

1987

Michael R. Barker v. Laura Beth McGillivray, and
the State of Utah, by and through Utah Dept. of
Social Services David L Wilkenson, Utah Attorney
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Utah Court of Appeals

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IN 7

Defendant,

v.

Laura Beth McGillivray, and the
State of Utah, by and through
Utah Dept. of Social Services
David L. Wilkenson,
Attorney General
Ross C. Blackham,
SanPete County Attorney
Utah Dept. of Social Services
John Abbott, Director
Roleen Olsen
Office of Recovery Services
Utah Department of
Social Services
Utah Legal Services, Inc.
Waine Riches, Attorney
Clella Lawrence, Attorney
Howard Maetani, Attorney
Plaintiffs/Respondants

ERROR

CV 9085

APPELLANT'S BRIEF

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District Court f te County
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II

JURISDICTION OF THE COURT

Appellant, Michael R. Barker, hereinafter referred to as Defendant, is a free, white, citizen (de jure) of the State of Washington, County of Washington, based upon the Preamble and the Bill of Rights to the U.S. Constitution and as such, the Appeals Court has the jurisdiction over the subject matter to secure as to protect the rights of Appellant/Defendant. Respondants/Co-Plaintiffs are U.S. Citizens who reside in the State of Utah.

STATEMENT OF THE ISSUES

POINT 1. SOVEREIGN STATUS

Is a free, white sovereign citizen (de jure) of the State of Utah entitled to protection of Organic Constitutional rights based on the Preamble and the Bill of Rights to the U.S. Constitution; especially when the court has taken Judicial Notice of that status?

POINT 2. VALIDITY OF FOREIGN DIVORCE DECREE

Can a foreign divorce decree be estopped when the sole purpose is financial gain to the harm of another?

POINT 3. DOMICILE

Is it not arbitrary for a Judge to rule, without any evidence or facts, that a person did not fulfill divorce domicile requirements of a foreign country; when the law states that the burden of proof rests with the opposing party?

POINT 4. NON-OBLIGOR STATUS

Is it not illegal, or at least an abuse of discretion, for a Judge to rule that a person is an "obligor" as defined by U.C.A. Section 78-45-2, as amended, when that person has proven on the administrative record that he is not; and furthermore, to do so when that person is not allowed by the court to ask questions pertaining to his defense at the trial?

POINT 5 . VIOLATION OF PRIVACY

Is it not unlawful, or both unlawful and illegal, or an abuse of process, or malicious prosecution, and against the intention of the Utah Legislature, and a violation of a sovereign state citizen's right to privacy, for the Utah Department of Social Services to operate outside of U.C.A. Section 78-45b-5, as amended to obtain private financial information about that person?

POINT 6. PARTIES ACTING ON DIVORCE DECREE WITH CONSIDERATION

Is it not arbitrary and an abuse of discretion for the court to rule that a foreign divorce decree is invalid because it was an agreement between parties to mutually divorce when the evidence and the facts show otherwise?

POINT 7. COURT NOT SET PROPERLY

Is it not a violation of the doctrine of Utah's separation of powers Article 5, Section 1, and a violation of basic U.S.

Constitutional rights, for a court to rule on the validity of a foreign divorce and the subsequent rescission of a Utah State marriage license when the judge has acted ministerially for the Utah Department of Social Services, and the Judge is at the same time acting Judicially to dissolve a Utah marriage which was administered by the Executive Department?

Is it not, furthermore, appropriate for the District Court to hear the rescission of the marriage license issue rather than refuse to hear it because it is not "proper"?

POINT 8. VIOLATION OF TRIAL BY JURY

Is it not a violation of a persons right to trial by jury for a Judge to refuse repeated demands for that right based on Article 1, Section 10, of the Utah Constitution, and for a judge to refuse a tendered jury fee?

POINT 9. RIGHT TO COUNSEL VIOLATED -- ABSURDITY

Is it not a violation of the right to due process of law for a judge to grant the right to counsel at a pre-trial hearing and then at the time of trial deny that right? Is that logic, furthermore, not devoid of reason and therefore absurd; and is it not reasonable that counsel and court cost suffered by a person in that circumstance should be awarded?

POINT 10. RIGHTS SUA SPONTE DENIED

Is it not a violation of a person's basic Constitutional right to have his rights sustained by a judge, and for the judge to inform a person when basic rights may be in jeopardy instead of a judge attempting to violate that person's rights?

POINT 11. DEFENDANT THREATENED WITH INCARCERATION

Is it not a violation of a person's Constitutional right for a judge to threaten a person with incarceration if he does not answer questions pertaining to his financial status which have already been answered pursuant to the Fourth and Fifth Amendments to the U.S. Constitution?

POINT 12. VIOLATION OF RIGHT TO DEFEND--JOINDER

Is it not a violation of a person's right to defend for the court to refuse to hear issues for which summons have been issued and parties have appeared in court; and further, after the Judge does allow summoned parties to take the stand is it not a violation of a person's right to due process, and right to defend to not allow questions pertinent to the defense to be asked?

POINT 13. INVASION OF PRIVACY

Is it not a violation of a person's right to defend for the court to not allow a person to ask questions pertaining to what

statute, law or authority allows them to harm another?

POINT 14. JUDGE GIVES LEGAL ADVISE

Is it not a violation of a person's right to due process for a judge to give the advise for him to obtain a licensed attorney when if that advise were followed it would take away the person's status and place him in the jurisdiction of the court?

POINT 15. CONSPIRACY AND BLACKMAIL

Is not the court a party to conspiracy when after having the evidence to same on the record finds that there is no conspiracy and blackmail?

POINT 16. VIOLATION OF RIGHT TO RELIGION AND SPEECH

Is it not a violation of Article 1, Sections 4, and 15, for the court to deny a person the right to communicate freely to his children concerning the destructive and malicious intentions and behavior of another so as to impart to them a concept of correct principles instead of that which leads to dissolution?

POINT 17. BIAS AND CONSPIRACY OF ATTORNEYS FOR THE STATE

Is it not a violation of a person's right to due process of law for the failure of the County Attorney and the Attorney General to act on a criminal assault complaint and a threat to the person's life?

POINT 18. COURT ATTEMPTS TO FORCE JURISDICTION

Is it not a violation of a persons right to due process of law for the court to order a person to pay child support to a third party when, in fact, no money is due or owing to that third party; and the only reason for so ordering is to bring that person into the court's jurisdiction?

POINT 19. PROPERTY TO A STRANGER TO THE RECORD

Is it not a violation of a persons right to due process of law for the court to rule on disposal of his property when, in fact he is a stranger to the record; and is that ruling therefore not null and void?

POINT 20. PRIOR PROPERTY AGREEMENT

Is it not a well established axiom of law that equity is not available to reinstate rights and privileges voluntarily contracted away simply because a party has come to regret the bargain made, especially when it is to the harm of another?

POINT 21. CUSTODY OF CHILDREN

Did not the court violate U.C.A. Section 30-3-5, as amended, when it awarded custody and visitation rights of children when it had already been made by a foreign divorce decree, since the foreign decree must be given full faith and credit?

POINT 22. VISITATION IS TOO RESTRICTIVE

Did not the court abuse its discretion in ruling for an unnecessarily restrictive child visitation rights for a father when there was a lack of funds and a great distance which caused hardship; and did not the court abuse its discretion since the parties had acted on a prior agreement for visitation rights which was not to the harm of the children or their father?

POINT 23. NO CHANGE OF SUPPORT CIRCUMSTANCES

Did not the court arbitrarily and with abuse of discretion issue new orders for support when, in fact, there was no change in circumstances of either parties to justify that order?

CONSTITUTIONAL AND STATUTORY PROVISIONS

UTAH CODE ANNOTATED (U.C.A.):

U.C.A., 1953, as amended, Section 30-3-5.

U.C.A., 1953, as amended, Section 78-27-50.

Financial information privacy-Act inapplicable to certain official investigations.-Nothing in this act shall apply where an examination of said records is a part of an official investigation by any local police, sheriff, city attorney, county attorney, the attorney general, or the state department of public safety, or the bureau of recovery services, department of social services.

U.C.A., 1953, as amended, Section 78-45-2.

(2) "Obligor" means any person owing a duty of support.

"Support debt" means the debt created by nonpayment of child support under the laws of this state or the decree of any court of appropriate jurisdiction ordering a sum to be paid as child support."

U.C.A., 1953, as amended, Section 78-45b-5.

Notice of support debt-Absent court order-(1) In the absence of a court order, the director may issue a notice of a support debt accrued or accruing based upon the furnishing of support by the department for the benefit of any dependent child. That notice shall include a statement of the support debt accrued or accruing, computable on the basis of the amount of assistance paid or to be paid, a statement of the name of the recipient and the name of the minor child for whom assistance is being provided, a demand for immediate payment of the support debt or in the alternative for a written answer from that person to the department setting forth any claimed defenses to liability, and requesting a hearing thereon, and a statement that if neither answer nor full payment are received within twenty days from the date of service the department may assess and determine that support debt and that, subsequent thereto, the property of that person shall be subject to appropriate collection action including, but not limited to, execution upon liens, wage assignments, attachment, and garnishment. This notice shall be served upon the alleged responsible parent in the manner prescribed for service of notices under section 78-45b-4.

(2) If a written answer is received by the department, a hearing shall be set in the manner provided under section 78-45b-6 and reasonable notice of that hearing shall be forwarded to the alleged responsible parent in the manner prescribed under section 78-45b-4.

(3) If payment is not received as demanded under

subsection (1) and no written answer is filed within twenty days from the date of service, the department may proceed to assess and determine that support debt and, at any time thereafter, may proceed with appropriate collection actions as provided in that subsection.

U.C.A., 1953, as amended, Section 78-45-9.

Enforcement of right to support (1) The obligee may enforce his right of support against the obligor and the state department of social services may proceed pursuant to this act or any other applicable statute, either on its own behalf or on the behalf of the obligee, to enforce the obligee's right of support against the obligor. Whenever any court action is commenced by the state department of social services to enforce payment of the obligor's support obligation, it shall be the duty of the attorney general or the county attorney, of the county of residence of the obligee, to represent that department.

UNITED STATES CODE (U.S.C.):

U.S.C. 1396-13969, Sub Chapter XIX, Chapter 7,
Title 42.

Summary Judgment--811. Generally: District court may use summary judgment in reviewing decision of Secretary on disability claim.

828. Plaintiff could not be granted summary judgment, in action for social security and disability benefits, since, because of favorable ruling for plaintiff on divorce question, under which it was held that Florida divorce obtained by wage earner from plaintiff was invalid for social security purposes, no consideration was given to question of whether plaintiff satisfied requirements of this section concerning her own primary insurance benefits, and where no determination had been made of the amount of any benefits.

UTAH CONSTITUTION:

Utah Constitution, Article 1, Section 1:

All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Section 3:

The State of Utah is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land.

Section 4:

The right of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution.

Section 7:

No person shall be deprived of life, liberty or property, without due process of law.

Section 10:

In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

Section 11:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have a remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Section 14:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched and the person or thing to be seized.

Section 15:

No law shall be passed to abridge or restrain the freedom of speech or of the press. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall

appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

Section 27:

Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.

Utah Constitution, Article 4, Section 10: (Oath of office)

All officers made elective or appointive by this Constitution or by the laws made in pursuance thereof, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation; "I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this State, and that I will discharge the duties of my office with fidelity.["]

Article 5, Section 1:

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Article 8, Section 13:

Except by consent of all the parties, no judge of the supreme or inferior courts shall preside in the trial of any cause where either of the parties shall be connected with him by affinity or consanguinity within the degree of first cousin, or in which he may have been of counsel, or in the trial which he may have presided in any inferior court.

Article 8, Section 19:

There shall be but one form of civil action, and law and equity may be administered in the same action.

STATEMENT OF THE CASE

Nature of the Case

This is a divorce action based on alleged cruelty to Plaintiff as a first cause of action and on allegations by the State of Utah by and through Utah Department of Social Services, hereinafter referred to as the Department, that the Defendant is an obligor as defined in Utah Statutes as a second cause of action.

Defendant has Counterclaimed with multiple actions arising out of the divorce action, alleging Want of Jurisdiction over subject matter and over his Person due to State citizenship (de jure) status based upon the Preamble and the Bill of Rights to the U.S. Constitution, Want of Jurisdiction over the subject matter based upon a prior Mexican divorce decree being valid, Non-Obligor status as defined by Utah Statutes, the original Utah State marriage having been rescinded based on constructive and actual fraud, Want of Jurisdiction over subject matter and Defendant's Person due to marriage rescission, violation of Constitutional rights, namely, right to trial by jury, right to counsel of choice, notification of rights sua sponte, right to due process, right to freedom of religion and speech, and other Constitutional rights violations causing harm and suffering to Defendant's Person involving conspiracy and alienation of the affections of Defendant's children from him, loss of health, loss of money, loss of time from work, and physical and mental suffering, through illegal activity of Co-Plaintiffs, involving invasion of privacy, conspiracy, fraud, blackmail, malicious

process, malicious prosecution, and failure of the County Attorney, who is a party to the action, to act upon a criminal complaint of assault and battery and a threat to Defendant's life by the use of firearms.

Course of the Proceedings

Co-Plaintiff, Laura McGillivray, separated from Defendant, Michael Barker, about 18 April 1984 and lived in Portland, Oregon. Defendant obtained a Mexican divorce 3 August 1984. Co-Plaintiff returned to Utah to sign the divorce decree on 30 September 1984, and to live in a home in Mayfield, Utah and to receive child support that Defendant provided for his children. Defendant relocated in November 1984 to St. George, Utah. Property settlement and visitation rights of parties were mutually agreed upon during that time as stipulated in the foreign divorce decree. A written contract pertaining to child custody was signed by both parties on 16 June 1985. Defendant was served with a Utah divorce Summons 2 January 1986.

Co-Plaintiff applied for Welfare on 2 January 1985. The Utah Department of Social Services obtained wage information from Defendant's employer in January 1985 after having been notified by Defendant that his children were being provided for in an amount greater than that required by the Department. The Department proceeded to threaten and hassle Defendant and have not stopped for over two years.

Defendant rescinded his marriage license with the State of Utah based on constructive and actual fraud. Attorneys for the State and Utah Legal Services, Inc., held Defendant's children ransom for two years in an attempt to obtain quickly, a new Utah

divorce.

While Co-Plaintiff was helping Defendant move some of his belongings stored in the Mayfield home on 16 June 1985 she, without provocation assaulted Defendant by beating him repeatedly with a short two by four board, and repeatedly threatened to kill him if she had a gun. Defendant reported, more than once, to the SanPete County Sheriff's Office, a Criminal Assault complaint which the SanPete County Attorney refused to act upon until Defendant reported the complaint via certified mail. The matter was submitted to the Attorney General, since The SanPete County Attorney, Ross C. Blackham, was representing the Department in the divorce action. The Attorney General never acted upon said complaint and Defendant feels sure that his life is still in danger.

Mr. Barker was forced over his objection and against his will, under threat, duress, and coercion to proceed in new divorce proceedings because his right to be with his children, as contracted with his former wife, had been violated by Co-Plaintiffs.

Disposition of the Case in Lower Court

The case was tried to the court on 25 March 1987. From the findings and order for the Plaintiff, Defendant appeals.

