

1967

John Elwood Dennett v. A. P. Neilson : Breif of Respondent

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IN THE SUPREME COURT OF THE

STATE OF UTAH

A. P. NEILSON, et ux.

Plaintiff-Respondent,

vs.

Case No.

11032

HERTA K. DENNETT, et al.

Defendants,

JOHN ELWOOD DENNETT,

Intervenor-Appellant.

BRIEF OF RESPONDENT

Appeal from an Order of Contempt of the
Honorable D. F. Wilkins, Judge of
the Third District Court for
Salt Lake County

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STATEMENT OF THE KIND OF CASE

This is an action brought by the Plaintiff to foreclose an equitable mortgage against certain property in which an interest was claimed by Defendants. Intervenor-Appellant, John Elwood Dennett, the husband of Defendant Herta K. Dennett, obtained leave of the Court to Intervene.

DISPOSITION OF THE LOWER COURT

On September 20th, 1967, the Court, pursuant to an Order to Show Cause supported by an Affidavit, on which hearing was held, made an Order finding Intervenor Appellant in Contempt of Court and sentencing him to five days imprisonment in the Salt Lake County Jail, or, in the alternative, to pay a fine of \$500.00. The said Order was amended on September 21, 1967, altering the

fine from \$500.00 to \$200.00.

RELIEF SOUGHT ON APPEAL

Plaintiff-Respondent seeks to uphold the dignity of the Law Courts of the State of Utah by seeking affirmance of the Order of Contempt against Intervenor-Appellant made by the Honorable D. Frank Wilkins, Judge of the Third District Court.

STATEMENT OF FACTS

On April 3, 1967, Plaintiffs filed a Complaint, (R.1-7), seeking to foreclose an equitable mortgage on certain real property situated in Salt Lake County, known as the Surety Building. On April 3rd, an Order, (R.13-15), was signed by Judge Stewart M. Hanson pursuant to Motion of Plaintiffs supported by the Verified Complaint, which Order appointed First Security State Bank of Utah as

Receiver of the subject real property,
and temporarily restrained the Defendants
or their agents from interfering with the
Receiver in the management of the property.
On April 5th Appellant Dennett executed
a highly obnoxious affidavit, (R.8-10),
(which itself could subject him to an
Order holding him in contempt), and pre-
pared an Order vacating the appointment
of First Security State Bank as Receiver,
which Order Judge Stewart M. Hanson signed
on April 7th. Plaintiffs then moved the
Court, (R.18), for an Order vacating the
Order setting aside the appointment of
First Security State Bank as Receiver,
which Order was signed by Judge D. Frank
Wilkins on April 7th, (R.19). Defendants
filed an Answer, (R.26-28), and an Amended
Answer and Counterclaim, (R.29-34). On
April 20th, a hearing (at which Defendant

Dennett was represented by counsel), was had on Plaintiffs' Motion for a Temporary Restraining Order, and an Order Appointing Receiver. Pursuant to this hearing the Court signed an Order on May 18th, (R.42), appointing a Receiver for the property and restraining the Defendants from interfering with the Receiver.

On May 24th, notice was sent to Defendants, (R.43-44), that on June 6th Plaintiffs would move the Court to substitute Alvin I. Smith, a lawyer licensed to practice law in the State of Utah, as Receiver, pursuant to a Petition for Permission to Withdraw as Receiver, filed by First Security State Bank, (R.35-39), On August 17th, (R.52), the Court specifically refused to sign an Order for Defendant staying the Receivership but

did grant Defendant's Motion to Stay the Order Substituting Receiver until September 1st, or until further Order of the Court. On August 17th Defendants filed Objections to the Order Appointing Receiver, (R.53-57), and Objections to the Order Substituting Receiver, (R.58-59); said motions contained notices of hearing set for September 1st. On August 22nd, Defendant Dennett mailed to Plaintiffs and filed a Motion to Consolidate and Motion to Terminate Receivership, together with a Notice, (R.62), that these Motions would be heard on September 1st, with the other Motions. On September 1st, and continuing through September 5th, (R.65), a hearing was had on the above referred to Motions. At this hearing, the Plaintiffs were represented by counsel, and the Defendant Mrs. Dennett, was

personally present for part of the proceedings and represented by counsel throughout the proceedings, and Intervenor-Appellant Dennett was personally present throughout the proceedings. The parties presented witnesses and documents and having submitted the matter to the Court, the Court (R.66), ordered:

1. Objections of Defendant Dennett to the Order of the Court dated May 18th were denied.

2. Intervenor-Appellant Dennett was allowed to intervene and Defendants in Intervention (Plaintiffs) were allowed until September 7th to answer or otherwise plead to Intervenor's Complaint.

