

1965

# James S. Stank and Priscilla M. Stank dba Acme Auto Associates v. John Hobert Jones : Brief of Appellant

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

JAMES S. STANK and  
PRISCILLA M. STANK  
dba ACME AUTO ASSOCIATES,  
*Plaintiffs-Respondents,*

vs.

JOHN ROBERT JONES,  
*Defendant-Appellant.*

Case  
No.  
10276

MAR 23 1965

BRIEF OF APPELLANT

Utah Supreme Court, Utah

Appeal from Order Denying Motion of Defendant  
in the Third District Court for Salt Lake County  
Hon. Marcellus K. Snow Judge.

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## CONTENTS

	Page
STATEMENT OF FACTS .....	1
DISPOSITION IN LOWER COURT.....	1
RELIEF SOUGHT ON APPEAL.....	2
ARGUMENT:	
POINT I: ASSIGNORS OF PLAINTIFFS-RESPONDENTS ARE INDISPENSABLE PARTIES, AS THEY HAVE RETAINED AN INTEREST IN THE ACTION..	2
POINT II: PLAINTIFFS-RESPONDENTS ASSIGNORS ARE THE REAL PARTIES IN INTEREST. ....	4
POINT III: THERE IS A MISJOINER OF ACTIONS IN THAT EVIDENCE INTRODUCED IN EACH CAUSE OF ACTION WILL BE PREJUDICIAL TO THE OTHER CAUSES OF ACTION.....	7
POINT IV: THE ASSIGNMENTS ARE AN ATTEMPT TO CIRCUMVENT RULE 14 OF THE UTAH RULES OF CIVIL PROCEDURE ON THIRD PARTY PRACTICE. ....	10
CONCLUSION .....	13

## CASES

	Page
Brown v. Ginn, 66 Ohio St., 316, 64 NE 123.....	1
Coleman v. Twin Coast Newspapers, 346 P. 2d 488 175 Cal. 2d 65 .....	7
First National Bank of Mangum v. Gorman, 176 S.W. 1197.....	10
Foote v. C. W. Davis & Co., 223 N.C. 479, 27 S.E. 2d 289 .....	7
Holland v. Whittington, 215 N.C. 33, 1 S.E. 2d 813 .....	7
McAulay v. Moody, 185 F. 144.....	9
Roberts v. Utility Mfg. Co., 181 N.C. 204, 106 S.E. 667.....	7
Snotherly et al v. Jenrette, 61 S.E. 2d 708.....	6
Southern Mills, Inc. v. Summitt Yarn Co., 223 N.C. 479. 27 S.E. 2d 289.....	7
State v. Laramie River Co., 136 P. 2d 487, 59 Wyo. 9.....	10
Teague v. Silver City Oil, 232 N.C. 469, 61 S.E. 2d 345.....	7
Town of Willsboro v. Jordan, 212 N.C. 197, 193 S.E. 155.....	7
Wingler v. Miller, 221 N.C. 137, 19 S.E. 2d 247.....	7

## STATUTES

Section 378, California Code.....	8
Rule 20, Utah Rules of Civil Procedure.....	8
Rule 14, Utah Rules of Civil Procedure.....	10

## TEXTS

50 Am. Jur. 111, Subrogation.....	11
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# IN THE SUPREME COURT of the STATE OF UTAH

JAMES S. STANK and  
PRISCILLA M. STANK  
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Case  
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## BRIEF OF APPELLANT

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### STATEMENT OF FACTS

This action was initiated in the Third Judicial District Court in and for Salt Lake County, Utah, on or about the 22nd day of January, 1964. The Complaint contains twelve causes of action (R. 1-11) alleged to have been assigned by seven independent creditors, with each cause having unrelated facts. The seven assignors are as follows:

1. Lawrence C. Jackson, 1st cause of action, assigned Colorado Judgment.
2. C. K. Beth, 2nd cause of action, assigned Note.
3. Largo Construction Company, 3rd cause of action, assigned Note.
4. St. Patrick's Parish, 4th cause of action, assigned Note.

5. Gene E. Szynskie, 5th, 6th and 10th cause of action, assigned Notes and checks.
6. Fred A. Mohrmann, 7th, 8th and 12th causes of action, assigned Notes.
7. W. W. Wampler, 9th and 11th causes of action, assigned Notes and checks.

The twelve causes of action were assigned for purposes of suit and collection, with the assignors retaining a two-thirds interest in the amount collected. The amount sued for is \$76,000.00.