Statement of the facts (No Court Record)

The lower court maintained that the only actions to be ruled on were a divorce and the Department's claim for support money owed by Defendant and did refuse to hear anything other than those two actions.

The Defendant maintained that after the parties separation and Mexican divorce that Co-Plaintiff Laura McGillivray had signed up for "welfare" while Defendant was providing her with a house to live in and \$300.00 in monthly child support payments as agreed upon as mutually as stipulated in a prior Mexican divorce decree. The Department began paying Co-Plaintiff "welfare" monies at the same time Defendant was providing for his children. The Department, in violation of Utah Statutes, did contact and obtain wage information from Defendant's employer upon which to base a claim of support. Defendant was notified by the Department that welfare money was being received by his children, whereupon Defendant timely notified the Department that he was already providing a house and money to Co-Plaintiff and to cease and desist welfare payments. The Department refused to stop the double payments, and then at a hearing denied Defendant credit for providing a home, and cash utility payments for Co-Plaintiff stating that it was considered payment "in kind" and would not be allowed as credit for support.

Co-Plaintiff, several months later, did move out of the house that Defendant was providing in an attempt to force him, through the Department, to pay more cash money per month than originally mutually agreed upon which Defendant was, at that time, unable to do.

Co-incidental to the above when Defendant was returning his children to Co-Plaintiff, Laura McGillivray did beat Defendant with a short two by four, and threatened to kill him with a firearm, with no provocation from Defendant, whereupon Defendant left with two of his children as witnesses, and reported the

criminal assault to the SanPete County sheriff. The County Attorney Ross C. Blackham did fail to act upon that complaint until Defendant filed a third complaint via certified letter because the first two witnessed complaint statements had been "lost". Said Attorney who was representing the Department in the instant matter notified Defendant in writing that there was a conflict of interest and he would forward said complaint to the Attorney General if so notified. Defendant did notify the County Attorney to forward the complaint to the Attorney General in writing. The County Attorney did investigate said complaint and "judged" in his opinion that the matter should not go to court, notwithstanding that he earlier had indicated his bias for Co-Plaintiff. The Attorney General did, notwithstanding the conflict of interest in the instant matter, notify Defendant that the County Attorney had acted "properly". Defendant joined County Attorney and Attorney General as parties to the action, since it was another attempt with conspiracy to prevent Defendant from having his due process and equal protection under the law arising out of the divorce action.

The SanPete County District Court failed to hold Defendant's rights inviolate since it ruled that a separate action had to be initiated for that matter.

In an attempt to recover welfare money expended, the Department, as indicated to Defendant in writing by Co-Plaintiff, through Utah Legal Services, Inc., initiated divorce action attempting to estop the Mexican divorce decree. Co-Plaintiff indicated in writing that she had initiated no action against Defendant but that the Department had determined that the foreign,

decree was invalid (Exhibit 1). The Department also notified Defendant in writing that it intended to pursue a property division other than "as mutually agreed upon" as stipulated in the foreign decree (Exhibit 42). Utah Legal Service, Inc., Attorneys then advised Co-plaintiff, as indicated by Co-Plaintiff to Defendant in writing (Exhibit DD) to disregard a prior written agreement or contract between the Parties which had been acted upon, so as to prevent Defendant from seeing his children until said Defendant accepted a new Utah State divorce which provided for more money, more property division and different visitation rights with the children, than that which had already been agreed to and acted upon by both parties, as per the foreign decree (Exhibit 2). Co-Plaintiff agreed to and acted upon written and verbal contracts as stipulated in the foreign decree, and as evidenced by assuming again her maiden name on licenses, in telephone directories, for conducting business, etc. A recently discovered letter indicating the same is herewith enclosed as (Exhibit 3).

Co-incidental with the above the Department through its Office of Recovery Services harassed Defendant over a two year period with numerous demands and threats in writing. The Department placed Defendant on a "tax intercept list" until Defendant noticed said Department that he would take legal action unless his name was removed from that list since there was no basis in law for said harassment. The Department did then notify Defendant that he would be taken off of that "tax intercept list" (Exhibit 42), however said Department notified Defendant a year later that he was still on the same list. After more

notices to the Department by Defendant he was again notified that he would be taken off of that list. Defendant is currently having to defend against the Internal Revenue Service due to the actions of said Department.

Defendant has continually supported his children, notwithstanding the Department has continued to hassle Defendant and alleges differently.

VI

SUMMARY OF ARGUMENTS

Point 1. The Court did not uphold Defendant's Constitutional rights inviolate after having taken Judicial Notice of Defendant's non-juristic status.

Point 2. The Court did not prevent the estoppel of the foreign divorce decree, notwithstanding the motivation to estop was to the harm of another.

Point 3. The Court ruling to estop the foreign divorce decree was arbitrary, since there was no evidence given to prove that Defendant was not in Mexico. The Co-Plaintiffs did, in fact, concede that it was entirely possible that Defendant was in Mexico.

Point 4. The Court did err by not allowing Defendant to defend himself by preventing said Defendant from asking Co-Plaintiffs questions to prove that he was not an "obligor" as defined by Utah statutes.

Point 5. The Court did err by not allowing Defendant to defend by showing that the Department unlawfully invaded his privacy since questions pertaining to Utah statutes were not allowed to be asked.

Point 6. The court did not consider that the Co-Plaintiff acted upon the provisions of property settlement and child visitation rights with consideration but instead used abuse of discretion by setting aside those facts.

Point 7. The Court was improperly set and did not act Judicially to protect the rights of Defendant, since a violation of the separation of powers doctrine was in effect.

Point 8. The Defendant's right to a trial by jury was denied, notwithstanding said Defendant demanded that right and tendered a jury fee which was refused. Also, the money involved in the litigation was in the thousands of dollars.

Point 9. The Court did grant Defendant counsel of choice at the 2 January 1987 pre-trial hearing but did at the time of trial refuse to allow said counsel, over the objection of said Defendant. The Court's absurd reasoning and abuse of discretion did cause Defendant physical and emotional harm and did not allow said Defendant to properly conduct a defenses due to intense pain from a injury that said Defendant was suffering from. Defendant suffered considerable expense of money and time to bring counsel hundreds of miles which harmed Defendant greatly.

Point 10. The Court did not advise Defendant of rights Sua Sponte but did, in fact, act in a manner to take away said Defendant's rights.

Point 11. The Court did err by violating Defendant's right to privacy and did threaten and coerce him with incarceration if he did not answer questions previously answered on pre-trial interrogatories; which questions were answered under the protection of the Amendments to the U.S. Constitution, namely, Articles 4 and 5.

Point 12. The Court did at the start of the proceedings determine that the only issues to be heard would be the Utah divorce and the alleged money owed to the Department since it was alleged that parties to the divorce action were not properly joined. The Court did then go through the process of allowing Defendant to place Summoned individuals on the stand but would

not allow him to ask questions so as to conduct a proper defense. The court by holding Defendant to the same standards as an attorney, is delaying justice and by its action will cause additional expense to said Defendant to bring action against several parties individually when they are already parties to the divorce action by their actions and on the record.

Point 13. The Court did not allow Defendant to ask questions pertaining to the Utah statutes so as to allow him to conduct a proper defense in proving that the Department exceeded its authority by specifically not following the Utah Code.

Point 14. The court legally advised Defendant, which would have harmed him if the advise had been followed. Defendant was advised by the Judge to obtain an attorney.

Point 15. Utah Legal Service, Inc., attorneys acted illegally and did advise Co-Plaintiff to breach a written contract allowing Defendant the right to be with his children for about two years; that being an attempt on the part of the attorneys to force Defendant to accept a new Utah divorce decree allowing for more property, and money for Co-Plaintiffs and with less visitation rights for Defendant than had been agreed and acted upon by the parties. The Court did not consider the above improper but ruled against Defendant when proof of the attempted blackmail was shown to the court by exhibit DD. The court did abuse discretion and did condone said illegal action.

Point 16. The Court did arbitrarily and with abuse of discretion disallow Defendant the right to converse freely with his children so as to convey to them, consistent with said Defendant's religion, what is right and wrong as it relates to

the experiences that the children have lived through relative to negative and harmful actions of their mother. Defendant was threatened with incarceration if any communication was given to the children which would be construed as negative towards their mother.

Point 17. The Attorney General and, the SanPete County Attorney failed to act on a criminal complaint of assault and battery and a threat to Defendant's life by Co-Plaintiff, McGillivray. The court did also prevent Defendant from defending the same. Bias and conspiracy existed since Defendant was not allowed to defend against those parties to the divorce who prevented Defendant's due process of law.

Point 18. The Court arbitrarily, since it refused to hear all the facts and evidence, and with abuse of discretion did try to force Defendant to pay support money to a third party, namely the Department, instead of the custodial parent. Defendant does not owe the Department money. The court refused to allow Defendant to bring forth all the evidence proving the same. There is no third party interest since Defendant has always provided for his children as has been proven on the administrative record.

Point 19. The Court did rule concerning the disposition of property of a stranger to the record, which property had been legally conveyed by parties to the divorce action, therefore said ruling is null and void.

Point 20. The Court did abuse it's discretion in attempting to award a home that Defendant was providing to Co-Plaintiff and his children which he had obtained before the parties marriage. Co-Plaintiff had been occupying said home as per a prior mutual

agreement as stipulated in the foreign divorce decree but then moved out of the home in an attempt to obtain more property than originally agreed upon.

Point 21. The Court did not consider a prior agreement and written contract mutually entered into as stipulated by the foreign divorce decree, prior to Utah divorce proceedings by the Defendant and Co-Plaintiff. The Court arbitrarily determined that the foreign decree was merely an agreement between the parties for financial purposes which was not the case. The parties had separated due to not being able to live with each other as was clearly pointed out in court and the the divorce was at that time obtained. The parties continued to effect a divorce as the relocation and change of employment of Defendant shows. The court did err in not upholding the custodial rights of children as determined by the decree of a foreign divorce.

Point 22. The Court did rule on child visitation rights too restrictively. Due to the time, distance, and expense involved in Defendant meeting with his children, said Defendant can hardly continue a bonding relationship with his children.

Point 23. The Court did arbitrarily, without any evidence of change in conditions or finances of either party abuse its discretion by increasing Defendant's monthly support payments as the children reach legal age.

VII

ARGUMENT

JUDICIAL NOTICE OF STATE CITIZENSHIP

Point 1. That the district court did take Judicial Notice of Defendant's Utah State citizenship (de jure) status, based on the Preamble and the Bill of Rights to the U. S. Constitution, recognizing that Defendant was an unenfranchised Sovereign, natural individual without any Nexus with the State; said court did then continue to proceed against him with full knowing, information and malicious intent, to gain jurisdiction over his Person causing Defendant to defend over his objection, and against his will, while under threat duress and coercion of not being able to see his children due to conspiracy and blackmail on the part of Utah Legal Service, Inc., Attorneys. The court did not maintain impartial judicial logic but did harm Defendant by not protecting said Defendant's inalienable Constitutional rights which was in violation of Article 1, Sections 1, 7, 14 & 27, Utah Constitution, Article 8, Section 19, Utah Constitution, and also Judge Tibb's oath of office. Article 4, Section 10, Utah Constitution.

MOTIVATION TO HARM BY ESTOPPEL

Point 2. That the evidence does not support a finding that the Co-Plaintiff Laura Beth McGillivray should be granted a new Utah State divorce, the matter having already been decided in another forum. Defendant Michael R. Barker had obtained a Mexican divorce on 3 August 1984 which was accepted by Co-Plaintiff through notarized signature in Utah and then acted upon by her

when she carried out the terms of the foreign decree's stipulated "mutually agreed upon" property settlement and also visitation rights of the parties children. Co-Plaintiff had accepted the foreign decree as legally binding and did not seek for estoppel until Defendant was Summoned 2 January 1986, because the Co-plaintiff, the Department, required her to do so for purpose of obtaining more money than that which was originally agreed upon between Parties.

Co-Plaintiffs cannot assert the invalidity of the foreign divorce decree inasmuch as Laura Beth McGillivray has acquiesced in such decree and has recognized its validity by acts or conduct inconsistent with the position that it is invalid; namely accepting said decree by signature and acting upon it by using her maiden name; and acting upon provisions of contracts between divorced parties as related to financial matters including but not limited to, custody rights of children. Bruguere v. Bruguere, (1961) 172 Cal. 199, 155 P. 988. Ann. Cas. 1917E. 122; Kelsey v. Miller, (1928) 203 Cal. 61, 263 P 200. Therefore the instant matter should be dismissed and the Mexican divorce decree allowed to stand.

Co-Plaintiffs are motivate purely by financial gain in trying to nullify the Mexican divorce decree after having acted upon written and verbal contracts as set out in that decree; and are thus prevented from estoppel of said divorce decree. Dorn v. Dorn, (1953) 282 App Div 597, 126 NYS 2d 713, see also Cross v. Cross, (1963) 94 Ariz 28, 381 P2d 573, and numerous other cases in several states. California courts have recognized another species of estoppel, called quasi-estoppel, which is based on the

principal that one with full knowledge of the facts shall not be permitted to act in a matter inconsistent with his former position or conduct to the injury of another. Hersuens Estate, 181 P.2d 69; also there exists a presumption in favor of the foreign decree, and, unless this presumption is properly and effectively rebutted by the party who raises the question of lack of jurisdiction in the foreign court to render the decree, the courts of the forum may and will recognize it as effective. This applies even when the foreign divorce decree is not entitled to extraterritorial recognition when the court rendering it lacked jurisdiction over the subject matter of the divorce because neither of the parties to the divorce action was domiciled in the divorce forum. Cardinale v. Cardinale, 60 P.2d 997 and 68 P.2d 351. Additionally, in no case has the Supreme Court of the United States invalidated a judgement of a state court for lack of due process because it recognized as valid the divorce decree of a sister state although neither of the spouses had domicile therein in the common law meaning of the term. Therefore the instant matter should be dismissed and the Mexican divorce decree allowed to stand.

It is well settled that when the motivating factor in seeking estoppel to a foreign divorce decree is pecuniary in nature, the doctrine of estoppel can not be applied. A number of courts have taken the position that while estoppel and like equitable doctrines be generally available to accord practical recognition to jurisdictionally defective divorce decrees, such doctrines will not be applied so as to aid a party primarily motivated by financial considerations. Chomsky's estate, 101 NYS

2d 60, and Considine v. Rawl, 242 NYS 2d 456. Also holding or recognizing that divorce decrees rendered in a foreign nation where neither spouse was domiciled may be accorded practical recognition by estoppel, laches, unclean hands, or a similar equitable doctrine under which the party asking for the decree may be effectively barred from securing a judgement of invalidity. Scherer v/ Scherer, 405 NE2d 40. Finally, where the validity of a divorce is attacked in order to assert a private claim for pecuniary gain, the defense of estoppel is available, although it would not be permitted in cases where a judicial determination of the marital status is sought, with the financial benefits flowing from the establishment of such status being purely incidental. Considine v. Rawl, 242 NYS 2d 456. Therefore the instant case should be dismissed and the Mexican divorce decree allowed to stand. The court did err. Article 1, Section 7, Utah Constitution.