3. Defendant Dennett's Motion to Terminate Receivership was denied.

4. The Order of the Court dated August 17th Staying the Order Substituting the Receiver was terminated and the substi-

tuted Receiver Alvin I. Smith, Esq., was ordered to take possession of the premises forthwith, and to manage the property as an arm of the Court.

5. Intervenor-Appellant was ordered to turn over to the Receiver, forthwith, \$1,500.00, which he, Dennett, had collected as rents from tenants of the subject property during the month of August.

This Order was signed on September 13th, (R.66). On September 14th Alvin I. Smith, Esq., filed an Affidavit, (R.68), stating that as of 1:00 o'clock p.m., September 14th, Dennett had failed to pay the \$1,500.00 and had not attempted to contact the Receiver nor his office. An Order to Show Cause was signed, (R.86), and served upon Intervenor-Appellant. Pursuant to this Order a hearing was held

on September 18th, (R.74), at which hearing Intervenor-Appellant John Elwood Dennett was personally present. The Court having been fully advised in the premises, found that John Elwood Dennett had willfully disobeyed the Order of the Court to pay \$1,500.00 to Alvin I. Smith, Esq., (R.74-75), and to account for an additional sum of \$300.00 collected, but claimed to have been spent by Dennett. The Court found Dennett in contempt and sentenced him to five (5) days in jail, or in the alternative to pay a fine of \$500.00. The Court allowed Dennett to purge himself of the contempt by paying the said money to Alvin I. Smith, Esq., by 12:00 o'clock noon, September 21st, (R.75). On September 21st the Court amended its sentence to read five (5) days in jail or in the alternative to pay \$200.00. From this Order Dennett is

appealing, (R.85).

ARGUMENT:

1. THE DISTRICT COURT OF SALT LAKE COUNTY HAD JURISDICTION OVER THE SUBJECT REAL PROPERTY AND INTERVENOR-APPELLANT JOHN ELWOOD DENNETT.

Mr. A. P. Neilson and his wife, Lillie I. Neilson, filed an action in the District Court of Salt Lake County to foreclose any equitable interest remaining in a building and lot situated in Salt Lake County to Herta K. Dennett, the wife of Intervenor-Appellant. Copies of a Warranty Deed to the property running from Defendants Herta K. Dennett to Plaintiff A. P. Neilson and a Quit-Claim Deed running from Intervenor-Respondent John Elwood Dennett to Plaintiff A. P. Neilson were before the Court, (R.25). Defendant Herta K. Dennett admitted the record title was in Plaintiffs but claimed

that Plaintiffs' interest was one in trust for John Elwood Dennett, her husband (R.54).

Defendant Herta K. Dennett and John Elwood Dennett tried to get Appellant into the action and on September 13, 1967, the Court signed an Order allowing Intervenor-Appellant John Elwood Dennett to intervene and file a Complaint in Intervention. Contemporaneously with this Order the Court ordered John Elwood Dennett to turn over \$1,500.00, admittedly in John Elwood Dennett's pocket, to Alvin I. Smith, Esq., an Officer of the Court, duly appointed Receiver in the subject litigation.

The filing of the action to foreclose a mortgage on certain described real property situated in Salt Lake County gave the Court jurisdiction over the subject matter of the action, 78-3-4, and 78-13-1,

Utah Code Annotated 1953, and obviously Intervenor-Appellant is under the jurisdiction of the Court as a party at his own request.

I am sure that even Intervenor-Appellant would not have the temerity to suggest that Judge Wilkins did not have the power, under 78-7-17 Utah Code Annotated 1953, to punish for contempt under the proper circumstances.

