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Mamie Nunnelly, et al., v. Ogden First Federal Savings and Loan Association, et al. : Reply Brief of Appellants on Appellants' Petition to Modify

Utah Supreme Court

R. L. Hedrick; E. A. Walton; Parnell Black; Attorneys for Appellants;

In the
SUPREME COURT
of the
STATE OF UTAH

MAMIE NUNNELLEY, et al.,
Plaintiff,
LEWIS L. RIGBY, et al.,
Appellant,
vs.
OGDEN FIRST FEDERAL SAVINGS & LOAN ASSN., et al.,
Respondents.

No. 6657

APPELLANTS' REPLY BRIEF ON APPELLANTS' PETITION TO MODIFY

R. L. HEDRICK,
E. A. WALTON,
PARNELL BLACK,
Attorneys for Appellants.

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On page 3 of their brief counsel quote from the opinion a few lines on receivership, and, overlooking the fact that the court is referring to a receiver that might be appointed by the state court, imply that the Federal

Savings and Loan Insurance Corporation might be such receiver.

Reference to 12 U. S. C. A., sec. 1729 (c), will disclose that it is only for insured institutions other than Federal Savings and Loan Associations that the services of such insurance corporation are available to courts. And it seems from 12 U. S. C. A., sec. 1464, that the Federal Home Loan Bank Board only can appoint such corporation as receiver of a Federal Savings and Loan Association.

Is it conceivable that the courts of Utah having undoubted jurisdiction of the merits are powerless to administer equity in these cases?

Counsel's attempt to distinguish Coleman v. Barnes, 5 Allen (Mass.) 374, strikes us as being rather lame. There the Court permitted the joinder of plaintiffs because of the common interest of the plaintiffs in the goods available to liquidate their several claims, and it required an equitable remedy to furnish the relief that was due and was sought.

Again counsel cite Spear vs. Green (Mass.) 140 N. E. 795. That case did not turn on the question of misjoinder of plaintiffs. There, there were seven different groups embracing forty plaintiffs having several interests in three distinct corporate defendants, and there was no "common relationship to a definite wrong." There was a clear misjoinder of causes of action. There was no single class that might have been represented,

and the holding was that a representative class suit was not maintainable.

In Brown vs. Werblin, et al., 244 N. Y. S. 209, there was no question as to a misjoinder of parties plaintiff, and could not have been, because there was only one plaintiff. The court held that *the legal remedy was adequate* and that plaintiff stated no cause of action in equity. The plaintiff sought to maintain the suit as a representative or class suit, but the complaint failed to show that the person she sought to represent was himself interested in any common fund.

The case is so absolutely wanting in appositeness that we never heretofore in our briefs even referred to it.

Again is cited Ballew Lumber & Hardware Company, et al., vs. M. P. Railway Co. (Mo.) 232 S. W. 1015. That case apparently is against our contention. The Missouri Court relies on but misstates completely the facts in the case of Tribette, et al, vs. Illinois Central Power Company, 70 Miss. 182, 12 So. 32, which case holds that the Railroad Company could not enjoin a number of persons from severally prosecuting their several actions at law for damages arising from a single fire.

But the Mississippi Court did say that where each of several plaintiffs could proceed *in equity,* "their joinder as plaintiffs or defendants in one suit is not objectionable."

While the Missouri Court refused to apply such principle, it treats the Mississippi Court's holding that the injured persons could not have joined even if they

had tried to do so (which they did not) in a pure action *at law,* as a precedent for the holding of the Missouri Court that the plaintiffs in Missouri could not join *in equity* to establish and enforce a trust. The case stands almost alone.

Note also that Missouri is one of the very few code states that never enacted the statute relating to parties where they are very numerous, and where there is a common interest in the same questions. This matter is referred to in Fourth Edition, Pomeroy Code Remedies, page 173. Mr. Pomeroy criticises the failure of the Missouri Courts to give effect to the Code of Civil Procedure.

Rural Credit Subscribers' Assn. vs. Jett, 205 Ky. 603, 266 S. W. 240, is again cited. In that case many persons attempted to join as plaintiffs and to maintain a class suit for others. The Court first held (and contrary to what has been held in this case against the respondents) that the several plaintiffs had each a mere cause of action at law and hence could not join. There was no common tie or equity among them. There was no common or insufficient fund. There was joined with the plaintiffs' suit against the corporation a pure derivative suit in right of the corporation. (The suit to set aside the permanent transfers to Colonial Corporation is not deriveative.)