NON-DOMICILE NOT PROVEN

Point 3. That, furthermore, the Co-Plaintiffs did not estop the Mexican divorce decree on the basis of lack of domicile, since they did not prove that Defendant was not in Mexico; on the contrary, for their defense they did concede that it was entirely possible that Defendant was in Mexico. Defendant's substantive right to due process of law was violated by the court assuming that said Defendant was not domiciled in Mexico, and then ruling, without proof or reason to do so, for a new Utah State divorce.

DEFENDANT NOT AN OBLIGOR

Point 4. That the evidence does not support a finding that the Defendant was an "obligor" as defined by Utah Statutes in the

second cause of action. By virtue of Section 78-45-9, U.C.A., 1953, as amended, the Office of the Attorney General and/or the County Attorney has no jurisdiction over Defendant, moreover, said Office should not even be a party to divorce action, since said Defendant has always been timely providing support for his children. Section 78-45-2, U.C.A., 1953, as amended clearly states: "Support debt" means the debt created by nonpayment of child support under the laws of this state or the decree of any court of appropriate jurisdiction ordering a sum to be paid as child support." Defendant has always provided more support to his children in an amount greater than that determined by the Department as proven on the Departments' administrative record. Defendant was prevented by the court from asking questions of the Department in an attempt to prove on the record his non-obligor status, thereby violating Defendant's right to due process of law and his right to defend. Article 1, Sections 1, 3, & 7, Utah Constitution. The court did err by sustaining objections to Defendant's proffered evidence.

RIGHT TO PRIVACY VIOLATED

Point 5. Notwithstanding, the Department did contact Defendant's employer and did obtain wage information upon which to base a claim of alleged monies owed in violation of Utah Statutes, there was no default judgement against Defendant and said Defendant had timely notified the Department as per Section, 78-45b-5, U.C.A., 1953, as amended. The Department did then, in complete disregard of Section 78-45b-5, U.C.A., 1953, as amended, proceed illegally and unofficially to violate Defendant's right

to privacy, and without affording him due process of law by obtaining wage information from his employer. Article 1, Section 14, Utah Constitution, and Article 1, Section 7, Utah Constitution.

The Department demanded and obtained financial information from Defendant's/Appellant's employer without justification for doing so, citing Section 78-27-50, U.C.A., 1953, as amended; thereby violating Defendant's right to privacy, but said Department was in violation of said statute since it was not conducting an official investigation as pursuant to Section 78-45b-5, U.C.A., 1953, as amended. Legislative intent for Section 78-27-50, U.C.A., 1953, as amended, obviously was not to give the Department unlimited power to violate the Utah Constitution (Article 1, Section 14), nor the U. S. Constitution Amendments (Article 4). Defendant had also timely notified the Department that he was providing a home and cash money for his children, but action was taken against said Defendant anyway. An administrative determination is "arbitrary" when it is erroneous, that is, when it is unsupported by substantial evidence, and it is "unreasonable" when under the evidence presented, there is no room for difference of opinion among reasonable minds. The Departments attempt to justify a grossly blatant violation of Defendant's rights by citing Section 78-27-50, U.C.A., 1953, as amended, is unreasonable and is not within the letter nor the spirit of the law, and is therefore illegal as applied to Defendant.

Furthermore, merely because the Department claims that providing a house and paying cash monies for utilities

constitutes payment "in kind" and is not allowable for "credit" by Defendant does not make it so, since the Department has no jurisdiction over Defendant, Defendant is not subject to what cash is or is not allowable. Simply stated, all cash money that Defendant provides for support of his children is support. The Department has no jurisdiction over Defendant to say that certain money spent on support is not support. The Department's argument, is in want of reason and common sense, and serves only to allow the Department to "bulldoze" whomever it wants into its jurisdiction by denying the true facts. The law will not tolerate an absurdity. Co-Plaintiff, the Department was contributorily negligent as a matter of law.

PARTIES ACTED UPON FOREIGN DIVORCE DECREE

Point 6. That the court did err by not allowing Defendant to conduct a defense against the Department. The Department initiated action against Defendant and is in Want of jurisdiction over Defendant since it, has no cause of action, the matter of divorce having been decided in another forum; and also Defendant is not an obligor as defined by Utah Statutes, therefore there is no reason why the Department should be a party to divorce action. The Department, as was pointed out on the record, required Co-plaintiff Laura McGillivray to illegally use her former married name; the Department having "decided", (not Co-Plaintiff McGillivray), that the foreign divorce was not legal. As was pointed out on the record, Co-Plaintiff believed that the Mexican divorce was valid when she accepted it by her notarized signature and consideration was manifest when Parties acted upon provisions of the mutually agreed upon property settlement and visitation;

rights of Parties children as stipulated in the Mexican divorce decree. The Department admitted to Defendant, in writing that the only reason for its' action as a Co-Plaintiff was because the foreign divorce was silent on property settlement and visitation rights of the parties' children; that is not according to fact however, since the foreign decree indicated that those issues were to be by "mutual consent" of the parties. Those issues were understood by both parties and acted upon, with consideration, for over a year. The court did err, in not dismissing the instant matter on that basis and on the basis that the Department did not serve Defendant with divorce papers until Co-Plaintiff McGillivray had been a Department funded recipient for over a year, which Defendant has just recently discovered. Furthermore, the Department in answer to Defendant's Counterclaim states as a first cause of action that there is "no cause of action on which to base a claim", but as Defendant has pointed out there has been a violation of Defendant's rights in addition to the courts' failure to prevent estoppel of the Mexican divorce when the sole purpose of said estoppel is to obtain financial gain to the harm of another. Article 1, Section 1, Utah Constitution. Hensgens Estate, 181 P2d 69; Cardinale v. Cardinale, 60 P2d 997 and 68 P2d 351. The principle involved in the above cited cases is one basis for Defendant's argument. Article 1, Section 27, Utah Constitution. Also, Article 1, Section 7, Utah Constitution.

COURT IMPROPERLY SET

Point 7. That because Defendant rescinded the former Utah marriage based upon constructive fraud, which the court refused to hear, the district court was improperly set, and Defendant

ministerially, not judicially, when the marriage rescission issue should have been adjudicated by a Judicial Branch Judge, thus violating the separation of powers doctrine. Furthermore, Defendant's Constitutional rights were violated when the State of Utah failed to fully inform Defendant that his Constitutional rights under the Preamble and the Bill of Rights would be lost as pertaining to a Utah State granted marriage license and there was undue influence exercised over Defendant to obtain said license. The court did proceed in collusion with the Attorney General's Office, and the State of Utah by refusing to hear anything but the Utah State divorce issue. The court did err since it did not have jurisdiction over either the subject matter or over Defendant's Person. Article 5, Section 1, Utah Constitution. Also the court did refuse to hear Defendant's demand to hear his argument which the court dismissed on the basis of being improper. The court did violate Defendant's right to defend which made the court a party to the deprivation of due process of law. Article, 1, Sections 1, & 7, Utah Constitution. It was stated on the record, of Defendant's Civil Case No. 9085 Writ of Prohibition, by the Utah Supreme Court that the proper place to hear the aforementioned was in the State District Court.

JURY TRIAL DENIED

Point 8. That the court did refuse to grant a trial by jury as demanded by Defendant pursuant to the Utah Constitution even after a jury fee was tendered; thereby violating Defendant's right to due process of law. The court's denial of Defendant's right to trial by jury in a matter which involved hundreds of dollars and other substantive issues of rights is an abuse of

discretion and patently in error. Article 1, Section 10, Utah Constitution.

COUNSEL OF CHOICE--ABSURD COURT ACTION

Point 9. That the court did grant Defendant counsel of choice, upon demand, at the pre-trial hearing on 2 January 1987, then providing the additional statement- "you can have whoever you want sitting up here", but did then refuse Defendant the right to counsel at the trial. Defendant relied upon the judge granting counsel of choice for his defense, but was denied that basic right to due process and equal protection under the law at the time of trial. Such Judicial "catch 22" logic of allowing counsel of choice then not allowing counsel of choice did cause Defendant much time, expense, physical and mental suffering at a time when said Defendant was in great physical pain, as evidenced on the record, and not prepared to be without advisory counsel. Said pain and suffering did last beyond the trial and involved medical expense to Defendant. Furthermore, said action on the part of the court did violate Defendant's right to due process since, it denied Defendant the right to adequately defend. Besides causing Defendant harm by causing him much legal expense, said deficient logic on the part of the court is sufficient to make reason stare. The law will not tolerate an absurdity. The court did knowingly, willfully, and with malicious intent, harm Defendant's Person as aforementioned and is open to a redress of injury to Defendant. Article 1, Sections 1, 7, and 11, Utah Constitution.

NO RIGHTS SUA SPONTE AS DEMANDED

Point 10. That the court did not advise Defendant of rights sua sponte as demanded. Defendant asked the court whether it was acting ministerially or judicially whereupon the judge began shouting that Defendant should not be arguing with the court when in fact Defendant was not arguing with the court but only trying to determine the nature of the court; the answer to Defendant's question was not forthcoming; the court did, as aforementioned and as will be shown hereafter, violate Defendants substantial rights rather than notify said Defendant as to when rights were being violated. The court, as it stated from the beginning of the trial, did refuse to hear any other issue before it, including motions before the court such as Defendant's Affidavit of Impecuniosity. The issue contained therein was not heard by the court, thereby denying defendant right to due process and his right to defend. Article 1, Sections 1, 3, 11, & 27, Utah Constitution.

DEFENDANT THREATENED WITH JAIL

Point 11. Judge Tibbs threatened Defendant with going to jail if said Defendant did not disclose financial information asked for on the pre-trial interrogatories by the Attorney for Complainant as to wages; which Defendant had already answered by citing the protection of the 4th and 5th Amendments to the U.S. Constitution. Judge Tibbs said he could not make a decision without it. Obviously, what judge Tibbs really meant was that he had already made a decision and he intended to threaten Defendant with jail in order to effect a property division. Instead of acting impartially to protect Defendant's Organic Constitutional

right to privacy, Judge Tibbs was more concerned with acting ministerially in ascertaining for Co-Plaintiffs questions of discovery with the added threat of judicially determined incarceration. The court did err. Article 1, Section 14, Utah Constitution and Article 5, Section 1, Utah Constitution.

VIOLATION OF RIGHT TO DEFEND--JOINDER

Point 12. That the court did, from before the completion of opening statements, refuse to hear any issues which did arise from the divorce action that involved any other agencies or individuals excepting Co-Plaintiff, Laura McGillivray and Utah Department of Social Services. The court's reasoning was that several tort actions needed to be filed and that several actions could not be lumped into one action and that the parties were not properly joined.

Several causes of action are properly joined however; where the subject-matter is for a tort arising out of certain wrongful continuous official acts, the several causes of action are properly joined in one action, and the complaint reaches the substantial rights without resorting to a needless multiplicity of action. Wilson v. Sullivan, Ut.R., 17-341. Fundamental principle is the basis for citing the above, pursuant to the Utah Constitution, Article 1, Section, 27. Defendant was prevented from defending himself after the court took Judicial Notice of his right to do so. Article 1, Sections 1, and 7, Utah Constitution.

INVASION OF PRIVACY

Point 13. That the court did have on the record facts pertaining to the Departments' invasion of privacy of Defendant,

even so, the court did not allow Defendant to ask questions pertaining to which Utah Statutes gave the Department authority to obtain financial information from Defendant's employer. Judge Tibbs said that he did not care about that and to "ask the next question". The court did err in preventing Defendant from conducting a defense by not allowing Defendant to prove on the record that the Department acted outside the scope of the Utah Code: clearly a violation of Defendant's Constitutional right to defend himself. Article 1, Sections 1, 3, 7, and 14, Constitution.

JUDGE GAVE DEFENDANT LEGAL ADVISE

Point 14. That the court did legally advise Defendant at the pre-trial hearing and at the trial to obtain a licensed attorney. Defendant did contact Utah Legal Services, Inc., for legal representation but was refused on the basis that there would exist a conflict of interest involving federal monies, since said Agency was already acting as legal counsel to Defendant's former wife.

Not only has equal protection under the law been denied Defendant, but Defendant later fully realized that the advise of Judge Tibbs, if acted upon, would have placed the Person of said Defendant under the court's jurisdiction. The court did err in legally advising Defendant so as to coerce the Person of said Defendant within jurisdiction of the court. Judge Tibbs should be disqualified for the above. Article 8, Section 13, Utah Constitution. Defendant was harmed by the aforementioned advise in that it cost him time and some expense to obtain information and did take away from the limited time Defendant had to conduct

his defense. Article I, Section 1, Utah Constitution.

CONSPIRACY, BLACKMAIL--DEFENDANT'S CHILDREN HELD RANSOM

Point 15. That the court did on the record and did receive exhibits proving perjury on the part of Co-Plaintiffs as it related to fraud and conspiracy of Attorneys for Utah Legal Services against Defendant. Said Attorneys did advise Co-plaintiff Laura McGillivray to not allow Defendant to see his children, notwithstanding the attorneys were aware of a written contract stipulating visitation rights between parties pursuant to the Mexican divorce decree, but denied same verbally on the record and in written interrogatories. The evidence was a letter to Defendant from Co-Plaintiff admitting that Utah Legal Service, Inc., Attorneys did in fact conspire with Co-Plaintiff to withhold children from Defendant. Said Attorneys were properly noticed over a period of time to cease and desist but failed to respond to said notification. The court did again proceed to pass over the violation of Defendant's rights over his objection and against his will, and by trying to hold Defendant to the same standards as an attorney in technically joining parties to the instant matter. The court did err in not allowing Defendant due process of law as a litigant in his own person. Said court did go through the process of allowing Defendant to question said Attorneys concerning fraud, and conspiracy to deny said Defendant to see his children, but the court did then refuse to make findings and then rule on said illegal activities when perjury and fraud were proven on the record through exhibits, and a subsequent change of Co-Plaintiffs' testimony; the argument on the part of the court being that separate tort action would be

necessary since a divorce action is all that the court could hear. Law - - - - - ty can be administered in a civil action. - - - - - le 8, Section 19, Utah Constitution. - - - - - is deprived of life, liberty, - - - - - property, since - - - - - d not rule on the facts proving perjury, conspiracy, blackmail, and fraud on the part of Utah Legal Service, Inc., Attorneys. Article 1, Section 7, Utah Constitution. Co-Plaintiffs did not re: - - - - - to Defendant's sever. - - - - - demands to give him the law or authority, - - - - - them to withhold his from him. Said court and said attorneys and Co- - - - - including the Department, which did i- action, as proven in exhibit 1 , did violate Defendant's rights by il - - - - - children from him, causing great harm, including great - - - - - physical distress, arising alienation of - - - - - his - - - - - from him, and alier. - - - - - affections - - - - - er from them; along with the al and - - - - - al and - - - - - , expense of time, arising out of having to defend as best he could ion in - - - - - e 1, Sections 3, 7, 11, and 14, Utah Constitution, - - - - - , Section 19, and Article 1, Section 27, Utah Constitution. Also, When a fraudulent conspiracy - - - - - common - - - - - ation, the conspirators and all persons affected by the fraud are proper parties to a suit based upon it. Stevens v. Imp. Co., Ut. R. 14-232. as the Stevens v. Imp., case is not a - - - - - in no way lessens the basis in principle to the secur: - - - - - Defendant's individual rights. - - - - - 1, Section 27, Utah Constitution.

