

1945

Mamie Nunnelly, et al., v. Ogden First Federal Savings and Loan Association, et al. : Brief of Respondents Opposing Petition for Rehearing

Utah Supreme Court

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In the
Supreme Court of the State of Utah

MAMIE NUNNELLY et al.,

Plaintiffs,

LEWIS L. RIGBY et al.,

Appellants,

vs.

No. 6657

OGDEN FIRST FEDERAL SAVINGS
AND LOAN ASSOCIATION et al.,

Respondents.

**BRIEF OF RESPONDENTS OPPOSING PETITION
FOR REHEARING**

STUART P. DOBBS,
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On page 3 of their brief in support of the petition for rehearing appellants reluctantly bow to this Court's rejection of their contention that they have a right to elect remedies for unnamed stockholders. From that brief it would seem that all other comments or rulings adverse to them are at best ambiguous and in no event should be taken seriously.

Several contentions made in this case by respondents were held to be unsound. With respect to some of them

we believe the Court erred. But, like appellants, we had a full hearing, followed by a clean-cut decision. In their petition and brief, appellants have done nothing more than seek a rehash of matters fully presented, considered and decided. All good things, including hearings, should sometime come to an end.

ALLEGED AMBIGUITY

The first ground of the petition really includes the other two grounds. If, as there contended, appellants have the "right to establish in this suit their several claims," it necessarily follows that the court would "retain jurisdiction" to adjudicate those several claims in this suit. If such had been the conclusion of this Court, the only substantial thing sought by and forbidden to appellants would have been their proffered election to rescind in behalf of unnamed persons.

Throughout the opinion in the *Nunnelly* case (154 P. (2d) 620), the Court stresses, with no shadow of ambiguity and with great clarity, its conclusion that plaintiffs, *named or unnamed*, can join in this suit for one purpose and one purpose only, to wit, "the marshaling of the assets and impounding the fund" (p. 628). Continuing on pages 628-9, the Court says:

"The suit thus has two phases. The first phase is to impound the fund, appoint a receiver, etc. For this phase the parties may all be treated as though they still owned their certificates. They may join their various claims as though they were still certificate holders for the purpose of obtaining and holding this fund. The second phase *will develop only if the*

fund is impounded and the court is confronted with the problem of distributing the fund. At this point equity can no longer treat these plaintiffs as though they still owned their certificates, for at this point the very issue for determination will be whether they were defrauded."

Then follows the statement referred to on page 3 of appellants' brief that appellants "cannot join to recover damages or to rescind."

At page 631, after indicating that upon proof of insolvency, etc., receivership might be proper (which suggestion would be entirely appropriate even if Federal Savings & Loan Insurance Corporation were appointed receiver), the Court says:

"Each defrauded certificate holder should *then* be given an opportunity to come in and claim the benefits of the suit so far as they had accrued and an opportunity to present his claim. If the claim were rejected by the receiver the usual procedure could be followed to determine the validity of the claim. *The named plaintiffs as well as those not named* would of course have to present their claims."

At pages 631-2 the Court continues:

"If the plaintiffs should be unable to establish grounds for preserving, impounding and marshaling the assets, so that the first phase of the suit would be unsuccessful, the second phase as outlined above *would never develop*. There would be no fund to distribute and thus no need insofar as this proceeding is concerned to determine the respective rights of the defrauded certificate holders. Whether the plaintiffs (*named and unnamed*) could wait until after this suit failed to commence separate suits without

the risk of being successfully met by a plea of the statute of limitations we now express no opinion," etc.

Thus the opinion spells out in primer English what appellants and the trial court may and may not do in any conceivable contingency. Obviously what appellants seek from this Court is not "clarification" but "retraction."

RE APPELLANTS' REHASH OF REJECTED CONTENTIONS

This Court was more successful than counsel on either side in discovering a case lending some support in certain aspects to a joinder like that here attempted. In that case (*Black et al. v. Simpson*, 77 S. E. 1023 (S. C.)) two of the five judges dissented. In this connection we invite attention to a later South Carolina case (*Stewart et al. v. Ficken et al.*, 149 S. E. 164, cited on page 26 of respondents' original brief in the *Nunnelly* case) which is in harmony with the editor's notes and annotation in 114 A. L. R. at pages 1015 et seq.