Defendant-Appellant filed an Answer and Counter-Claim and the Counter-Claim was dismissed, the Court giving no reason, upon motion of Plaintiffs-Respondents. Subsequent motions and pleadings were filed and disposed of, most of which are immaterial for purposes of this Appeal.

The material pleading for purposes of this Appeal was a Motion to Dismiss or for Judgment on the pleading (R. 45) filed by Defendant-Appellant on or about the 11th day of November, 1964. Defendant-Appellant alleged that the Plaintiffs-Respondents assignors had not been joined as parties indispensable to the action. Reasoning was based upon Plaintiffs-Respondents admission that the assignors had retained an interest in the twelve causes of action (R. 43-44).

#### DISPOSITION IN LOWER COURT

The Third Judicial District Court, with the Honorable Marcellus K. Snow presiding over the Law and

Motion Calendar, denied the aforementioned Motion (R. 46), and this Appeal was commenced.

## RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks to have the assignors joined as parties to the action, and, to declare the action misjoined.

## ARGUMENT

### POINT I

ASSIGNORS OF PLAINTIFFS-RESPONDENTS ARE INDISPENSABLE PARTIES, AS THEY HAVE RETAINED AN INTEREST IN THE ACTION.

It is admitted that as a general rule an assignor is not considered an indispensable party, but an important question arises which Defendant-Appellant submits should be litigated by the Utah Courts, when the assignor retains an interest as here they have done. This is not a case where the assignors receive a designated amount for the assignment. Here the assignors cannot be separated from the suit, as the amount each receives is contingent upon the outcome.

*McAulay v. Moody* 185 F. 144 is a case to be considered. The action was commenced by a Duncan McAulay and Roderick McAulay, citizens and subjects of the Kingdom of Great Brittain, against a Z. F. Moody and M. A. Moody, citizens of the State of Oregon, and John McAulay, a citizen and resident of Montana, to recover on a

promissory note executed in favor of John McAulay Bros. in the amount of \$5,000.00. The complainants and defendant John McAulay were owners of the note in the following proportions: Duncan McAulay,  $43\frac{1}{3}$ ; Roderick McAulay,  $13\frac{1}{3}$ ; and defendant John McAulay,  $43\frac{1}{3}$ . The Defendant John McAulay refused to join in the suit.

The Moodys demurred on the ground the Court was without jurisdiction because John McAulay was an indispensable party. The Court, after discussing and finding they had jurisdiction, sustained the demurrer on the following rationale:

“Now the defendant John McAulay is more than a mere nominal party to this litigation, or even a necessary party whose interest is separable from those before the Court. His interest in this litigation is of such a nature that a final decree cannot be made without injuriously affecting him, and leaving this controversy in such a condition that the final result may be wholly inconsistent with equity and good conscience. The Complainants seek to recover a portion of a debt alleged to be due them and John McAulay jointly, on the theory that they are the owners of the remainder. They thus tender an issue which cannot be adjudicated as between themselves or for the protection of the defendants Moody without John McAulay being before the Court, and which must necessarily be determined before any decree can be made. If the Court should proceed to trial without the presence of John McAulay, its findings as to the respective interests of himself and the complainants would not be binding upon him, nor would it be any protection to the defendants Moody, in case he should subsequently proceed against them on the obligation.



... They have a right to stand upon their contract and insist that they should not be harassed with different actions or suits to recover parts of one single demand. It may be that a court of equity has jurisdiction to enforce the contract at the suit of the complainants alone for the reason that one of the payees of the note refuses to join in an action at law to recover thereon; but this can only be done in a suit to which all the payees are parties, so that one decree may determine the duty of the defendants Moody to each claimant and their rights and interests be fully protected by the decree, and their obligations to all the payees discharged when the decree, if one is rendered against them, is satisfied."

By retaining an interest that cannot be determined until the final judgment, the assignors are so integrated in this case that they have placed themselves in the same category as John McAulay and brands them as indispensable parties.

Plaintiffs allege the rights of the assignors have been assigned, taking them out of the realm of indispensable parties. This argument would be true if a complete assignment had been made, but there is nothing in the record to so indicate. Defendant-Appellant fears further harassment by Plaintiffs-Respondents assignors and requests assurance that his rights will be fully protected.

## POINT II

PLAINTIFFS-RESPONDENTS ASSIGNORS ARE THE REAL PARTIES IN INTEREST.