FREEDOM OF RELIGION AND SPEECH VIOLATED

Point 16. That [redacted] did violate Defendant's right to exercise his religion and freedom of speech in rendering a final judgement that will not allow defendant to speak "anything derogatory about, or to criticize" Co-Plaintiff in front of said Defendant's children. It is Defendant's God given right to speak his mind to his children, and to educate them in things which are good. Defendant has the right to talk about bad actions of Co-Plaintiff which the children have lived through in order to point them away from the negative things which they should not do. The court has threatened Defendant with contempt of court and will consider a jail sentence if Defendant speaks his mind freely to his children. The court may have been well meaning in those general terms but has, if that is the case, stated it's intent in such vague and ambiguous terms so as to render its purpose contrary to Defendant being able, in accordance with his religion, to teach and communicate freely with his children. The court did err. Said judgement should therefore be held void and without effect since it is a clear violation of Defendant's rights as aforementioned Article 1, Sections 4, Utah Constitution.

Fundamental to Defendant's religious belief is the right to verbally point out contrasting actions, beliefs, and opinions of others, including Co-Plaintiffs', to his children, so as to convey an understanding of what he believes to be a course of attitude and action which is righteous, good, true, and leads to God and Life. Article 1, Sections 4, and 15, Utah Constitution.

BIAS

17. Furthermore, co-11 instant case, the
Ross C. fail to act upon a
of assault battery & threat to life
of Defendant by said Defendant's laintiff, Laura
McGillivray. Defense witnesses, te
County s. Of the said trial c
"lost"; at, again witnessed, was gain
"lost"; a stified letter, thereby
forcing action on the al complaint which was by then over a
ye Attorney B conflict of interest in a
letter to Defendant but ated said complaint a gave
an sion to not bring it to Defendant ested the
referred to the Attorney General but the matter was
on. ney, Ross C. Blackham, clearly b
since he did, in effect, "rule" in favor of
ay while he was representing the State
of Utah in the ind matter. Defendant attempted to ask
qu Ross C. Blackham, whom
the ad allowed to witness stand, said
court, would not ask questions which pertained
to v. rights. The court did err in not
allowing Organic Constitutional
by not allowing said Defendant to conduct a defense. Ar.

1, 3, 7, 11, & 27, Utah Constitution.

and join all agencies and officials who
as they became parties to the action directly arising
out of the later.

When a fraudulent conspiracy is the common litigation, the conspirators and all persons affected fraud are proper parties to it based upon it. Stevens v. Imp. Co., Ut. R. 14-232. Inasmuch as the Stevens v. Imp., case is not a divorce in no way lessens the basis in principle to security of Defendant's individual rights. Article 1, Section 27, Utah Constitution. The SanPete County court did fail to hold Defendant's rights inviolate. Furthermore, the complaint which was turned over to the Attorney General's Office has never been acted upon. Defendant has been denied due process of law in a criminal action against his person based upon bias and prejudice, with conspiracy between agencies by aforementioned agencies. Article 1, Sections 1, 7, and 11, Utah Constitution.

COURT JURISDICTION

Point 18. the court did rule against Defendant in division of property parties, which property division had already been effected and acted upon by both parties as per the prior Mexican divorce. Then in a blatant attempt to gain jurisdiction over the court did rule that said Defendant should support payments directly to the Department instead of Defendant's former wife who has shared custody of the children. Since Co-Plaintiff Laura [redacted] has turned over all child support payments to the Dep. in the past the only reason to require Defendant to Pay the Department is to gain jurisdiction over said Defendant's Person. The court did err by not protecting Defendant's Organic Constitutional rights as a non-juristic individual. The judge, in that the Defendant pay the Department, is, in essence, actively [redacted] and is

ground for his disqualification. in law for
said ruling since Defendant is not an
to an unreasonable attempt of the maritime bias and
judice against the Defendant to pay a
when clearly there is no debt a
Article 1, Section 1, 7, 11, & 27, Utah Constitution,
8, Section 13, Utah Constitution.

Furthermore, since Co-Plaintiff, Laura McGillivray has given
the Department power of attorney and is also otherwise
in commerce as a juristic person under Maritime equity
in opposition to the status of Defendant, he being a de jure
state citizen, where is the jurisdiction of the court to
that Defendant pay any support, especially since the Department
routinely performs operations on aforementioned child and does
not notify Defendant; and moreover, the cost of operation
borne by the Department as authorized by U.S.C. 1396-13969, Sub
Chapter XIX, Chapter 7, Title 42, which jurisdiction Defendant is
not under. Certainly Title 30, Chapter 3, U.C.A., 1953, as
amended places the State of Utah in a position of violating
Defendant's rights with respect to his state citizenship status
based upon the Preamble and Bill of Rights to the United States
S. Constitution, since said state is attempting to force
Defendant into Maritime equity jurisdiction, even though
Defendant has provided, and continues to provide for his
Article 1, Sections 3, 7, & 27, Utah Constitution.

STRANGER TO THE RECORD

Point 19. That the court did err in adjudicating upon the
property rights of a person not a party to the case who was a

stranger to the record. A court's judgment rendered against persons not parties to the action and over whom the court acquires no jurisdiction is absolutely void as to them. Houser v. Smith, Ut. R. 19-150; Mosby v. Gisberr, Ut. R. 17-257. Frequent recurrence to fundamental principles is essential to the security of individual and to the perpetuity of free government--Article 1, Section 27, Utah Constitution.

PRIOR PROPERTY AGREEMENT

POINT 20. The court did err in not taking into consideration that the property consisting of a house with 2 and 1/4 acres in Mayfield was obtained from the proceeds of a sale of a home owned by Defendant before the parties marriage. That the Defendant had made available that home, as agreed and acted upon, for the use of Plaintiff and his children, but in an attempt to obtain more money than originally agreed upon between parties, Co-Plaintiff moved from the home. Equity is not available to reinstate rights and privileges voluntarily contracted away simply because a party has come to regret the bargain made; the law limits the continuing jurisdiction of the court where a property settlement agreement has been incorporated into the decree. Land v. Land, (1980) 605 P 2d 1248.

CUSTODY

Point 21. That the court exercised discretion in awarding custody of children to Co-Plaintiff, inasmuch as no recognition was given to an agreement and contract between parties that Defendant was to have custody of children during the entire marriage; nor did the court take recognition that there is no statutory presumption in favor of the mother having custody of children. Rice v. Rice,

564 P 2d 305; Tolman v. Wassom (1977) 564 P 2d 307. Furthermore, Section 30-3-5, U.C.A., 1953, as amended is not applicable in determining who shall have custody of a child where a proceeding is brought in Utah and the custody is made by the court of a foreign state. The decree of the foreign state must be given full faith and credit. Tolman v. Wassom (1977) 564 P 2d 307. (1965) 16 U 2d 258.

DEFENDANT'S VISITATION IS TOO RESTRICTIVE

Point 22. That the court's order allowing Defendant visitation every 2 week periods during the summer and every other week during the school year with his children is too restrictive. That because Defendant lives over two hundred miles from the children, the Co-Plaintiff, and his financial situation is limited, he is unable to visit the children as often as the Co-Plaintiff originally requested. Defendant should be allowed visitation to last an entire summer. Defendant should be allowed to enjoy a more reasonable visitation with his children without the travel distance and which result in a waste of time and expense. Porter v. Porter, 577 P 2d 111.

NO CHANGE OF CIRCUMSTANCES

Point 23. That the court did abuse its discretion by awarding orders for support money when there was, in fact, no change of circumstances of Defendant or Co-Plaintiff. The court awarded Co-Plaintiff \$125.00 per child per month or a total of \$500.00.; then the court determined that the support should increase to \$150.00 per child or a total of \$600.00 when the children reached age 18. The court did abuse discretion by arbitrarily penalizing Defendant for his children's support.

age. Modifications or new orders must be based upon allegations of changed conditions and evidence in support thereof. Cody v. Cody, 47 U 456; Osmus v. Osmus 114 U 216.

VIII

CONCLUSION AND RELIEF

WHEREAS Appellant/Defendant seeks reversal of the judgement on as a matter of law, and the foreign divorce decree and relief granted from the in litigation arising, out of one action, and of prayed for in Appellant/Defendant's addition to damages to Defendant by the court,

1. For the Court to order the Department to cease and desist in any of any al treatment being related by the to order the Department to cease and desist in all,
2. For the Court to order Appellants/Defendants to advise all parties to above action to cease and desist in all Appellant's child ransom, which is to his children.
3. For the court to order child visitation rights pursuant to the mutually agreed contract as in the divorce decree. That Appellant/Defendant shall have right to take the children for the children when the children out of shall have right to take the children every week including the to pick up the children at 5:00 pm on Friday and the children by Sunday.
4. That the Court order that the decision in writing is to be from both the Appellant/Defendant or

Respondant/Plaintiff 30 day an are taken
State of Utan.

5. That Appellant/Defendant will walth, accident,
and dental insurance, if available, his employment and
for the court to order that each of the parties shall each be
obligated for one-half of any deductible that has to be paid for
medical expenses for the minor children.

6. That the Court order Respondant/Plaintiff to live in the
Mayfield home as per the parties mutual agreement pursuant to the
foreign divorce decree.

7. That the Court award to Appellant/Defendant
Respondant/Pl. If equally, one-half of the mining stock or the
equivalent purchase price of three dollars per share.

8. That the Court award to Appellant/Defendant, tually
agreed upon, the adult section of the Encyclopedia Britanica
which is in his possession, and the re two sets to remain
in the possession of Respondant/Plaintiff.

9. That the Court award the pencil water purifier and the
Triple Combination Scripture Book, or the current market f
each to Respondant/Plaintiff.

10. That the Court award one-half of the few silver coins and
medalions or the current market price to Respondant/Plaint s
mutually agreed upon.

11. That the court award to Appellant/Defendant any of his
personal belongings still n. in the possession of
Respondant/Plaintiff.

12. That all other shall remain in the possession of
either the Appellant/Defer. f.

13. That the Court order that the Appellant/Defendant be held in contempt of court together with interest and to the Department.
14. That the court order that the Appellant/Defendant is to pay his child support to the custodial parent and not the Department; and that the Department cease and desist from harassing said Appellant/Defendant.
15. For the court to order the SanPete County Sheriff and the SanPete County to act upon a restraining order issued by the Court to protect the Appellant/Defendant from harm from his former wife when picking up his children.
16. That the Court award the sum of Seventy five thousand dollars to the Uta County Department of Social Services for compensatory, exemplary, and punitive damages.
17. That the Court award the sum of Twenty thousand dollars from John P. Doe for compensatory, exemplary, and punitive damages.
18. That the Court award the sum of Twenty thousand dollars from Ross C. Blackham for compensatory, exemplary, and punitive damages.
19. That the sum certain of Fifty thousand dollars be awarded to the John and Jane Does, A through Z, for compensatory, exemplary, and punitive damages.
20. That the sum certain of Seven thousand dollars be awarded to V. Tibbs for Court costs and personal costs.
21. That the Court order that all Appellants/Defendants are to suffer the expense and to assume their own court costs.

22. For the court to order such other and further relief as the court deems just and proper.

this 17th day of July, 1987. SIGNED

Michael R. Barker

VERIFICATION

The above signator, known to us, verifies and affirms that all statements made herein are true and correct to the best of his knowledge, information and belief, and not for the purpose of evasion or delay, and is witnessed in the State of Utah, County of Washington.

D. 17th day of July, 1987.

WITNESS

Steven E. Kirkland

DATED 17th day of July, 1987.

WITNESS

John Donnelly

Certification of Mailing

I hereby certify that a copy of the foregoing Brief on Appeal was mailed, postage prepaid to:

Waine Riches, Attorney
Utah Legal Services, Inc.
455 N. University, Suite 100
Provo, Utah 84601

David L. Wilkenson, Atty. Gen'l.
C/O Blaine R. Ferguson
236 State Capitol Bldg.
Salt Lake City, Utah

Ross C. E.
SanPete County Attorney
SanPete County Courthouse
Manti, Utah 84642

on the 22nd day of July 1987.

SIGNED

Michael R. Barker

EXHIBIT 1

not count on your financial support
I signed up for all the benefits.

I've initiated no action against
you nor have I suggested Social
Services do such a thing. It is
standard practice for them to
attempt to recoup funds which
have gone to the custodial parent.

You can call Social Services
& ask their policy concerning
a couple that is not legally divorced.

It will be interesting to see if
you do indeed meet your total
child support obligation since

EXHIBIT 2

___ To whom it may concern:

___ Michael R. Barber and Laura Beth T. McEllinay
___ enter into this agreement whereby custody of
___ the children of their former civil marriage is
___ to be mutually shared. Laura will have custody
___ of the children during the normal school year;
___ and Michael is to have custody during the
___ summer months or when school is normally
___ not in session; also he is to be able to have
___ custody of said children on certain weekends
___ as is mutually arranged between both Michael
___ and Laura.

___ Both parties agree to the foregoing this 16th
___ day of the month of June and year 1985.

___ Signed Laura B. McEllinay
___ Barber

___ Signed Michael R. Barber

___ Witnessed by: Walter Hansen
___ Walter Hansen

EXHIBIT 3

May 7, 1985

Dear Jim Mount,

I have received a sweepstakes entry in the name of my ex-husband. I would like to order some pens as well as enter the sweepstakes. Could another form be sent with my name or should I use the form enclosed in his entry? Please respond quickly.

Thanks!

Laura McCallum
Box 62
Mayfield, UT

84643

P.S. His pen has the numbers #115732
#97819.

He lives 300 miles away & never even opens what he considers junk mail so he would have thrown it out.

Exhibit DD

Mike,

— Because you have contested the divorce & my attorney has had to file a motion etc the divorce is still not final. I have been counselled by my attorney & her supervisor to keep the children till it is finalized.

The time you set up with the kids 6pm June 6 (666!) is not suitable. Rebecca is in summer school till the end of June. Abe told me you gave him your phone number but he lost it. Maybe you could give it to him again.

✓ Gordon would also like to talk to you about the Mayfield house sometime. He lives in Rhea Kunz' home, you have the address.

Benjamin's eye surgery was something that Sozial Services demanded. His eyes are straight & look better all the time.

They are all to have physicals & dental work as a requirement of them, also anything recommended by the doctors has to be taken care of.

Laura



Social Services

Norman H. Bangerter, Governor, State of Utah
Norman G. Angus, Executive Director

October 23, 1985

Mr. Michael Robert Barker
P.O. Box 142
Santa Clara, Utah 84765

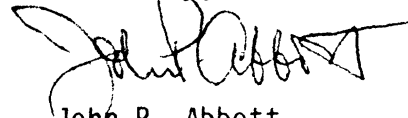
Dear Mr. Baker:

Since the receipt of your October 11, 1985 letter, I have reviewed your case with "Team 38" in Richfield. I noticed several misunderstandings of law in your letter and, if I may, offer some further explanation of the issues you raised.

