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Pleading—Effect of Suit for Injunction on Subsequent Suit for Damages

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Pleading—Effect of Suit for Injunction on Subsequent Suit for Damages

On May 7, 1952, Ernest and Mabel Bahm, Theodore Sohl, and Willy and Alvina Wischmann obtained a decree enjoining Ralph Raikes from diverting the flow of certain creeks onto plaintiffs' lands. This judgment was affirmed by the Nebraska Supreme Court.[1] On June 10, 1954, the Wischmanns brought an action against Raikes to recover monetary relief for damages done to their property by defendant's diversion of water. The case was tried before a jury and a verdict was returned in favor of plaintiffs for $10,000. This verdict was reversed and remanded on the ground that the evidence did not sustain plaintiffs' pleaded cause of action.[2] Upon rehearing, the court concluded that they were in error in the original opinion, and substituted another in its place.[3] *Held:* Where multiple party plaintiffs bring a suit for an injunction and such an injunction is issued, one of the original plaintiffs may not bring a subsequent suit for damages sustained prior to the issuance of the injunction by the thing enjoined.

The court's holding stems from the rule that a plaintiff may not split his cause of action. This rule has been exhaustively discussed,[4] and the reasons for it have been summarized by one authority as being to prevent harassment of defendants, wasting the court's time, and multiplicity of suits.[5] However, where this "splitting" involves an action in equity and a subsequent action at law, as in the subject case, the authorities have been far from unanimous.[6] In determining whether one or two causes of action exist in this situation, the determining factor frequently is the extent to which law and equity have merged under the code provisions in a particular jurisdiction.[7]

[1] Bahm v. Raikes, 160 Neb. 503, 70 N.W.2d 507 (1955).

[2] Wischmann v. Raikes, 167 Neb. 251, 92 N.W.2d 708 (1958).

[3] Wischmann v. Raikes, 168 Neb. 728, 97 N.W.2d 551 (1959).

[4] 1 AM. JUR. *Actions* §§ 96-121 (1936); 1 C.J.S. *Actions* §§ 102-06 (1936).

[5] See CLARK, CODE PLEADINGS § 73 (2d ed. 1947).

[6] For an exhaustive survey see Annot., 26 A.L.R.2d 446 (1952); and *Restatement, Judgments* § 66.

[7] Such a distinction was made in the leading case of Perdue v. Ward, 88 W.Va. 371, 106 S.E. 874 (1921), (subsequent damage action allowed), in distinguishing Gilbert v. Boak Fish Co., 86 Minn. 365, 90 N.W. 767, (1902), (subsequent damage action denied), wherein the court stated:

Therefore, in considering the wisdom of such a rule in Nebraska, it becomes necessary to inspect the provisions of section 25-101[8] which states:

> The distinction between actions at law and suits in equity and the forms of all such actions and suits heretofor existing, are abolished, and in their place there shall be hereafter but one form of action, which shall be called a 'civil action'.

The majority in justifying their holding state:

> The basis for the breadth of this rule is the fact that in this state there has been a complete merger of legal and equitable remedies.[9]

Thus the court extends section 25-101 to include a merger of remedies as well as actions. To sustain this proposition, the court quotes the following from *Hopkins v. Washington County*:[10]

> In this state there is but one form of action, to be called a civil action, . . . in which either relief may be sought and obtained, . . .

It is noted that the court said "either relief *may* be sought," (emphasis added) and not that both reliefs shall or must be sought in one action. *City of Beatrice v. Gage County*,[11] the other case cited by the court, uses the same permissive language. Consequently neither case cited by the majority gives complete justification for an extension of section 25-101 to include a merger of legal and equitable remedies.

To the contrary, several decisions of long standing show that such a complete merger under section 25-101 has never been accomplished by this court, and that abolition of common law names and forms of action has not changed the essential character of judicial remedies.[12] Thus, the effect of the instant decision is to extend section 25-101 beyond all previous decisions.[13]

> "But it will be observed that this decision was influenced by the code practice adopted in that state, for it is stated therein that the code system of practice was undoubtedly designed to avoid a multiplicity of suits by enabling parties to settle and determine in one action all matters of difference between them arising out of or relating to the same transaction."

[8] NEB. REV. STAT. § 25-101 (Reissue 1956).

[9] *Supra* note 3, at 739.

[10] 56 Neb. 596, 77 N.W. 53 (1898).