But appellants have now found what they designate as a "leading case . . . much in point on the general proposition," to wit, *Coleman et al. v. Barnes*, 5 Allen (Mass.) 374. They seem to think that case should induce this Court to "clarify" its holding that appellants "cannot join to recover damages or to rescind," by permitting them to do either or both. A reading of the opinion in the *Coleman* case discloses that, like all other decisions of the Massachusetts courts, it is in harmony with the decision of this Court denying the claimed right of joinder. Plaintiffs sought recovery of

certain property and the matter came before the court on general demurrer. The complaint set forth that plaintiffs were the several owners of different parcels of goods in possession of the defendant which defendant's pledgor obtained from plaintiffs by separate and distinct acts of fraud and that such sales had all been rescinded by the respective plaintiffs on account of said fraudulent acts. Notwithstanding the fraud and already accomplished rescission alleged in the complaint and admitted by the general demurrer, the Court says: "If the averments in the bill went no further, the objection (multifarious) would be insurmountable." The court then proceeds to point out that defendant held the property by way of pledge to secure payment of one entire sum of money; defendant had been innocent of any fraud or knowledge thereof, and plaintiffs admitted the validity of his lien upon all of the property and in their complaint offered to pay the full amount of his claim. In this situation, where all of the property was covered by this common lien or burden, the court says at page 376:

"It is a case, therefore, where the property of several different persons is subject to a common charge or burden. Neither of them can reclaim his goods until the whole of it is satisfied and discharged; and yet no one of them ought to pay the whole sum which the defendant is entitled to receive in discharge of his lien. There is, therefore, no complete and adequate remedy at law by which each of the plaintiffs can recover his own property without paying a larger sum than is properly chargeable on his portion. The only remedy by which the rights of all parties interested can be protected is in equity," etc.

Unable to find a single case which by any plausible stretch of logic or interpretation could justify the requested "clarification," appellants seek elbowroom for their fancies in a maxim of equity.

RETENTION OF JURISDICTION

We repeat what we said in our reply brief in the *Good-liffe* case:

"It is of course elementary that in many situations a court of equity, having once acquired jurisdiction of a case, will retain it in order to do justice between the parties."

If mere allegation of some matter of equitable cognizance, with or without a prayer for equitable relief, would permit numerous plaintiffs with entirely separate and distinct causes of action to join and litigate all of their several controversies in a single suit, a novel innovation in pleading and practice would be ushered in.

A desire for brevity is always laudable, but, in quoting a text, it does not violate good practice to add the author's express qualification of his text, even though such addition may require an additional line or two of printing. At page 11 of their brief appellants quote from 30 C. J. S. 414 as follows:

"It is a general rule of equitable jurisprudence that where the court has assumed jurisdiction for one purpose it will retain it for all purposes, legal or equitable, connected with the principal controversy;"

The quoted excerpt ends with a semicolon, not a period, and is immediately followed by the qualification:

“but the rule is permissive rather than peremptory, and will not be applied so as to defeat the fundamental rights of litigants or to violate the basic doctrines of pleading; and it may not be invoked where no ground of equitable jurisdiction has first been asserted and established, nor in violation of contrary statutes.”

On the same page the author also stresses the rule that questions determined must be “incidental to the main controversy” and that any relief granted must be “incidental to the accomplishment of the principal object of the bill.” Appellants strenuously and frequently urged in earlier briefs and upon the oral arguments that the marshaling and impounding of assets, appointment of receiver, etc., are remedies ancillary to their causes of action arising out of the alleged conspiracy and frauds. Obviously those causes of action are neither ancillary nor incidental to any of the reliefs sought.

The “nine columns of cases” referred to on page 11 of appellants’ brief support the text under which they are cited. Neither they nor any other case or text imply or support a contention that by incorporating in a complaint some matter of equitable cognizance rules of pleading fly out the window and improper joinders become immaterial. Obviously a court of equity may retain jurisdiction and proceed to grant relief with respect to those matters only which are properly included in the bill.

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If, as stated in above quoted text, the rule permitting a court of equity retaining jurisdiction for one purpose to

retain it for all purposes will not be applied so as "to violate the basic doctrines of pleading," it would seem improper to apply it in clear violation of the mandate of Section 104-7-3, U. C. A. 1943. As pointed out in the original briefs, that statute expressly applies to a joinder of causes of action "legal or *equitable* or both" and, except in foreclosure suits, permits such joinder only where the causes of action so united "all belong to one" of the designated classes and "affect all the parties to the action." (See pages 9-21 of respondents' brief in the Nunnelly case.)

At page 9 of their brief, appellants refer to the *Brenner* case, 114 A. L. R. 1010, as one "so strongly relied on by respondent" Associations. The fact that we have never before even cited the case is not permitted to cramp appellants' style. On said page 9 they say the *Brenner* case "is not remotely in point for the Colonial Corporation" but holds that "the several plaintiffs could be properly joined even at law." In their analysis of the case do appellants act on the assumption that this Court has not read or will not read the opinion of the New York court? Why did appellants refrain from pointing out that the sole reason why *Brenner et al.* might have joined in an action at law was the existence of a recent New York statute (so far as we are aware the only one of its kind) expressly permitting such joinder? At page 1014 the court specifically identifies the basis of its observation that plaintiffs there might have joined in a suit at law by pointing out that the New York legislature "has adopted a new and very broad provision for the 'joinder of plaintiffs generally' in whom any right to relief is alleged to exist, 'whether jointly,

severally or in the alternative.'” Notwithstanding this statute, the court refused to permit joinder of plaintiffs in a representative suit, such joinder not being permissible under another and earlier statute. At page 1014 the court thus aptly states why the mandate of Utah statutes relative to joinder may not be ignored:

“The courts may not disregard a limitation which the legislature has not destroyed even if there were no sound basis for retaining in the statute the old distinction.”