The fact that you are now a resident of Utah places you in a position of being subject to its laws. I'm sure you know that this office has been empowered by statutory law to pursue the rights of children and to collect support in their behalf. Since the custodial parent has deemed it necessary to get assistance from the state, the recovery of money spent by the state is our specific interest. Whether or not your children receive state assistance is a matter for the custodial parent (in this instance your former wife) to decide. This is not a decision making matter for the non-custodial parent. I noticed your divorce decree is mute regarding monthly support requirements. That being the case, we are empowered to set the obligation and enforce its payments. An investigator from our office would like to discuss this aspect with you in order that we may arrive at a mutually agreeable figure. I urge you to call or write the Richfield office to arrange that meeting. Every effort will be made to accommodate your needs.

In the meantime, I have instructed the Richfield office to remove your name from the tax intercept list. This does not mean we intend to cease and desist. It is merely meant as a waiting period. Frankly, we intend to pursue the issues of this case and we will take every legal action necessary to bring it to a successful conclusion. Your assistance and understanding in this matter will be very much appreciated.

Sincerely,



John P. Abbott
Director

JPA/VLM/gt

Office of Recovery Services
John P. Abbott, Director

Salt Lake Office, 3195 South Main
Salt Lake City, Utah 84115-3749
801-486-1812

[illegible]

Where one spouse goes into a state other than that of the matrimonial domicile and there obtains a divorce under a residence simulated for that purpose and not in good faith, the judgment is not binding on courts of other states and may be held void in any other state on proof of the fraudulent residence and of the fact that the divorce was obtained by substituted service only.

2. DIVORCE—§ 328—JUDGMENT—FOREIGN DIVORCE—FULL FAITH AND CREDIT

Where the husband leaves the matrimonial domicile in California and obtains a divorce decree in Nevada on substituted service only, such decree is not binding on the California courts, though he established a bona fide residence in Nevada. 180 J. PRACTICE, ¶ 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835,

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 831-834; Dec. Dig. § 328.]

3. DIVORCE ~~326~~—JUDGMENT—FOREIGN DI-
VORCE—PROCEEDINGS TO SET ASIDE—ESTOP-
PEL

Where the wife, knowing that her husband had obtained a divorce decree in Nevada, married another and lived with the new husband for several years, she was precluded from setting up that the Nevada decree was invalid because obtained on a fraudulent residence established in that state and from claiming marital rights against her former husband, though at the time of her remarriage she did not know of the alleged invalidity of the decree.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 827-830, 840; Dec. Dig. § 326.]

2. Department; 1. Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge; 3. Action by Marjory Brugulere against Peter S. Brugulere; 4. From judgment for defendant; 5. plaintiff appeals. Affirmed.

Black & Clark, of San Francisco (Morrison, Dunne & Brobeck, of San Francisco, of counsel), for appellants; A. J. Treat, of San Francisco (R. P. Henshall, of San Francisco, of counsel), for respondents.

SHAW, J. The plaintiff began this action against the defendant for permanent support and maintenance. The court below sustained a demurrer to her complaint, and thereupon gave judgment for the defendant, from which plaintiff appeals.

The plaintiff and defendant intermarried in Reno, Nev., on December 20, 1902. They were both residents of San Francisco at that time and had gone to Nevada solely for the purpose of having such marriage ceremony performed. They immediately returned to San Francisco, where they lived together until July 24, 1904. In the meantime the child Peder S. Brugulere, Jr., was born to them. On the day last stated the plaintiff left the residence of the defendant and has ever since remained separate and apart from him. According to the allegations of the complaint she was compelled to leave him by his extreme cruelty toward her. In February 1905 the defendant went to Nevada for the purpose of establishing a residence there for a sufficient length of time to enable him to obtain a divorce from the plaintiff in the courts of Nevada. He never in good faith resided in that state, but remained there only for the purpose of acquiring a pretended residence for the purpose of maintaining such action for divorce. His real residence during the entire period was in San Francisco, Cal. On June 28, 1906, under said fraudulent claim of residence in Nevada, the defendant obtained in said state a decree of divorce from the plaintiff. This decree was based on constructive service upon the plaintiff. She received no actual notice of the proceedings, and did not appear in the action. The ground of the divorce was the alleged desertion of the defendant by the plaintiff, which it is alleged, is not true. The custody of the child aforesaid was given by the said decree to the plaintiff herein. Immediately thereafter the defendant returned to San Francisco, again married, and has there remained continuously ever since. The plaintiff has resided in the state of Nevada. The plaintiff learning of the divorce decree and the defendant's subsequent marriage, and supposing that she had been legally divorced by Nevada decree, and being ignorant of the law on the subject, entered into a second marriage with Stewart Denning in July, 1907, the marriage taking place in New Jersey. She continued to live with Denning as his wife thereafter until the year 1910, when she learned for the first time that the divorce was invalid because of the fact that her bona fide residence in Nevada on the date of the husband's Thereupon she obtained a divorce from Stewart Denning in the state of New York, where she then resided with Denning, a decree declaring the marriage with Denning annulled on the ground that she had not been lawfully divorced from Brugulere. This decree was entered in 1910. Thereafter the plaintiff began this

on to obtain maintenance for herself and child, claiming to be the defendant, notwithstanding the decree of divorce. All admitted by the demurrer of the case. *Haddock v. Haddock*, 207 U. S. 562, 28 Sup. Ct. 525, 50 L. Ed. 117. The question was referred to the effect of the credit clause of the Constitution of the United States. In that case, the husband and wife were domiciled in New York in 1883. The wife, however, abandoned the matrimonial domicile and established residence in Connecticut. The courts of Connecticut, he divorced from his wife on constructive service only. Many years later, the wife, who had remained in New York, began an action in that state for divorce from the husband and on constructive service upon him in the state of New York and set up the Connecticut divorce as an adjudication that she had been previously divorced. The Supreme Court of the United States, although the Connecticut divorce was obtained in Connecticut, it was within the state of New York, the domicile of the state of New York to which force and effect should be given. The United States would not overrule the New York courts in giving credit to the Connecticut divorce in the action of the wife.

It is a well-established principle where one spouse goes to a state to change the matrimonial domicile and obtains a divorce under a statute for that purpose and no other, the judgment is not binding on other states of the Union, even if the fraudulent residence is shown, if the divorce is obtained on constructive service only, it may be held in that state than that in which the divorce was obtained. *James*, 99 Cal. 237, 37 Am. St. Rep. 60. The divorce is held valid in the state where it was obtained is a question dependent on the policy and law of that state.

In *Haddock v. Haddock*, the husband, who, without the wife and takes up his residence in a state than that of their domicile, changes the matrimonial domicile to his new residence so that the divorce in that state on his constructive service only, is valid in that state, as an adjudication of the divorce.

The subject of the effect of a decree of divorce in a state other than that of the matrimonial domicile of the spouses, was elaborately discussed by the Supreme Court of the United States in *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867.

of New York in 1863. The husband, however, abandoned the wife and the matrimonial domicile and established a bona fide residence in Connecticut. Thereafter,

and set up the Connecticut decree, which, as an adjudication that the marriage had been previously dissolved. The

...the state of New York to determine
...and effect should be given to it
...state, and that the Supreme Court of
...States would not overrule the
...New York courts in refusing to

It is a well-established proposition
where one spouse goes to a state other
than the matrimonial domicile and
obtains a divorce under a residence

service only, it may be held void in
state than that in which it was
Estate of James, 99 Cal. 377, 33
321 Am. St. Rep. 60. Whether

husband, who, without cause,
his wife and takes up his residence
more than that of their residence,
the matrimonial domicile to

...new residence so that a di-
...state on his complaint
...service only, may be
...state as an indication of the

as an adjudication of the
breach of the contract.

Upon the principles thus established, it seems clear that the decree obtained by the husband in Nevada is not binding upon the courts of California, even if his residence

[3] The case presented, however, does not depend wholly upon the action or policy of the state of California with reference to decrees of divorce given in other states to

marriage, contracts, and living with the new husband for several years in accordance therewith. The vital question in this case is whether she is estopped by her conduct from now questioning the validity of the

from now, questioning the validity of the Nevada decree, whether she has not, by her conduct, accepted it, as a satisfactory solution of the controversies between herself and her husband, Bruguiere, and, thereby satisfied and affirmed the irregularities upon

ratified and affirmed the irregularities upon which the decree was obtained, and waived all right to attack it. She alleges that she was ignorant of the law governing such matters. But she does not allege that she was not aware of the decree purporting to dis-

not aware of the decree purporting to dissolve the marriage relation, and of the fact that, after a divorce, she was free to contract another marriage. She admits and declares that she was. The invalidity of the Nevada decrees is not due to any vice apparent upon

decree is not due to any vice apparent upon the record, but to the policy of the state of California, which refuses faith and credit to such a decree. No reason suggests itself to us why the wife should consider herself bound by this state policy or why she could

bound, by this state policy, or why she could not waive all questions, of its effect, upon her and accept the status, given to her, by, the Nevada decree. We are of the opinion that, whether she had, a right to do this, or not, is not a question, which we are to decide.

having done so, and having, upon that theory, married another person, she is now precluded from setting up the invalidity of the Ne-

judges' decree, and from claiming marital rights against her former husband, and said: "The authorities are practically unanimous in favor of this proposition, that a remarriage estops the party entering into it from denying the validity of the previous divorce." In *Marvin v. Foster*, 61 Minn. 154, 63 N. W. 484, 52 Am. St. Rep. 586, the decree of divorce showed want of jurisdiction and the faces of the record and was consequently void, even on collateral attack. The husband afterward married another person and lived with her for 14 years. The court held that he was estopped to question the validity of the divorce. In *Mohler v. Shank*, 93 Iowa, 273, 61 N. W. 981, 34 L. R. A. 161, 57 Am. St. Rep. 274, where the facts were essentially the same, the wife, after a second marriage, attacked the decree. The court said: "Having accepted the divorce as valid, in the way she did, she should be estopped from maintaining any claim to any part of the estate of her former husband." In *Arthur v. Israel*, 15 Colo. 147, 25 Pac. 81, 10 L. R. A. 693, 22 Am. St. Rep. 381, speaking of a similar case, the court said: "We discover, upon principle, no sufficient reason why petitioner's conduct in the premises should not produce just as effective an estoppel as if she had received the proceeds of a void judgment for money. By her subsequent marriage, with Israel, during Arthur's lifetime, she accepted, so far as was within her power, the benefits or privileges of the divorce decrees. The fact that she did not then know that those decrees were void is a matter of no more consequence than is the ignorance in this respect of one who, knowingly in all other particulars, receives the fruits of an ordinary void judgment at law." In *Yorston v. Yorston*, 32 N. J. Eq. 505; *Richerson v. Simmons*, 47 Mo. 20; *Whittaker v. Whittaker*, 51 Ill. App. 263; *Sedlak v. Sedlak*, 14 Or. 540, 13 Pac. 452; *Richardson's Estate*, 132 Pa. 292, 19 Atl. 82.

The following cases are to the same effect: *Yorston v. Yorston*, 32 N. J. Eq. 505; *Richerson v. Simmons*, 47 Mo. 20; *Whittaker v. Whittaker*, 51 Ill. App. 263; *Sedlak v. Sedlak*, 14 Or. 540, 13 Pac. 452; *Richardson's Estate*, 132 Pa. 292, 19 Atl. 82. The appellant cites *Norton v. Tufts*, 19 Utah, 470, 57 Pac. 409, and *Sammons v. Pike*, 108 Minn. 291, 120 N. W. 540, 122 N. W. 168, 23 L. R. A. (N. S.) 1254, 133 Am. St. Rep. 425, in support of the opposite doctrine. In *Norton v. Tufts* there was no previous divorce, but only a so-called "church divorce," under the sanction of the Mormon Church. In point of law it was no more than an agreement of separation, but the parties supposed it to be a dissolution of the marriage. Both of them married again. It was held that she remained his wife and was not estopped to claim dower in his land against one who had taken a mortgage from the husband. Inasmuch as there was not even the semblance of legal proceedings for a divorce, to hold that an estoppel arose from the subsequent marriage would be the equivalent of saying that a divorce could be secured by contract. In *Sammons v. Pike*, there was no subsequent marriage by the wife, nor even acquiescence by her in the divorce,

except so far as mere inaction constituted acquiescence. The cases do not apply to the facts here, under considerations, and the judgment is affirmed. 69 Cal. 387, 390. We concur: SLOSS, J.; LAWLOR, J. *JORDAN v. BEALE* (Cal., 3491) (Supreme Court of California, March 2, 1916.)

1. TAXATION—§ 879(7)—SALE BY STATE—VALIDITY—PRICE—STATUTE—Under Pol. Code, § 3897, providing that no bid for land sold to the state for taxes shall be received or accepted at sale by the state for less than the amount of all taxes, all costs and penalties, and all expenses where the notice of sale, published by the tax collector, stated that the taxes and interest due upon the land amounted to \$35.22, while the cost of advertising was \$5, a total of \$40.22, the sale of the property for \$35.22, was invalid. *Ed. Note.*—For other cases, see Taxation, Cent. Dig. § 1361, 1362; Dec. Dig. § 879(7).

2. TAXATION—§ 796(3)—SALE BY STATE—OWNER'S RIGHT TO OBJECT—STATUTE—Under Pol. Code, § 3780, 3817, giving the owner of land sold for taxes the right to redeem until the state has disposed of the land, the person liable for a tax may complain of the invalidity of a sale by the state, as violative of section 3897, providing that no bid for the land shall be received or accepted for less than the amount of all taxes, costs and penalties, and expenses, since the owner may redeem by paying the amount due, with expenses and interest, while section 3897 informs him that his right will remain until some purchaser at least bids an equal amount.

Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1580; Dec. Dig. § 796(3).

3. QUIETING TITLE—§ 35(1)—PLEADING DEFENSE—ADVERSE POSSESSION.

In a suit to quiet title, where defendants filed a cross-complaint alleging title in one of them as trustee, asking to have it quieted, which cross-complaint the plaintiff answered, going to trial on the issues so raised, defendants could rely on adverse possession as a source of title without specifically pleading it in their answer.

Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 73; Dec. Dig. § 35(1).

4. ADVERSE POSSESSION—§ 114—SUFFICIENCY OF EVIDENCE.

In suit to quiet title, evidence held insufficient to establish actual adverse possession of the property by defendants.

Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 683, 685, 686; Dec. Dig. § 114.

5. ADVERSE POSSESSION—§ 13—ESSENTIALS.

To be adverse, possession must be under a continuous claim of title, hostile to that of the opposing party, for the period prescribed by law.

Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65, 67-76; Dec. Dig. § 13.

In Bank Appeal from Superior Court, Kern County; *J. W. Mahon*, Judge. Suit to quiet title by John C. Jordan against Truxtun Beale, trustee, and others. From a judgment for defendants, plaintiff appeals upon the judgment roll and a bill of exceptions. Reversed.