Another case closely related and in support of Defendant-Appellant's position is the case of *Brown vs.*

*Ginn* 66 Ohio St. 316 64 N.E. 123. This case involved several open accounts which were assigned by the holders to another, termed trustee, for the purpose of having the same prosecuted for collection by suit or otherwise, and the proceeds, after payment of costs and fees of the trustee for prosecuting the action, to be paid the assignors. The case involved accounts being assigned to an attorney for collection. The Court held the assignment was champertous, but applied the following reasoning on whether the alleged assignee was the real party in interest:

“It would be difficult to conclude that he (the assignee) is the real party in interest when his relation to the accounts declared on is constructed with that of the others who claim to have performed the labor and to have earned the sums sued for. Prior to making the contract, he had no possible interest in the subject matter. By the contract, he acquired an apparent beneficial interest to the extent of his fees for services yet to be rendered, and none other; that is, it was a contingent interest. If the effort to collect fails, he loses compensation for the work done and the costs made by him, and the other parties to the contract, if bound by the result, lose their entire claims. If he succeeds, he gets only compensation for his professional labor with immunity for costs, and they get the whole of what remains. It may be admitted that plaintiff is a party in interest, but it seems hardly reasonable to assume that in this situation, the plaintiff is the real party in interest, and we are of the opinion he is not.”

The Court went on to discuss that a number of courts consider the assignee the real party in interest where

there is an assignment of negotiable instruments for collection only, but the Court also pointed out the distinction which, the writer is of the opinion, holds true here also. That distinction is that the plaintiffs-respondents have only a contingent interest, contingent upon collection, and that the entire claim has not been assigned. The type of assignment here involved might even be challenged on that basis that it is no assignment at all; it is a mere agreement to remit money when the debt is collected.

Defendant-Appellant asserts that apart from the allegation of indispensable parties, a miscarriage of justice will result if the twelve causes of action are allowed to be tried in one suit.

### POINT III

THERE IS A MISJOINDER OF ACTIONS IN THAT EVIDENCE INTRODUCED IN EACH CAUSE OF ACTION WILL BE PREJUDICIAL TO THE OTHER CAUSES OF ACTION.

Defendant-Appellant states and contends that there is a misjoinder of action where several causes of action with independent facts and independent parties are joined in one action. Plaintiffs-Respondents cannot circumvent this requirement by the processes of assignment. In the case of *Snotherly et al v. Jenrette et al*, 61 S.E. 2d 708, the Court stated:

"It has been uniformly held by this Court that separate and distinct causes of action set up by different plaintiffs or against different defen-

dants may not be incorporated in the same pleading, and that a misjoinder would require dismissal of the action."

The same Court cited the following cases in support of this proposition: *Teague v. Silver City Oil*, 232 N.C. 469, 61 S.E.2d 345; *Foote v. C. W. Davis & Co.*, 230 N.C. 422, 53 S.E.2d 311; *Southern Mills, Inc., v. Summit Yarn Co.*, 223 N.C. 479, 21 S.E.2d 289; *Wingler v. Miller*, 221 N.C. 137, 19 S.E.2d 247; *Holland v. Whittington*, 215 N.C. 33, 1 S.E.2d 813; *Town of Willsboro v. Jordan*, 212 N.C. 197, S.E. 155; *Roberts v. Utility Mfg. Co.*, 181 N.C. 204, 106 S.E. 667.

California adheres to the same reasoning as the North Carolina Courts and in the case of *Coleman v. Twin Coast Newspapers*, 346 P.2d 488, 175 Cal. 2d 650, a statute similar to Rule 20 of Utah Rules of Civil Procedure was construed.

The Coleman case was an action by three chiropractors for damages for alleged trespasses and for conversion against defendants who allegedly conspired to molest, hinder and discredit each plaintiff in his practice. The District Court of Appeal held that where plaintiff's Complaint set forth six separate causes of action for trespass and conversion, each of which referred only to the particular plaintiff involved, and the Complaint contained no allegation to the effect that there was any community of interest among the three plaintiffs in any respect whatsoever, and failed to allege anything which might establish the existence of either a common interest

in subject matter of action, or right to relief arising out of same transaction or series of transactions, such as would authorize permissive joinder; plaintiffs were misjoined.

Section 378 of the California Code and Rule 20 of the Utah Rules of Civil Procedure are herein set forth for comparison, and Defendant-Appellant submits the same reasoning is applicable to both statutes.

*Section 378, California Code:*

"All persons may be joined in one action as plaintiffs who have an interest in the subject of the action or in whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist, whether jointly or severally, or in the alternative, where if such person brought separate action any question of law or fact would arise which are common to all the parties to the action; provided, that if upon the application of any party, it shall appear that such joinder may embarrass or delay the trial of the action, the Court may order separate trials or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he or they may be entitled."