2. THE FACTS ESSENTIAL TO THE FINDING OF JOHN ELWOOD DENNETT IN CONTEMPT OF COURT ARE UNDISPUTED.

The facts surrounding the Order holding John Elwood Dennett in Contempt are rather simple, although Intervenor-Appellant would have this Court think there are real complications involved and questions of constitutional law.

John Elwood Dennett, a party to

the action, was ordered, (in the presence of the Court), to turn over monies admittedly received by him (see page 2 of Appellant's brief), as rent from tenants of the building to Alvin I. Smith, an Officer of the Court, pursuant to an Order appointing Alvin I. Smith, Receiver of the said property. Dennett not only did not turn the money over to Mr. Smith, but did not bother to plead an inability.

"A Receiver is entitled to collect rents accruing upon property transferred to him." 4 Am Jur Receivers § 197.

"A party to the action may be summarily compelled to turn over to the Receiver any portion of the property covered by the Receivership which he holds," 2 Clark on Receivers 1044.

A proper Affidavit was filed; an Order to Show Cause served, and a hearing

was had, at which hearing, Appellant was present.

3. THE CLAIM OF INTERVENOR-

APPELLANT JOHN ELWOOD DENNETT THAT THE ORDER OF THE COURT WAS NOT LAWFUL IS NOT SUPPORTED BY LAW.

A reading of the transcripts of the hearings would expose manifold examples of insolence and contemptuous behavior by John Elwood Dennett toward our judicial system. The writer submits that the first paragraph of the second page of Appellant's brief is contemptuous.

However, let us examine whether or not the Order of the Court was not "lawful", as opined by Appellant. Rule 66 of the Utah Rules of Civil Procedure, provides that a Receiver may be appointed ex parte. Rule 66 (d), upon which Appellant relies so heavily, is here set forth in toto,

"Oath and Undertaking of Receiver. Before entering upon his duties, a Receiver must be sworn to perform them faithfully, and with one or more sureties, approved by the Court, execute an undertaking to such persons and in such sums as the Court may direct, to the effect that he will faithfully discharge the duties of the Receiver in the action and obey the Orders of the Court therein." Dennett contends that the language of the statute imposes a duty upon the Receiver to execute an undertaking. Indeed the language does so state, however, the same sentence says "to such persons, and in such sums as the Court may direct...." this would seem to leave it discretionary with the Court; indeed the matter was not overlooked in the subject Order, but it was expressly set out that "it is not necessary that the said First Security State

Bank be required to post an Undertaking".

In the event the Receiver applied for an injunction against a third person, the Receiver would be obliged to file an Undertaking, Popp vs. Daisy Gold Min. Co. 22 Utah 457, 63 P.185. The ruling in this case is understandable as the third party is not before the Court and could be irreparably damaged with no recourse. However, in the subject case we are not concerned with potentially innocent third parties but rather parties to the action. The Order Substituting Receivers also specifically stated that Alvin I. Smith, a member of the Utah Bar and already an Officer of the Court would not be required to post a bond.

Both First Security State Bank and Alvin I. Smith filed the required Oaths of Receiver, (R.12, R.43).

Whether or not the filing of a bond is technically necessary for the final discharge of Alvin I. Smith as Receiver, is of no great consequence when viewing the question of contempt. Dennett had admitted refusing to turn over property under the jurisdiction of the Court to an Officer of the Court. If the Court had Ordered Dennett to turn this money over to the Clerk of the Court, it is submitted that a refusal to do so would be contemptuous. Indeed the contempt with which we are dealing in this matter has the earmark of criminal contempt as well as civil. The Order was not directed as enforcing relief for one party against the other. The Order was to turn money over to an arm of the Court, for the benefit of all the parties. The disobedience of this Order, indeed the arrogant defiance of

this Order, shows the deep disrespect that Dennett holds for the Third District Court and indeed seems to held for any Court in this State.

4. ASSUMING ARGUENDO THAT THE ORDER APPOINTING THE RECEIVER WAS IMPERFECT, THE DEFECT IS NOT JURISDICTIONAL AND MAY BE CURED.