Wattins & Blodgett, *Pellam & Thomas*, *Scott*, respondents, versus *SLOSS, J. W.* The plaintiff, in the usual form to quiet title, sought to quiet title in a land situated in Kern County, California, answered, denying and filed a cross-complaint asserting ownership of the same, and title quiet claims. Plaintiff answered. The court found that the defendant, trustee, was the owner entitled to their possession, accordingly. The court, on the judgment roll, attacked the defendant's support of the title, with regard to the ownership. Title was originally under a United States land Beale, trustee, claim for delinquent taxes. Evidently by virtue of adverse property was sold to the failure to pay taxes, the collector's deed to the August 1, 1901. Sale by a trustee was made, and a deed executed on corrected deed was made. The plaintiff attacked both the sale to the state and the sale by the state on a void will be unnecessary to answer we are satisfied that the points made, is fatal to respondent's claim under the deeds from both the original and the show that the property was of \$35.22. The notice of the tax collector, as required by the Political Code, stated that the interest due upon the \$35.22, advertising \$5.00 appears, therefore, that for less than the amount of the taxes and interest, the state last quoted, while the state was to bid for the property. No bid shall be received for less than the amount of the taxes and interest, for every year delinquent rolls for said year, execution of the deed to the state, together with interest. The section contains, upon a resolution of the state controller, authorization direct the tax collector for a smaller, or larger, amount, but this is the exception. On the other hand, the collector's authorization, which expressly declares that the collector shall not be liable for any amount in excess of the amount of the taxes and interest due upon the property.

the decree came final upon the original trial for a new trial. Defendant's counsel contend that the notice of motion for a new trial was not filed within the time authorized by the statute, and, for that reason, the motion did not have the effect of extending the time for taking an appeal. The interlocutory decree of divorce, as we have seen, that decree was entered on November 6, 1913, or more than six months prior to the 19th day of June, 1914, when the notice of appeal was served and filed. Yet counsel for the plaintiff insists that the notice of appeal was served within proper time for two reasons: (1) Because the notice of the original decision was served on the plaintiff; and (2) because the decree was the same as if entered on December 20, 1913, and hence as appeal might be taken at any time within six months from that date, and inasmuch as the notice of appeal was served on the 19th day of June, 1914, it was served within six months from the date the judgment or decree was entered. As we have before stated, we think that the record is conclusive that the decree was entirely in favor of the plaintiff, and that the same was prepared by her attorneys. The statute requiring the filing of a notice of motion for a new trial was not intended to apply to a case in whose favor the decision was given. The party who has prepared the findings of fact and conclusions for the court to sign. The party who prepared the findings of fact and conclusions, and decree, must file a notice of motion for a new trial. In *Jensen v. Lichtens*, 100 Pac. 1133, we deemed it to be the decision, and hence is not entitled to further notice thereof. The plaintiff is not entitled to notice of the decision in the divorce proceedings, and hence her notice of motion for a new trial was not used to extend the time within which to take an appeal. [2] Plaintiff's counsel, however, insists that, though that be conceded, the decree did not become final until December 20, 1913, when it was amended in the parties' favor. We are of the opinion that in view of the record in this case the amendment in question did not have the effect intended for by plaintiff's counsel. The alleged amendment, or change, was merely to make the decree conform to the actual decision made by the court. The amendment, therefore, related back to the time when the decree was originally entered, and did not have the effect intended for by counsel, namely, that it was the same as if a new decree had been entered as of that date. The plaintiff, therefore, was required to file notice of appeal within six months from the entering of the interlocutory

if she intended to appeal from that decree, as pointed out in *Parsons v. Parsons*, 40 Utah, 602, 122 Pac. 907, and *Custer v. Custer*, 41 Utah, 575, 126 Pac. 880. That it is manifest she has not done. The motion to dismiss the appeal from the interlocutory decree must therefore prevail.

There is, however, another phase of the case which requires consideration. As already stated, the action was originally commenced for separate maintenance. Notwithstanding that fact, however, the plaintiff asked for permanent alimony in her original complaint in the following words:

"That the court assign and set apart and decree to her, as alimony for the permanent support of herself and her said minor child, such amount of the earnings of the defendant as the court in its discretion may deem just and equitable."

When the complaint was amended by asking for a divorce, the prayer for permanent alimony as given above, was stricken out. The court, in its interlocutory decree, however, did not grant the prayer for permanent

alimony. As we have before stated, nothing is made to appear in the record of fact or conclusion as to why permanent alimony was allowed. In view of the fact that no permanent alimony had been granted by the court in the interlocutory decree, that allowance of only \$50 per month had been made therein for the support of the child on the 8th day of June, 1914, and filed her notice of motion for an increase to her of permanent alimony, she also asked for an increase in the allowance for the child as aforesaid. The defendant, on the 10th day of September, 1914, filed a motion in which he moved the court "to dismiss said motion for alimony upon the ground that the matter of alimony had been adjudicated."

Two days thereafter the court granted defendant's motion and dismissed plaintiff's motion for permanent alimony. The court also granted the support of the child. The plaintiff, in her application, in substance alleged that since the interlocutory decree a divorce was entered her physical condition by reason of bodily injuries sustained that she was unable to support herself and her child, and that the defendant's earnings were then sufficient to support the making allowance of alimony for her, and to permit an increase of the allowance for the support of the child. All these allegations and averments were contained in papers and affidavits on file in the case. The court, it seems, did not consider the allegations and averments, or changed position of the plaintiff, but entered an order or judgment dismissing the motion on the ground that the matter had been adjudicated.

The interlocutory decree, therefore, granted the support of the child, and also granted a separate allowance of alimony for the plaintiff.

The court, in its interlocutory decree, also granted the support of the child, and also granted a separate allowance of alimony for the plaintiff.

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peal from that order or judgment, and now insists that the court erred in that regard. Defendant's counsel contend that plaintiff's appeal must fail for two reasons: (1) Because the bill of exceptions in which the proceedings are recorded was not settled in time; and (2) because the matter of alimony was adjudicated in the interlocutory decree. And they further assert that, because the appeal from that decree failed for the reasons before stated, we are powerless to review the question.

The contention that the bill of exceptions which contains the matters relating to the second appeal was not settled in time cannot prevail. As to those matters the bill was settled in accordance with the requirements of our statute, and hence we are required to consider the matters therein contained, in so far as they have any bearing on the second appeal. The question of whether the matters covered by the second appeal have been adjudicated in the interlocutory decree, and should have been reviewed on the appeal from that decree, if reviewed at all, remains to be considered. It is doubtless true, as contended by defendant's counsel, that where the court allows, or disallows, alimony in the interlocutory decree by which a divorce is granted, the party aggrieved, in the absence of fraud, must review the question on an appeal from that decree, and, in case no appeal is prosecuted from that decree within the time prescribed by our statute, the matter of alimony, like all other matters included in the divorce proceedings, is concluded by that decree. While it is true that in attempting to appeal from the interlocutory decree the plaintiff sought to have reviewed the court's refusal to allow her permanent alimony, yet that fact, standing alone, is not necessarily fatal to her second appeal. Her second appeal is based upon Comp Laws 1907, § 1212 as amended by chapter 109 Laws Utah 1909. That section reads as follows:

When an interlocutory decree of divorce is made, the court may make such order in relation to the children, property, parties, and the maintenance of the parties and children as shall be equitable. Provided, that if any of the children have attained the age of ten years and are of sound mind, such children shall have the privilege of selecting to which of the parents they will attach themselves.

"Subsequent changes, or new orders, may be made by the court in respect to the disposal of the children or the distribution of property, as shall be reasonable and proper."

Her counsel contends that, inasmuch as it was made to appear in plaintiff's application that after the interlocutory decree was entered her physical condition had changed by reason of the alleged injuries, and that the defendant, when the application was made, was earning sufficient money to authorize an allowance for alimony and an increase in the allowance originally made for the child she was at all events entitled to have the court consider her application and make

findings of fact and conclusions of law thereon. That, counsel contends, is what is contemplated by the statute, we have quoted above. The contention seems reasonable. The statute in terms provides that "Subsequent changes or new orders may be made by the court in respect to the disposal of the children, or the disposition of the property as shall be reasonable."

Defendant's counsel, however, contend that, if the court had in the interlocutory decree granted the plaintiff some amount as permanent alimony, then the court could, upon application and showing, have changed such an allowance; but they insist, nevertheless, that the court made no allowance whatever, and therefore there is nothing to change, and hence the only way that a modification or change in the interlocutory decree could have been effected in that regard was by timely appeal to this court, and upon a review of the evidence produced before the trial court. We think the Legislature in adopting the statute intended to, and did, enlarge the common-law powers of our courts. We also think that the Legislature possessed ample power to pass such a statute. The statute must therefore be given a reasonable construction and application. Although the language is general in permitting "subsequent changes and new orders" to be made, yet we think it was not thereby intended that the courts could at any time review their own former orders or decrees respecting the allowance of alimony, etc., and are of the opinion that what was contemplated by the statute was that where a court had granted a decree of divorce and allowed alimony, or had made distribution of property and disposal of children, either party could thereafter come into the court and allege that since the entry of the original decree material and permanent changes had taken place, by reason of which the allowance of alimony, as made, was either excessive or insufficient under the changed conditions, and that for that reason the allowance should either be increased or decreased, as the case may be, or the distribution of the property, or the disposal of the children, as made, should be changed so as to reflect justice between the parties.

To illustrate. Suppose that after a fixed sum as permanent alimony was allowed to the wife, she, while still unmarried, should suffer serious personal injuries, and by losing her property, if she had an allowance made to appear that her former husband had ample means to supply her wants, should not the court change or modify the former allowance or make a new

that regard, if necessary, in the divorced wife from being charge? Again, suppose that the time a divorce is granted means, and the court makes an allowance to the wife as alimony, periodically or otherwise for a certain time, and suppose, further, that the husband, after the divorce, and after the time for which the allowance was made, suffers financial reversal, or, if not all, of his property is injured physically, or loses the allowance theretofore made. Why should not the court, upon application and proof and conditions, decree by decreasing or setting aside the allowance theretofore made. Under such circumstances was permanent alimony awarded before it was made in *Buzzo v. Buzzo*, 148 Pac. 3d 381. Why should not a divorced wife be required to increase the allowance for the maintenance of his minor child of which was awarded to her wife, in case it was made to be permanent after the allowance was made for a reason of serious illness, or original allowance is no longer sufficient for its maintenance and support. The foregoing, however, are questions, and are not intended to be decided within which modification of allowances may be made upon application and proof and conditions. We have set them forth for the purpose of showing various conditions that may exist in granting of the original decree, and the changes or new orders made, without giving the court power to review their own orders in the facts existing at the time made. We do not think the Legislature intended that the courts should review allowances made by them for divorce proceedings, but what we think is that, where material changes have arisen after the decree, which conditions were not, at the time made, considered or passed upon by the courts, then, upon proper application and proof, the courts may make changes or new orders respecting the allowance of alimony or the distribution of property or the disposal of children. If a party is dissatisfied with the original allowance or distribution of property or disposal of the children, he must make timely appeal to review the original decrees in that regard, and upon review must be had upon the facts existing at the time the original decree was made. If the conditions have changed, as before stated, the changes or

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that regard, if necessary, in order to prevent the divorced wife from becoming a public charge? Again, suppose that a husband at the time a divorce is granted has ample means, and the court makes a liberal allowance to the wife as alimony, to be paid periodically or otherwise for a definite period of time, and suppose, further, that in such a case the husband, after the decree is entered, and after the time for an appeal has elapsed, suffers financial reverses and loses the most, if not all, of his property, or he is injured physically, or loses his health, and the allowance theretofore made for the divorced wife is no longer just and equitable; why should not the court, upon such a statement of facts being shown, modify the decree by decreasing or setting aside the allowance theretofore made? A change under such circumstances was permitted, even under the statute before it was amended. See *Buzzo v. Buzzo*, 148 Pac. 362. Moreover, why should not a divorced husband be required to increase the allowance made for the maintenance of his minor child, the custody of which was awarded to the divorced wife, in case it was made to appear that after the allowance was made the child suffered permanent physical injuries, or by reason of serious illness, or otherwise, the original allowance is no longer just or sufficient for its maintenance and support?

The foregoing, however, are mere illustrations, and are not intended as fixing the limits within which modifications of existing allowances may be made upon the proper applications and proof and under changed conditions. We have set them forth only for the purpose of showing that there are various conditions that may arise after the granting of the original decree that may require the changes or new orders spoken of in the statute respecting the original allowances made, without giving the courts the power to review their own allowances upon the facts existing at the time they were made. We do not think the Legislature intended that the courts should review the allowances made by them for alimony in divorce proceedings, but what was intended was that, where material new conditions have arisen after the decrees were made, which conditions were not, and could not have been, considered or passed on by the courts, then, upon proper application and proof, the courts may make "subsequent changes or new orders" respecting the allowance of alimony or the distribution of property or the disposal of children. Where a party is dissatisfied with the original allowance or distribution of property, or the disposal of the children, he must prosecute a timely appeal to review the court's orders or decrees in that regard, and in such cases the review must be had upon the evidence adduced upon the original hearing. When the conditions have changed, however, as before stated, the changes or new orders

must be based upon the allegations of the changed conditions and the evidence in support thereof.

We think, therefore, the district court should have heard the evidence in support of plaintiff's application, and should have made findings of fact and conclusions of law upon the evidence, and entered judgment accordingly. By what we have said we do not mean to be understood as holding that the court should have made an additional allowance in this case for the child, or should have made an allowance of alimony in favor of the plaintiff. Applications that are made for a change of allowance, or which require new orders, must first be submitted, considered, and passed on by the trial courts, and those courts must make findings of fact and conclusions of law thereon and enter their judgments accordingly. In that regard much must be left to their discretion, and all we have the power to do is to review their judgments; the same as in other cases.

In conclusion, we remark that the record presented to us is very incomplete, imperfect, and unsatisfactory. This condition, we think, was brought about by two causes: (1) For the reason that different counsel represented plaintiff from time to time pending the proceedings; and (2) that because of appellant's poverty she was unable to advance any money to counsel for costs and expenses, either to prosecute her case or in preparing it on appeal, all of which is made to appear from her affidavit of impecuniosity filed in this court. Notwithstanding the condition of the record, however, we have given it full force and effect, except where the defects were jurisdictional. In view that neither party advanced any money for printing, nor for other purposes in this court, we make no allowance for costs. The district court may, however, make such allowance to the plaintiff in presenting her application as to it may seem just and equitable. Since writing the foregoing the Chief Justice has handed me his opinion, in which he, in part, dissents from the conclusions reached herein. I have carefully considered what is said by the Chief Justice, and have also again carefully reviewed my conclusions, and, while I agree with much that he says, yet I must confess my inability to yield to the conclusions reached by him. I can see no way to escape the positive provisions of our statute. The Chief Justice, in effect at least, concedes that if the court, in the decree, reserves the right to make changes in the matters contemplated by the statute, then perhaps such changes may be made in the same action upon filing a proper application therefor. In my judgment, under our statute, the reservation exists to the same extent as though it were written into every decree. True, a proper application should be made, and, as I have pointed out in my

opinion, the court should not attempt a review of his former decree, but should limit any change strictly to the new conditions as they are alleged in the application and established by the evidence. It is often the case that courts deem themselves better qualified to determine what the law should be upon a given subject than the Legislature, and for that reason, by strict construction, practically fritter away the substance of a statute governing that subject.