[11] 130 Neb. 850, 266 N.W. 777 (1936).

[12] State v. Barney, 133 Neb. 676, 276 N.W. 676 (1937); Wilcox v. Saunders, 4 Neb. 569 (1876); Hart v. Barnes, 24 Neb. 782, 40 N.W. 322 (1888); Fuchs v. Parson Const. Co., 166 Neb. 188, 88 N.W.2d 648 (1958).

[13] *Supra* note 3, at 771-80.

Under Nebraska statute and case law, prior to this decision, a strong argument could be made for allowing a plaintiff to bring an action in equity and then an action at law. An even more compelling argument could be made where the original action in equity was brought by numerous plaintiffs, as in the subject case. Several plaintiffs, seeking damages caused by diversion of water, would have differences in proof relating to their individual land, crops, buildings, and other personal property damaged. To require that all these damage claims be joined with the equitable action, and hence adduce all this evidence in one lawsuit, would confuse not only the plaintiffs, their attorneys, the court, the jury (if present), but the defendants as well.

This reasoning was summarized by J. Hammond McNish in his article, *Joinder and Splitting Causes of Action*,[14] where in discussing whether one or two causes of action would exist, he said:

> The first view has the desired effect of limiting litigation, but there are serious logical difficulties obstructing its acceptance, especially where several plaintiffs are involved, and the better reasoning would seem to favor the second. In a suit for an injunction, ordinarily the primary right invaded or threatened with invasion is the broad right to conduct business or other activities free from inequitable conduct and frequently, as in the *Ledingham* case, it is a right in which many may be interested and the injunction which protects that right will affect all of complainants so as to allow them to join. The primary right, for the trespass of which damages are sought, is, on the other hand, a personal right affecting each personally and not affecting all, so that several plaintiffs may not join in a suit for their separate damages caused by the wrong enjoined.

This view is not only supported by the better reasoning, but by statute as well. Section 25-702[15] states:

> The causes of action so united must affect all the parties to the action, and not require different places of trial.

To this the court has added that two or more plaintiffs having several claims may not join in one suit, even though such claims are similar and arise out of the same transaction, because each claim and the relief demanded to it does not affect all the parties to the action.[16] Therefore, in a factual situation such as that pre-

[14] 26 NEB. L. REV. 42, 67 (1948). See also note, 19 NEB. L. BULL. 156 (1940).

[15] NEB. REV. STAT. § 25-702 (Reissue 1956).

[16] Shull v. Barton, 56 Neb. 716, 77 N.W. 132 (1898); Strawn v. First Nat'l Bank of Humboldt, 77 Neb. 414, 109 N.W. 384 (1906).

sented in the *Wischmann* case, the plaintiffs would have been precluded by law from joining their damage claims, if they had not also sought equitable relief.

The majority disregard this reasoning when they state:

> There is no doubt that the Wischmanns could have obtained both types of relief had they seen fit to do so.[17]

In support of the above statement, the court cites *Brchan v. Crete Mills*[18] and *Armbruster v. Stanton-Pilger Drainage District.*[19] The latter case affirms the former and both state that it is permissible to join damages in an equity action, not mandatory, and neither case involves multiple party plaintiffs.[20] Had the Wischmanns or any other plaintiff joined their damages to the equity action, they would have precluded the other plaintiffs from also joining their damages, under section 25-702 and the applicable cases[21] prior to the *Wischmann* decision. Thus, their failure to obtain both types of relief was more than a failure to "see fit to do so."

Later, in attempting to answer this multiplicity problem, the court quotes from *Schriener v. Witte*[22] as follows:

> It is a well settled principle of equity jurisprudence that, where a court of equity has obtained jurisdiction of a cause for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation.[23]

In applying this principle, the court assumes that the numerous damage claims of the multiple plaintiffs are "all matters in issue," and thereby avoids the problems presented in forcing these plaintiffs to join their legal and equitable claims.

It is submitted that a rule allowing one of many plaintiffs in an injunction action to bring a subsequent action for damages, would be more just, would be as consistent with the reasons underlying this area of law,[24] and would not result in as much legal confusion, as the *Wischmann* holding.

[17] *Supra* note 3, at 738.

[18] 155 Neb. 505, 52 N.W.2d 333 (1952).

[19] 165 Neb. 459, 86 N.W.2d 56 (1957).