Appellants further say on page 9 that in the *Brenner* case “and note thereto” there was no “element of common and (or) insufficient funds or the necessity of injunction, marshaling or accounting” as in the cases at bar. The only accurate portion of that statement is that such elements did not happen to be present in the *Brenner* case. That the statement may have been made without reading the text or cases contained in the note would probably not serve as a good excuse. The *Spear* and *Brown* cases next below cited are among those referred to by the editor in support of his text.

Spear v. Greene Co., 140 N. E. 795 (Mass.), is cited and discussed at length on pages 1017-1018 of the note and cited on page 26 of our brief in the *Nunnelly* case. This was a suit in equity wherein impairment of corporate defendant's capital was alleged and plaintiffs sought rescission for fraud and conspiracy, establishment of a trust upon the proceeds of the frauds for the benefit of all stockholders, an accounting, appointment of a receiver, and a pro rata distribution of assets, and other reliefs.

Brown v. Werblin et al., 244 N. Y. S. 209, is cited and analyzed on page 1021 of the note and cited and discussed on pages 16-17 of our brief in the *Nunnelly* case. The cause of action was based on allegations of fraud and conspiracy with respect to stock sales, creation of a fictitious market, etc., very similar to those in appellants' complaint. It was alleged that the fraudulent profits constituted a trust fund, and among the reliefs sought was an injunction requiring the impounding of such profits, that they be impressed with a lien in favor of plaintiffs, etc.

A great number of the decided cases where two or more plaintiffs sought to prosecute their separate and distinct causes of action in a single suit involved one or all of the elements of insolvency, trust fund, marshaling and prorating of assets, and demand for a receiver. Uniformly the presence of any or all of these elements has been held insufficient to permit plaintiffs to join and prosecute in a single suit separate and distinct causes of action each of which being of concern to one plaintiff only. Among the many cases cited in our original briefs where one or more or said elements was present and joinder denied are the following:

Ballew Lumber & Hardware Co. et al. v. M. P. Ry. Co. et al., 232 S. W. 1015 (Mo.), cited on page 26 of our *Nunnelly* brief. Fraudulent conveyance to insolvent defendant Railroad Company was alleged by creditors who sought an accounting, the establishment of and recourse to a trust fund and appointment of a receiver.

Rural Credit Subscribers Ass'n v. Jett, 266 S. W. 240 (Ky.), cited on page 26 of *Nunnelly* brief. In-

junction and payment of the fund to trustee and prorating thereof were sought.

Lile et al. v. Kefauver et al., 51 S. W. (2d) 473 (Ky.), cited on pages 15 and 26 of our *Nunnelly* brief. Insolvency and necessity of prorating claims were elements.

We frankly confess our inability to understand appellants' observations relative to intervention appearing on pages 4 and 5 of their brief. If their thought is that the opinion suggests or should suggest that unnamed plaintiffs may intervene in this suit for any other purpose than "the marshaling of the assets and impounding the fund" or that named plaintiffs may join for any other purpose, we find no basis in the opinion for such surmise.

We believe we have mentioned every point raised by appellants' brief except their contention that because Section 88-2-12, U. C. A., 1943, provides that the "singular number includes the plural, and the plural the singular" it necessarily follows that the provision of our Uniform Fraudulent Conveyance Act permitting "a creditor" to proceed against the grantee of a fraudulent conveyance repeals or otherwise nullifies the Utah statute relative to joinder and permits any and every creditor to not only join in preserving the res but under one complaint in a single suit to have their separate and distinct causes of action adjudicated. Thus liability to one of a hundred creditors for assault and battery, to another on a promissory note, to another for a grocery bill or personal injuries, etc., might all be alleged in one complaint and adjudicated in one suit. By the same reasoning, under our death by wrongful act statute, Section 104-

3-11, U. C. A. 1943, all heirs or personal representatives of all *persons* ("persons" because the words "a person" employed in the statute includes the plural) might unite in one suit against the wrongdoer. Indeed the same reasoning and statutory construction would permit a joinder as defendants in one suit of all persons whose wrongful acts have resulted in death, even though the respective deaths (like the alleged frauds here complained of) may have occurred at entirely different times and places. Appellants' rule of statutory construction would necessarily permit a single suit against all persons responsible for the deaths of all decedents because the language of the statute permitting suit against "the person causing the death" includes the plural and authorizes such suit against all persons causing deaths. Thus the plaintiffs in all pending suits for death by wrongful act against railroads and other corporations and persons, might properly have joined in one complaint and litigated all of their claims in one suit.

Respectfully submitted,

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