As stated in the original opinion, in my judgment, our statute clearly confers powers upon the courts of original jurisdiction which they did not possess before it was adopted. These powers should not be minimized or construed away by the court of last resort, simply because that court may deem the power conferred unwise, or that by a careless court it may be too liberally applied, or even at times abused. All courts should exercise the powers conferred upon them carefully, prudently, and conscientiously, and the presumption is that they will do so until the contrary is shown. But in view that the Legislature has conferred the power, it is the exclusive prerogative of that body to withdraw it, or to modify it, if deemed wise to do so. I also concur with the Chief Justice that an application should be made in a formal manner, and that it should be stated therein, in clear and concise terms, just what the applicant complains of and what he desires to prove. While the application in this case is far from a model, yet, under the facts and circumstances, it was sufficient to apprise the court and the opposite party just what the applicant claimed. Nor did the court disregard the application because it was insufficient either in form or substance. For these reasons, I am still of the opinion that the former conclusions should prevail.

For the reasons stated the first appeal is dismissed, and the second is sustained. So far we are all agreed, but beyond this we are divided. For the reasons stated in my opinion I still think the order of the trial court dismissing the application to modify the decree should be reversed and the case remanded, with directions to reinstate the application and to proceed in accordance with the views expressed by me. To this my Associates, for the reasons stated by them in their separate opinions, do not agree, and their judgment in that regard must therefore prevail. The order of the court below dismissing the application to modify the decree, therefore, should be, and it accordingly is, affirmed.

[3] Ordinarily, under the statute, the affirmation of the judgment carries costs. In this case, however, the appellant, who was the former wife of respondent, files an affidavit of impecuniosity, and the appeal, therefore, is one in forma pauperis. We shall therefore make no order for costs in favor of respondent against his former wife, and

STRAUP, C. J. (dissenting): The plaintiff, in her amended complaint, asked for a divorce on the grounds of cruelty, permanent alimony, custody of the child, and an award for its support. The defendant denied the allegations of cruelty, and alleged that the plaintiff was addicted to the use of opiates and intoxicating liquors, and was guilty of adultery and licentious conduct. The court found the issues in favor of the plaintiff, granted her a divorce, awarded her the custody of the child and \$20 a month for its support, but awarded her nothing for alimony or counsel fees. Neither a motion for a new trial nor an appeal from that judgment was made or taken in time; hence the proceedings resulting in the judgment are not properly before us for review. Nearly a year after the judgment became final and irreversible, the plaintiff served and filed a notice that she, on a day named, would ask the court for an allowance of \$50 a month as permanent alimony, and an increase of \$20 a month for the support of the child. The notice, of course, was not verified, and was signed only by plaintiff's counsel. It stated that the motion would be based on the fact that since the decree the plaintiff had sustained personal injuries by accident which incapacitated her from earning a livelihood, and that it would be made upon "the records and files and minutes of this court in said cause and upon testimony of witnesses to be produced at the hearing of this motion." Nothing else was filed to invoke action to modify the decree. The defendant served and filed a motion that on a specified day she ask the court to dismiss plaintiff's motion on the ground that "the question of alimony has heretofore been decided and adjudged by this court by its decree herein, by which decree the said plaintiff is denied alimony." Both these motions came on for hearing. The court, first, hearing arguments on the defendant's motion, granted it, and dismissed plaintiff's motion to modify the decree. Then the plaintiff, as stated by her counsel, "to make a record," stated that she had to show that the defendant then was, and during the course of these proceedings, in this action was brought, had been earning in the neighborhood of \$200 a month, and that since the decree the plaintiff had sustained personal injuries," so that she is unable to do work which she could do prior to that time and had been doing, and that she is not able to earn wages or to do housework to any great extent, and is unable to earn a living by reason of those injuries, and by reason of injuries which she had received during the marriage which partially incapacitated her from doing housework, which is the only kind of work she is capable of doing; that those injuries have been greatly aggravated by this fall, and that particularly since that time she has been unable to earn anything more than probably

her board and room; and we ask for an allowance of alimony, both on the ground that it should have been originally awarded, and on the ground of the change of the condition of the plaintiff since the divorce, that she should have alimony awarded, and that the defendant is amply able to pay a reasonable allowance of alimony." It is thus seen that the modification of the decree was asked on error, and matters adjudicated in the original decree, and on the only new matter or changed conditions, that the plaintiff, since the decree, had by accident sustained personal injuries.

[4, 5] Now, I think the ruling an appealable order; but I think the motion to modify the decree was properly dismissed. I have no doubt that, under the statute, when judicial action is properly invoked, the court, as to orders which relate to alimony, custody of children, and awards for their support, when they are continuing and over which the court retains a continuing jurisdiction, is authorized on a proper showing to modify the decree in such particulars. But a further essential to such relief and which is universally agreed upon, is that there must be averments and proof of a change of circumstances or conditions of the parties. Thus I think the order awarding \$20 a month for the support of the child was, on such averments and proof, subject to modification. Such an order by its very nature is continuing. So also was the order awarding the custody of the child continuing and subject to modification according to changed conditions, circumstances, habits, and conduct of the parties. So also would be an order allowing alimony for a designated amount per month or other stated period, or until the happening of a contingency or contingencies. But where, upon issues and evidence, the question of alimony is set at rest, either by awarding a gross sum in lieu of all rights in and to the husband's property, or where, in lieu of all such rights specific property is in fee awarded to the wife, or where, upon issues and evidence adduced, no alimony whatever is awarded, then I think such an order is final and constitutes a full discharge, unless the order awarding no alimony is based upon grounds that the husband then had no property and no means with which to support the wife, and physically was unable to earn support for her, and that he thereafter acquired property, or otherwise became able to support her.

I know there are authorities which hold that a final judgment for alimony in gross is, even after the judgment, becomes irreversible, subject to modification on averments and proof of changed conditions and circumstances. But I believe the better rule and weight of authority to be against such a holding. The cases bearing on the question may be found in 7 Standard Ency. of Procedure, 842; 17 Century Digest, Divorce, § 692; 7 Decennial Digest, Divorce, § 245;

2 Nelson on Divorce, §§ 933a and 934. Except dicta stated in them, there is nothing in Read v. Read, 28 Utah, 297, 78 Pac. 675, or Buzzo v. Buzzo, 148 Pac. 362, to make against this. If an order allowing alimony in gross, or specific property in lieu of all rights in and to the husband's property, is final and res adjudicata, and not open to modification, except upon averments and proof of fraud, deceit, or misrepresentation in procuring the order, for just as cogent reasons do I think an adjudication upon issues and evidence awarding no alimony is likewise final and set at rest, and not subject to modification, except on averments and proof of fraud, deceit, or misrepresentation in procuring it.

Though it should be assumed that the order was continuing, both as to the disallowance of alimony and the award for the support of the child, still, I am of the opinion that the motion for a modification of the decree was properly dismissed, on the ground that judicial action for a modification was not properly invoked. To invoke such action it, of course, was not essential to bring a new action. The plaintiff could move for a modification in the main cause. But to do that it nevertheless was requisite to file a verified petition, or affidavit, or some pleading, setting forth the new matter, or facts constituting the changed conditions or circumstances of the parties. 7 Standard Ency. of Procedure, 844; 14 Cyc. 787. Nothing of that kind was filed, and until something of that kind was filed judicial action for a modification was not properly invoked. All that the plaintiff did was to serve and file a notice that she, at a specified time would apply to the court for a modification of the decree in the particulars stated in the notice. Such a notice but served the purpose of a summons or citation, or process to appear. It was no more traversable than is a summons or citation. As well could it be sought to take a judgment on a summons without a complaint as a modification of the judgment on a mere notice, without a petition or affidavit or some pleading calculated to invoke action and confer power. To sanction the latter requires but a further step to permit the former. If a party desires a modification of a decree which has become final and irreversible, there is no hardship in requiring the filing of a petition, affidavit, or some pleading setting forth the facts relied on, to invoke action and secure relief. I do not well see how such action may otherwise be invoked. To look at the notice itself for averments of facts is to confuse process with pleadings and to do violence to well recognized principles that pleadings, not process, are the juridical means of investing a court with jurisdiction to adjudicate; that the jurisdictional facts must affirmatively appear and be stated in the right pleading, that fundamental principles of procedure arise, not from process, but from organic law; and that the jurisdictional record, the right record, and

which generally is strictly construed, must sustain the order of judgment. Others in the proceedings will be regarded as coram non judice. Because no such petition or amendment, or other instrument in the nature of a pleading, was filed, I think the court was without jurisdiction to modify the decree in any particular, and that it therefore properly dismissed the motion. My reasons are as follows: Though the notice should be regarded as the juridical means to invest the court with jurisdiction to modify, yet, when it is looked to, it falls in substance. So far as it relates to the award for the support of the child, it is wholly wanting in facts, as it changed conditions or circumstances. The only new matter stated to modify the order of disallowance of alimony is that the plaintiff, since the decree sustained personal injuries. But it is not made to appear in what respect such alleged new matter was pertinent. Neither the findings nor the decree in the original cause show the specific ground on which the court denied the allowance of alimony. In this proceeding it must be assumed that the disallowance was based upon some good ground justifying it. If the court on the issues and evidence, erred in such respect, the error ought to have been corrected by a motion for a new trial or by appeal, which, as has been seen, were not invoked in time. The matter is therefore, stands as though no action was taken to correct what, if any, errors were made. Thus, must it be presumed that there were no errors and that the court properly and for good cause, disallowed alimony. The grounds upon which the disallowance was based are but inferable. It certainly was not done on the ground that the plaintiff had property, or herself had other means of support, for the undenied averments in the pleadings show that she had no property or other means of support. Neither was the disallowance made upon the ground of any disability of the defendant, for by his answer in the original cause it was admitted that he was a railroad engineer in the employ of a railroad company and that "his average earnings are about \$150 per month." Thus it would seem that the court disallowed alimony upon the ground of misconduct or misbehavior of the plaintiff. True, the court, in general terms, found the averments of the complaint to be true, and those of the answer to be untrue, from which it can be argued that the court found that the plaintiff was not guilty of the alleged misconduct in the answer. But the fact nevertheless remains that the court disallowed alimony, and it may be that after the court found the averments in the complaint to be true and those in the answer to be untrue, it most grievously erred in disallowing alimony. But, as before observed, if so, that ought to have been corrected by a motion for a new trial, or by an appeal. It cannot be corrected on an application for

modification of the decree, for that must proceed on the theory of new matter, and changed conditions and circumstances of the parties, which have arisen since the decree on facts fraudulently withheld. So unless it is made to appear by averments and proof that the disallowance of alimony was based on the ground that the plaintiff had ability to earn her own support and livelihood, and since became disabled, or that when the decree was rendered the defendant was without ability, and since became able, the fact that the plaintiff, since the decree, sustained personal injury affecting her ability to support herself is not pertinent. That the plaintiff, since the decree, sustained personal injury affords no ground to now review the ruling of the court in disallowing alimony, and now do what the court could have done on a motion for a new trial, or what we could have done on an appeal, correct the error, if, on such particular was made, and award alimony. That would be a most novel writ of error or review, or method to restore a lost appeal or motion for a new trial. If, on the other hand, the court disallowed alimony on the ground of misconduct of the plaintiff, then, of course, the fact that she, since the decree, sustained personal injury, would have no bearing on the modification of such an order. So I do not see how, on an application for a modification of the decree, the merits of a ruling made in the main cause may be reviewed, or the question of alimony thrown at large, as it seems was attempted by plaintiff's offer of proof, because she, since the decree, sustained personal injuries. I, therefore, think the plaintiff's motion to modify the decree was properly dismissed.

McCARTY, J., Comp. Laws 1907, § 121, so far as material here, provides:

"When a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties and children as shall be equitable. Subsequent changes may be made by the court in respect to the disposal of children or the distribution of property, as shall be reasonable and proper."

While the scope and intent of that part of the section which I have italicized is free from doubt, I am of the opinion that it can only be invoked for the purpose of securing "changes" in the distribution of property in cases where an order respecting distribution has been made. In other words, the phraseology, "subsequent changes of the distribution of property," presupposes that some order respecting distribution has been made. In this case no order respecting alimony or distribution was made by the court; hence I am of the opinion that the court was without jurisdiction to make an order of distribution.

I therefore concur with the reasoning and in the conclusions reached by the court.

McMILLAN, J., FOR SYLVESTER, J., Supreme Court of Utah, Dec. 11, 1907. *hearing denied Feb. 11, 1908.* *See also* 100 Pac. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

For other cases see same topic

exempt under the laws of the state or under this constitution in proportion to its value, to be provided by law. The words used in this article, is hereby included moneys, credits, bonds, and all matters and things, and mixed, capable of private use, these notes and accounts, partly, owned by the plaintiff, exempt either under the laws of the state or the constitution, article 3, section 13, of the constitution: "The legislature shall fix a uniform and equal rate of taxation on all property in proportion to its value in money, and by general law such regulations as shall secure a just valuation for taxation; so that every person shall pay a tax in proportion to his, her or its property." In exercising this authority, the legislature shall tax all taxable property at its full cash value." Rev. St. 1890, 516, Rev. St., provides that just before the first Monday of each year, ascertain the names of the inhabitants and all property subject to taxation, except such as is to be assessed by the state, and must assess such person by whom it was claimed, in whose possession or control, twelve o'clock m., of the first of January, next preceding, and file the same." Said notes and accounts, property belonging to the plaintiff, exempt from taxation, under the provisions of the statute, assess such property at its full value in the absence of fraud, or the fault upon the part of the assessor, of the value of said property, exclusive, unless changed, of the plaintiff, by the board of assessors. Application was made by the plaintiff to the board of assessors, section 2576, Rev. St., to correct the assessment, but, upon the showing by the plaintiff, refused to do so. It is the duty, by the constitution, to assess and valuation, for taxable property in the state, as provided the method for the valuation by the assessor, the correction of assessments, not subject to review by the facts presented in this case. Section 2518, Rev. St., making up the amount of tax, every person is required to list the same to deduct from the gross value, the amount of all bona

fide debts owing by him." The plaintiff, under this provision, was entitled to a deduction of all bona fide debts owing by him. But, in the case at bar, the plaintiff, at the date of the assessment, was not indebted to the insured. An indebtedness could only arise upon the happening of the contingency on which the liability of the plaintiff depended. The deduction claimed by plaintiff is not such as the constitution and the statute allow. *Insurance Co. v. Cappellar*, 38 Ohio St. 561-570; *State v. Board (La.)* 18 South 462; *Insurance Co. v. Pollak*, 75 Ill. 292-300; *Association v. Hill*, 51 Kan. 636-649, 33 Pac. 300, and cases cited; *People v. Davenport*, 91 N. Y. 574. The contingency did not deprive said notes and accounts of their character as personal property, but it materially affected both their intrinsic and marketable value, and in the assessment that fact should be considered. But, if the assessor fails to do so, and the board of equalization refuses to reduce the assessed valuation, the courts are powerless, in an action like the present one, to grant any relief. We are of the opinion that the demurrer was properly sustained. The judgment of the court below is affirmed, with costs.

BARTCH, C. J., and MINER, J., concur.

19 Utah, 150)

HOUSER v. SMITH et al.

(Supreme Court of Utah. March 28, 1899)

FRAUD—EVIDENCE—COMPETENCY—PERSONS NOT PARTIES—PROPERTY RIGHTS—JURISDICTION—EFFECT OF JUDGMENT—NECESSARY PARTIES.

1. Where no fraud is pleaded, evidence tending to show it is improper.

2. Courts have no right to dispose of and adjudicate upon property rights of persons not parties to the case and strangers to the record, and a judgment rendered against persons not parties to the action, and over whom the court acquired no jurisdiction, is absolutely void as to them.