[20] The *Brchan* case involved two plaintiffs, who were brothers jointly owning the same property, while the *Armbruster* case involved a husband and wife who jointly owned the same property.

[21] *Supra* note 12.

[22] 143 Neb. 109, 8 N.W.2d 831 (1943).

[23] *Supra* note 3, at 745.

[24] *Supra* note 5.

Such a rule was adopted by the Nebraska court in *Ledingham v. Farmers Irrigation District*,[25] where plaintiff recovered damages from defendant for failure to deliver water, after plaintiff and others had obtained equitable relief against the same defendant.[26] This case has been compared with *Shepard v. City of Friend*,[27] which the court now accepts as controlling. In the *Shepard* case, the court denied an action for damages by four plaintiffs, after injunctive relief had been denied to these plaintiffs and two others.[28] In denying the injunction, the court had determined that there were no damages, and this determination of no damage was held to be binding in the subsequent suit. But such a determination was not present in either the *Bahm*[29] or *Vonburg*[30] cases, as in both the injunction was granted, and damages were not considered by the court in the injunction action. Thus, the holding in *Shepard* that determination of no damage was binding in a subsequent action would not apply in either case, and the *Ledingham* holding should control the *Wischmann* situation.

However, the court refused to follow *Ledingham* and distinguished it "by reason of the fact that injury or damage was no part of the cause of action in the *Ledingham* case and did not properly belong to the subject of that litigation."[31] The court's distinction is that since the original equity action was for a proration of water based on a contract, damages were not involved, while in the *Shepard* and *Wischmann* cases, the original action was for the abatement of a nuisance and proof of damage would be necessary.

It seems hard to conceive that damage to crops is less involved in the failure to deliver water, than damage to land is involved in the unlawful diversion of water onto that land. It is true that one arises in contract and the other in tort, but it does not necessarily follow that injury and damage are a part of the latter while not a part of the former.

[25] 135 Neb. 276, 281 N.W. 20 (1938).

[26] Vonburg v. Farmers Irrigation District, 128 Neb. 784, 260 N.W. 383 (1935).

[27] 141 Neb. 866, 5 N.W.2d 108 (1942).

[28] Hall v. City of Friend, 134 Neb. 652, 279 N.W. 346 (1938).

[29] The *Bahm* case, *supra* note 1, was the equitable action preceeding the *Wischmann* case, *supra* note 3.

[30] The *Vonburg* case, *supra* note 26, was the equitable action preceeding the *Ledingham* case, *supra* note 25.

[31] *Supra* note 3, at 745.

In addition to these legal difficulties, the *Wischmann* case poses certain questions of tactical significance to the practicing lawyer. One is whether the *Ledingham* case is still controlling in certain fact situations, or is completely overruled.[32] From the court's distinction, it might seem that a plaintiff may bring a subsequent suit for damages after he has received injunctive relief, where that relief involves a proration of water rights or some other action in which "injury or damage was no part."[33] But even then he might still wonder if this applies only to multiple party plaintiffs, and not to single party plaintiffs, or whether the "complete merger of legal and equitable remedies"[34] wipes out *Ledingham* in all fact situations.

Another curious question raised by this decision concerns the constitutional right to trial by jury[35] under the now complete merger of legal and equitable remedies. According to two recent Nebraska cases,[36] if a plaintiff joins his equitable and legal claims, and is denied the equitable relief, he may retry his damage claim before a jury. But if the injunction is granted, and the court of equity is to retain jurisdiction for all purposes, it would seem to follow that the plaintiffs are deprived of a jury trial.[37] Such a problem has also bothered the federal courts under rule 38,[38] and has caused inconsistency among several decisions.[39]

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[32] *Supra* note 3, at 751.

[33] *Supra* note 3, at 745.

[34] *Supra* note 3, at 739.

[35] U.S. CONST. amend. VI; NEB. CONST. art. 1, § 6.

[36] Gillispie v. Hynes, 168 Neb. 49, 95 N.W.2d 457 (1959); Buck v. Village of Davenport, 168 Neb. 250, 95 N.W.2d 488 (1959).

[37] *Supra* note 3, at 781-83.

[38] FED. R. CIV. P. 38.

[39] For a thorough discussion of this problem, see Comment, *Developments in the Law — Multiparty Litigation in Federal Courts*, 71 HARV. L. REV. 874, 985 (1958).