication of notice to creditors of the estate of said deceased, the filing of a verified claim against said estate by appellant for \$15,000, the alleged value of said lands, water rights, and improvements, and for interest on said sum in the amount of \$1,925, and the subsequent rejection of said claim by the executor.

While several points are advanced by respondent against the sufficiency of the complaint, we think that one is decisive thereof, and we will therefore not discuss the others.

A copy of said verified claim is by reference made a part of the complaint. In this claim appears the following statements, to wit: "That at the time of the death of said Fred M. Wightman, said deceased, an action was pending and is now pending brought by this claimant against said Fred M. Wightman and others to establish said trust and to annul said deed of conveyance, made as aforesaid by said Fred M. Wightman, said deceased, to Gray, Reid & Co., a corporation, and to recover said lands and premises, water rights and improvements, with damages and costs as well as for an accounting of the profits derived from said lands and premises; that said action was brought in the district court of the Eighth Judicial District of the State of Nevada, in and for the County of Churchill; and that at this time said action is on appeal to and pending in the supreme court of the State of Nevada; that this claimant presents this claim to the executor of the last will and testament of said Fred M. Wightman, said deceased, in order to preserve her rights and demands and claims against said Fred M. Wightman, said deceased, and his estate, for the value of the lands and premises and water rights and improvements conveyed by said Fred M. Wightman, said deceased, to said Gray, Reid & Co., a corporation, as aforesaid, in violation and disregard of his duty as trustee of and for claimant in respect of said lands and premises,

water rights and improvements, as aforesaid, *should said above mentioned action be finally decided and determined adversely to claimant.*" (The italics are ours.)

It thus appears from this part of the complaint that appellant's claim is dependent upon the action mentioned therein being decided adversely to her. She has no claim unless such action is so determined; consequently it was essential to the statement of facts sufficient to constitute a cause of action in the present case to negative a decision favorable to her in the action brought by her against Wightman and the others to establish a trust, to annul said deed of conveyance, and to recover the lands, water rights, and improvements.

The complaint nowhere alleges such a decision and is thus vitally defective. Appellant cannot recover the property and also its value.

2. In view of the circumstances of this case, we deem it not inappropriate to propound this query: Can the appellant, having elected to pursue the property in the event of failing in that suit, maintain an action to recover its value? On this tentative point we cite the following statement of principle: "Where he (cestui que trust) has elected to hold the trustee personally responsible for an improper investment, he cannot afterward follow the trust property into the investment; and on the other hand, if he elects to pursue the trust property, he cannot afterward hold the trustee personally responsible." 39 Cyc. 535.

The judgment of the district court is affirmed.

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