Although it has been held to the contrary, the majority view is that the technicality of filing an Undertaking by a Receiver is not fatal and therefore jurisdictional, and may be cured by a nunc pro tunc Order, 45 Am. Jur., Receivers, § 94.

5. ASSUMING ARGUENDO THAT THE ORDER APPOINTING THE RECEIVER WAS IMPERFECT THE DEFECT MAY NOT BE COLLATERALLY ATTACKED.

"When the Court appointing a Receiver has jurisdiction of the subject matter and

of the parties, its order appointing the Receiver, no matter how erroneous, cannot be collaterally attacked, and an objection to the appointment of a Receiver comes too late, where it is not made until a hearing in Appellate Court and is not jurisdictional," 43 Am Jur, Receivers § 116.

The situation before this Court is that Mrs. Dennett did not see fit to object to the appointment of First Security Bank as Receiver because of the bond. Is it unreasonable to assume that John Elwood Dennett was well aware of what his wife was doing, if not in fact dictating every word for her lawyer's pen?

6. ASSUMING ARGUENDO THAT THE ORDER APPOINTING THE RECEIVER WAS IMPERFECT THE ONLY REMEDY OPEN TO APPELLANT HAS NOT BEEN FOLLOWED.

An Order appointing Receiver pendente lite is not a final order from which an appeal would lie in the State of Utah, Popp vs. Daisy Gold Mining Co., Supra. It is submitted that the failure of Mrs. Herta K. Dennett and of Intervenor-Appellant to complain as to the setting of the amount of the Receivers Bond amounts to an acquiescence to that portion of the Court's Order, the objections as to the appointment of any Receiver were made and indeed hearing was held upon these objections. Although the Orders appointing and substituting a Receiver were not final Orders and therefore were not subject to Appeal as a matter of right, Appellant Dennett could have followed the procedure for taking an Interlocutory Appeal, as set forth at Rule 72 B, Utah Rule of Civil Procedure. This route Dennett did not

see fit to follow, and therefore cannot be heard at this time to complain as to any facet of the appointment of a Receiver in the subject case.

Although the exact steps which Intervenor-Appellant should have followed to protect an appeal are nowhere set forth in the Utah cases, it would seem that the proper approach would have been to move the Court to vacate the appointment of a Receiver-which he did; from the denial of this Order he could have sought permission to take an Interlocutory Appeal-which he did not do. It is well established, as pointed out above, that complaint as to appointment of the Receiver or the technical defects of the said appointment will not be heard in a collateral attack. The refusal to pursue the remedies as set forth above coupled with the refusal

to obey a proper Order of the Court renders the objection herein to the proper appointment of the Receiver a collateral attack raised in the matter of contempt, and as such will not be heard, ⁴⁵Am Jur Receivers § 116.
^

Irrespective of whether an Order discharging or vacating the appointment of a Receiver is otherwise appealable, it has been generally held that such Order is not appealable, where it is made for the purpose of substituting another Receiver for the one previously appointed, 72 Alr (2d) 1087.

CONCLUSION

Even a perfunctory perusal of the record will disclose the complete contempt with which the Intervenor-Appellant John Elwood Dennett holds and treats the Orders of the Courts of the State of Utah, and indeed of the Courts of the United States. This Court cannot fail to marvel at the

forebearance of Judge Wilkins; the real question before this Court is whether anyone, with or without the unsavory reputation of Intervenor-Appellant, can continually flout the established law and judicial system of the State of Utah with impunity. Intervenor-Appellant willfully and arrogantly refused, when ordered by the Court, to turn over monies, taken by him from tenants, when he was fully aware of the fact that a Receiver had been duly appointed to manage the premises occupied by the tenants. The Receiver, whether or not suffering from a technical defect in appointment, was nevertheless an Officer in good standing of the Court. The Court's Order to Dennett to turn the money over to Mr. Smith was a lawful Order, the refusal of which to obey, quite rightly resulting in an Order of Contempt.

It is respectfully submitted that the

Honorable D. Frank Wilkins should be
upheld in his Order of Contempt against
Mr. Devious Dennett, aka John Elwood
Dennett.

Respectfully Submitted,

DUDLEY M. AMOSS
Amoss and Groussman

Attorneys for Plaintiff-
Respondent