*Rule 20, Utah Rules of Civil Procedure:*

"All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."

The California Court went on to state:

"The purpose of Section 378 is to permit the joinder in one action of several causes arising out of identical or related transactions and involving common issues.

There may be permissive joinder of parties plaintiff under Section 378 in two situations: (1) Where there exists *both* a common interest in the subject of the action *and* any question of law or fact common to *all* the plaintiffs, and (2) where there exists *both* a right to relief arising out of the same transaction or series of transactions and any common question of law or fact.

. . . In the case at bar, appellants have sought to establish the existence of common questions of law and fact which may arise upon a trial of their respective causes of action. However, assuming that such common issues do exist, appellants do not, and, we believe, clearly cannot, point to anything alleged in the complaint which establishes the existence of either a common interest in the subject matter of the action or a right to relief arising out of the same transaction or series of transactions."

Each of the causes of action in this case involve a separate set of facts requiring independent evidence, all of which would be prejudicial to Defendant-Appellant, if allowed to be paraded before a jury in one complicated case.

It is an improper joinder of a cause of action where such joinder permits the introduction of evidence which is highly prejudicial and likely to influence the jury in

plaintiffs-respondents' favor on the other cause of action. See *First National Bank of Mangum v. Gorman*, 176 S.W. 1197 and *State v. Laramie River Co.*, 136 P.2d 487, 59 Wyo. 9.

The Brown case *supra* recognized this principle in stating:

"It is to be observed, also, that these eight creditors (assignors) were not joint owners of all the claims, but were several owners, each of his own. Neither had any interest in the other, nor were the claims connected with another. Each rested on its own peculiar facts. The parties could not, therefore, have joined in one action in their own names. Why should they be permitted, by agreeing to create a joint trustee, to collect their several claims in one suit? The transaction bears the appearance of an effort to evade the statute regulating the joinder of causes of action."

#### POINT IV

THE ASSIGNMENTS ARE AN ATTEMPT TO CIRCUMVENT RULE 14 OF THE UTAH RULES OF CIVIL PROCEDURE, ON THIRD PARTY PRACTICE.

Rule 14 states, in part:

"Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and

complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him."

In Plaintiffs-Respondents' fourth cause of action, there are four co-makers. Should the defendant-appellant herein be obligated to pay the note in question, the rights and remedies of the assignor would be subrogated to defendant-appellant for him to compel payment from not only the party primarily liable, but the third parties, also. *See 50 Am. Jur. Section 111 on Subrogation.*

The four alleged co-makers are Gene Z. Szynskie, J. Robert Jones, Fred A. Mohrmann, and T. W. Goodwin. The assignor in this cause of action is St. Patrick's Parish.

Plaintiffs-respondents assignors have endeavored to eliminate the Defendant-appellant's rights under Rule 14 of the Utah Rules of Civil Procedure to have a summons and complaint served upon a person not a party to the action, who is or may be liable to him for all or part of plaintiffs-respondents' claim.

None of the co-makers, except the Defendant-Appellant herein, are parties to this action, and all, except the Defendant-Appellant herein, are outside jurisdiction of the Utah Courts.

This Court should once again take note of the meticulous route Plaintiffs-Respondents assignors have taken



to avoid Utah jurisdiction. In the fourth cause of action, Plaintiffs-Respondents have by-passed three defendants in their own back yard, i.e. Gene E. Szynskie, Fred A. Mohrmann, and T. W. Goodwin, to reach the Defendant-Appellant herein in a foreign court.

This Court should not allow a plaintiff to circumvent defendant's rights under Rule 14 of the Utah Rules of Civil Procedure to bring in a third party.

## CONCLUSION

Defendant-Appellant respectfully submits that Plaintiffs-Respondents assignors have a substantial interest in this case, that in retaining the right to receive a percentage of the proceeds rather than a set amount, the assignors are so integrated with this action that they should be considered indispensable parties. The assignors, in working on a percentage basis, are actually the real parties in interest and can control the action from behind the scenes, leaving Defendant-Appellant with no assurance of further prosecutions.

Notwithstanding the fact that Plaintiffs-Respondents assignors are indispensable parties, the Plaintiffs-Respondents have also committed prejudicial error in joining several actions with unrelated facts and independent plaintiffs, which should be corrected by this Court.

Defendant-Appellant is further stymied by the processes of this action, in that he has no way of bringing in parties that may be liable to him under Rule 14 of the Utah Rules of Civil Procedure. Defendant-Appellant respectfully requests relief from this Court, based upon the foregoing reasoning.

Respectfully submitted,

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and Appellant*