The Court there held that the plaintiffs' causes of action were at law and the other and derivative cause of action was in equity, and so there was a misjoinder of causes of action. In Kentucky, unlike Utah, equitable

and legal actions cannot be joined in the same suit.

See Kentucky Civil Code of Practice, Sections 5, 6, 8, 83.

But as we have heretofore in other briefs pointed out, Kentucky has held both ways many times on the question of joinder of plaintiffs.

Lile v. Kefauver, et al, 51 S. W. Rd. 473, is again cited, and counsel say:

> "Insolvency and necessity of prorating claims were elements."

Insolvency *was not an element;* that is to say, no insolvency of any defendant was alleged. The bank, of which plaintiffs had been depositors, was insolvent, but it was not a party to the action. There was no claim that any of the defendants were insolvent and there was no suggestion or allegation touching any necessity to prorate any loss.

Counsel admit that Black, et al, vs. Simpson (South Carolina), 77 S. E. 1023, lends support to our contention as to joinder of plaintiffs, but counsel say that two of the five judges dissented. It is true that the majority found but little in the way of a common tie, but they did assert a common equity in the fact that the defendant there was a fiduciary of all the plaintiffs and that they were entitled to an accounting.

The dissenting judges did not refer to such matter and evidently thought that the fiduciary relation was an insufficient bond or tie. The dissenting opinion says:

> "This is not a case in which there was a fraudulent sale of the property of the corporation where the same act necessarily affected all."
>
> "I do not see a single bond of union."
>
> "The complaint does not even allege that the defendant now has the proceeds of sale, and the plaintiffs are entitled to share in the fund."

Thus the dissenting opinion in its implications as applied to the facts of this case is favorable to us.

Again counsel refer to Stewart, et al, vs. Ficken, et al, (South Carolina), 149 S. E. 164, and they intimate, this being a later case, that such weakens or overrules the Black case.

In the Stewart case:

> "The basis of the complaint is that by culpable mismanagement of the affairs of the bank by the directors' defendants, its assets have been wasted, producing the failure and loss."

The Court then proceeded to hold, and correctly, that the depositor plaintiffs did not own the cause of action so arising, but that it belonged to the bank, and also held that the several depositors could not join as plaintiffs to recover their several deposits. There was no matter of a common fund, no matter of a necessity to prorate losses, no matter of fraudulent conveyance of property to the injury of plaintiffs, or any other matter of equity tending to tie or unite the plaintiffs.

Then, as to the matter of joinder of the particular two plaintiffs, the Court cites Fant vs. Brissey, 143 S. C. 264, 141 S. E. 450, a case involving the simple

principle that where there is no common equity, two or more persons injured by the same tort cannot join.

Apparently counsel fail to get our point based on the Uniform Fraudulent Conveyance Act. We tried to point out that such Act simply removes the former requirement that a creditor or creditors had to have judgments before they could sue to set aside a fraudulent conveyance, and we showed that formerly any number of creditors could join in such a suit, and the conclusion is inevitable that nonjudgment creditors could now join to set aside a fraudulent conveyance.

Counsel now say that our contention would lead to the result that all personal injury plaintiffs separately injured could have all of their cases tried in the same action. To say the least, this seems to be rather far-fetched.

However, if there were a number of personal injury plaintiffs having claims aggregating say a half million dollars, against an insolvent railroad company, which, however, was able to pay a substantial portion of the damage, but not all, we should not hesitate to claim that such situation would present a case for a proper joinder in equity.

Or if there were a number of plaintiffs having such claims against a railroad company which had rendered itself insolvent by a fraudulent conveyance of its assets, we should not hesitate to say that they might join and have in one suit full equitable and legal relief.

Counsel, to our minds, have failed to discriminate between a pure derivative suit in right of a corporation

and a suit to set aside a fraudulent conveyance. Our suit here as against the Colonial Corporation is not in the nature of a stockholders' suit in right of a corporation and is in no sense derivative.

An investing certificate holder stands more in the relation of a creditor than as a stockholder of an ordinary corporation.

And "the statute protects all just and lawful actions, etc., whether the demand is one sounding in damages or arising under a contract."

Bump on Fraudulent Conveyances, 3rd ed. 502.3.

Respectfully submitted,

R. L. HEDRICK,
E. A. WALTON,
PARNELL BLACK,
Attorneys for Appellants.