3. When a complete determination of a controversy requires the presence of persons not already parties, section 3192, Comp. Laws Utah 1888, prescribes the procedure.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Action by Maggie S. Houser against Charles Smith and others. Judgment for defendants, and plaintiff appeals. Affirmed.

This is an action to quiet title and to recover possession of certain real estate described in the complaint. The record shows, in substance, that on February 19, 1889, the defendant Charles Smith was the owner of the premises described in the complaint, and on that day, in consideration of the sum of \$3,000, then paid to him in cash, he conveyed said premises to the purchaser, Joseph R. Morgan, by warranty deed, and that such deed was duly recorded on that day. The plaintiff, Maggie Smith Houser, was married to the defendant Charles Smith on June 4,

1890. This was over one year after such conveyance by Smith to Morgan. The defendant Smith first became acquainted with plaintiff in April, 1890, which was some time after such conveyance. On August 26, 1891, plaintiff brought suit against defendant Smith in Salt Lake county to procure a divorce, and a decree of divorce was granted to her December 23, 1892, and thereafter she married one C. A. Houser. Neither the defendants Joseph R. Morgan nor August W. Carlson were made parties to the said action, nor did either of them appear therein. On the same date an injunction was issued against defendants Smith and Morgan enjoining them from transferring or incumbering said real estate previously conveyed to Morgan. On the same day a summons was issued in said action, and served on Charles Smith April 26, 1891, but Morgan and Carlson were not named therein as defendants to the action. On the 2d day of September, 1891, Smith answered said complaint. On November 11, 1892, an order was issued, requiring Smith alone to show cause why Smith should not be required to pay alimony and expenses of the suit. This paper included a restraining order against defendants Smith and Morgan, forbidding the sale or incumbrance of the said land. This was served on Smith and Morgan November 15, 1892. On the 28th day of December, 1891, an amended supplemental complaint was filed by the plaintiff against the defendant Smith, but not served. This complaint charged that on the 12th day of November, 1891, Morgan, by instigation of Smith, had executed and delivered to the defendant Carlson, herein named, a mortgage of \$2,000 on said land, in violation of the order of the court, and charging the mortgage to have been fraudulently executed, and void, and asking to have the same canceled. Neither Morgan nor Carlson were made parties to this complaint, nor was summons issued or served upon them. On the 20th day of December, 1892, an order was made by the district court, requiring Smith and Morgan to show cause why they should not be punished for contempt in violating the order of injunction issued November 12, 1891, but in the meantime the parties plaintiff and defendant had compromised their difficulties, and had been living together for several months prior to the order. This order to show cause was served on Smith and Morgan December 20, 1892, but it does not appear that any hearing was ever had upon the order, and no action was taken thereunder. On the 11th day of November, 1892, Maggie Smith, the plaintiff herein, filed a second supplemental complaint against the defendant Smith. In this supplemental complaint it appears that, after filing the first complaint for divorce, the plaintiff and defendant had been reunited, and had been living together as husband and wife from November, 1891, to the 30th day of September, 1892. It is not charged, and does not appear from either complaint, that Joseph R. Morgan had been guilty of any fraud in

the transaction, except that he made the mortgage to Carlson on the land previously conveyed to him. It does not appear that this complaint was served upon any one. Neither Morgan nor Carlson were made parties to this complaint, and they did not appear in the action. On December 20, 1892, another order to show cause was issued against Smith, Morgan, and Carlson to show cause why they should not be punished for contempt. This was personally served, but no hearing was ever had upon it. All papers in the case were entitled "Maggie Smith vs. Charles Smith." After trial a decree of divorce was entered in the case on December 30, 1892. The decree granted the divorce prayed for in the complaint, and purported to adjudicate the rights of property, and to decree the deed from Smith to Morgan fraudulent and void, and the mortgage from Morgan to Carlson void, and to decree the plaintiff judgment for alimony, which was declared to be a lien upon said real estate, although neither Morgan nor Carlson were ever made parties to said action. After such decree, sale was made of said land to pay the alimony decreed to the plaintiff, and Carlson became the purchaser on the first sale to pay the first installment of alimony, and plaintiff became the purchaser under her decree at the second sale to pay the second installment of alimony. In this present action the plaintiff seeks to have her title quieted to said land under said decree and sale to her. In the present case before us the defendant Morgan answered, denying all the allegations in the complaint, and claims title to the land under his deed from Smith, made prior to his marriage, and asking to have the title quieted. Upon the trial the plaintiff endeavored to show the transaction fraudulent between Smith, Morgan, and Carlson, and the decree in the former action was introduced in evidence. Upon this hearing the court found, adjudged, and decreed the title to said land in Morgan, and also found that Smith conveyed the land to Morgan in good faith, for the sum of \$3,000, paid in cash, without any intent to hinder, delay, or defraud the plaintiff; that said consideration was paid, and the deed made to Morgan, before said Smith became acquainted with the plaintiff; that said Smith had no interest in said land since the sale to Morgan; that the said decree of the district court, declaring said deed to Morgan and the mortgage to Carlson void and fraudulent as to the plaintiff, was made in a case where neither said Morgan nor Carlson were parties defendant; that no summons or process was ever served upon them in the case as defendants, and that they never appeared therein as parties thereto; that their rights could not be adjudicated therein; that the court had no jurisdiction to make or cause to be entered any decree in the said action adjudicating their rights in or to said premises, and that said decree was of no force or effect as to the said defendants Morgan and Carlson, who were not made parties thereto; that the

sale of said property under said void decree was irregular and void, and carried no title to the purchasers as against said Morgan or Carlson. The plaintiff appealed from this decree, and claims that the findings of fact and decree are contrary to the evidence.

C. S. Patterson, for appellant, Booth, Lee & Ritchie, for respondents.

After stating the facts, MINER, J., delivered the opinion of the court.

It appears from this decree that in the case of Maggie Smith against Charles Smith no complaint was ever filed against Joseph R. Morgan or August W. Carlson, and no summons was ever served upon them in that action, nor did either of said parties ever appear, nor were they ordered to appear, therein. Writs of injunction were served, forbidding them from transferring or disposing of the property. No default was ever entered against them, or either of them, and there is no record in the decree that they were ever made parties; but it does appear that they testified as witnesses. It does appear from the testimony that the conveyance was made by Smith to Morgan more than a year before Smith knew, or was married to, the plaintiff. There is no fraud charged against Morgan or Carlson in the complaint as in any manner affecting the plaintiff. No effort was made to have Morgan or Carlson brought in as defendants in the case of Smith against Smith. Section 3192, Comp. Laws 1888, provides that "the court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and thereupon the party directed by the court must serve a copy of the summons in the action, and the order aforesaid in like manner of service of the original summons, upon each of the parties ordered to be brought in, who shall have ten days, or such time as the court may order, after service in which to appear and plead; and in case such party fail to appear and plead within the time aforesaid, the court may cause his default to be entered," etc. Appellant claims to rely upon section 3301, Comp. Laws 1888, and claims to have proceeded under that section; but this section was repealed in 1890. See Sess. Laws 1890, p. 17. If this section was in force, it would not be applicable to this case. On the trial of the case some evidence was offered tending to show fraud, but, as fraud was not pleaded, the evidence tending to show it was improper. *Wilson v. Sullivan*, 53 Pac. 994, 17 Utah, —. The plaintiff placed in issue her rights to the land in question under the decree and deed from the marshal. The defendants Morgan and Carlson were strangers to the proceedings under which the decree was obtained. This property

wrongfully and illegally decreed to belong to another party, without the owners being made parties to the action, or having any opportunity to be heard in court to defend the title thereto. After their rights to the property were made known to the court, no proceedings were taken, as provided by statute, to make either Morgan or Carlson parties, so that the title to the land could legally be determined. The defendants Morgan and Carlson alleged in their answer, and the proofs show, that they were not parties to the proceeding wherein Maggie Smith was plaintiff and Charles Smith was defendant, in which a decree was rendered declaring said deed from Smith to Morgan fraudulent and void. On the face of the record as shown, the decree in the case of Smith against Smith, in so far as it declares said deed and mortgage void, is wholly and absolutely void, and was rendered without jurisdiction over the persons or property of said Morgan and Carlson. It is not a question of collateral attack upon the judgment. The record presents a case where the judgment is shown to be absolutely void, and rendered against persons who were not before the court, and over whom the court had no jurisdiction. Courts have no right to dispose of and adjudicate upon the property rights of persons who are not parties to the case, and who are total strangers to the record. *Van Fleet, Coll. Attack, §§ 16, 494; Mosby v. Gisborn, 54 Pac. 121, 17 Utah, —*. We are of the opinion that the findings of fact and the decree are sustained by the evidence. We find no reversible error in the record. The findings and judgment of the district court are affirmed, with costs.

BARTCH, C. J., and BASKIN, J., concur.

(22 Mont. 391)

STATE ex rel. KNIGHT et al. v. HELENA POWER & LIGHT CO.

(Supreme Court of Montana. March 31, 1899.)

STREET RAILROADS—DUTY TO OPERATE—ORDINANCE—MANDAMUS.

An ordinance granting a street-railway company the right to construct and operate lines in certain streets, and providing that, if the company shall not construct and operate a certain portion of the line within a certain time, the right shall be forfeited, as to the parts where the failure occurs, does not impose on the company the duty to continue the operation of any portion of the line, and mandamus cannot issue to compel it to do so.

Appeal from district court, Lewis and Clarke county; Henry C. Smith, Judge.

Application by the state, on the relation of W. Knight, Jr., and another, against the Helena Power & Light Company, for mandamus to compel respondent to operate a portion of its line of street railway in the city of Helena. From a judgment sustaining a demurrer to the application, relators appeal. Affirmed.

Clayberg, Corbett & Gunn, for appellants. Toole, Bach & Toole and M. Bullard, for respondent.

PER CURIAM. Relators applied to the district court of Lewis and Clarke county for a peremptory writ of mandate requiring the respondent, a street-railway company, to operate a portion of its system. The affidavit in support of the petition or application discloses the following facts: That respondent is a corporation under the laws of Montana, and for several years last past has been, and now is, engaged in the business of operating street railways in the city of Helena; that on July 13, 1889, and on October 8, 1890, by two several ordinances of the said city there were granted to the predecessors in interest of the respondent the right, license, franchise, and easement of laying down and maintaining in certain streets of Helena a street-railway track, and of operating a line of street cars thereon, by which ordinances it was, among other things, substantially provided that unless the grantees, or their successor or assigns, should within a certain period of time construct and operate a designated portion of the line of railway, the right and privilege so granted would be forfeited as to the parts of the line where the failure occurred; that by section 12 of article 8 of chapter 19 of the Revised Ordinances of the City of Helena of 1890 it is provided: "On all routes the cars shall be run for such number of hours each day, and at such intervals, and allowed to stand for such length of time at either terminus of the road, as the city council may from time to time direct by resolution or order;" that in 1894 respondent succeeded to the rights of the original grantees named in the ordinances; that the respondent, after acquiring the rights granted by the ordinances, operated the railways from 1894 until June 30, 1898, and that on or about the date last mentioned it refused to run its cars on its line known as the "Lenox Addition Line," or to operate the same, although requested so to do, and has abandoned the same, and threatens to, and will, unless otherwise directed, take up and destroy the track built to and through the Lenox addition; and that the railway company is fully equipped with apparatus necessary for its operation. Respondent demurred for insufficiency. The demurrer was sustained, and a judgment entered dismissing the application. Relators appeal.

The writ of mandate may be issued to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. Code Civ. Proc. § 1961. Is the operation of the line of street railway which respondent has abandoned an act specially enjoined as a legal duty? We think it is not. It does not appear that the charter of respondent, or the statute under which it was organized, requires it to maintain or operate a line of railway; nor is it

KELSEY v. MILLER. (L. A. 8539.)

Supreme Court of California. Jan. 5, 1928.

1. Husband and wife \S 14(3)—That wife aided husband's divorce from former wife did not per se work forfeiture of her right to procure joint tenancy deed of property purchased with her funds.

That wife, before marriage, counseled, aided, assisted, and abetted husband's divorce from former wife did not per se work a forfeiture of her right to dispose of her property on same terms as others, as by procuring execution of joint tenancy deed to property paid for with her funds.

2. Deeds \S 196(3)—Evidence in suit to annul joint tenancy deed held to rebut presumption of husband's undue influence over wife (Civ. Code, \S 158, 2235).

In administrator's action against decedent's husband to annul joint tenancy deed, evidence held to rebut presumption of undue influence by husband, under Civ. Code, \S 158, 2235.

3. Husband and wife \S 266—Marriage \S 11—Invalidity of one divorce decree would not inevitably nullify husband's subsequent marriages and acquisition of property rights from later wife.

Invalidity of one divorce decree for want of jurisdiction to render it would not inevitably nullify husband's subsequent marriages and transactions whereby he obtained property rights from subsequent wife.

4. Divorce \S 65—Wife's pro confesso, filed in husband's divorce suit, constituted appearance, giving court jurisdiction of defendant.

Pro confesso, executed by wife and caused to be filed as record in husband's divorce suit, reciting that she waived notice, copy, pleading, and term, and agreed to immediate trial, constituted appearance, giving court jurisdiction of defendant.

5. Divorce \S 329—Evidence held not to show fraud or collusion invalidating husband's foreign decree of divorce from former wife.

Evidence held not to show fraud or collusion, invalidating foreign divorce decree granted husband in suit brought by him against former wife without substituted service after she filed bill for divorce against him in another state.

6. Divorce \S 326—Parties remarrying are estopped to deny validity of foreign divorce.

Parties to foreign divorce decree are estopped by remarriage to other persons to deny validity of decree, even if void on collateral attack as showing want of jurisdiction on its face.

7. Divorce \S 327—Husband requesting wife to accompany him to another state, qualifying himself to practice medicine therein, remaining there some time, and not returning to former state, held bona fide resident when granted divorce therein.

Husband requesting wife in good faith to accompany him from Massachusetts to Tennessee, qualifying himself to practice medicine in

latter state, remaining there several months after sanitarium of which he was medical director closed, and not returning to Massachusetts, but going to and remaining in California, held a bona fide resident of Tennessee at time of divorce decree granted him therein.

8. Divorce \S 326—Tennessee divorce judgment will not be held invalid on collateral attack for failure to allege plaintiff's residence in state and defendant's desertion or absence for statutory time (Shannon's Code Tenn. \S 4203, and \S 4201, subds. 4, 8).

Judgment of divorce, granted in Tennessee will not be held invalid on collateral attack because statutory requirements of two year's residence by plaintiff in that state and desertion or absence of defendant for two years (Shannon's Code Tenn. \S 4201, subds. 4, 8, and section 4203) were not alleged in complaint nor incorporated in judgment.

9. Evidence \S 80(1)—Laws of another state are presumed same as those of state on similar subjects.

Supreme Court must presume, in absence of contrary showing, that laws of another state are the same as those of California affecting similar subjects.

10. Judgment \S 503—Judgment of court having general jurisdiction of subject-matter cannot be successfully attacked collaterally because of imperfect or defective complaint.

Judgment of court having general jurisdiction of subject-matter cannot be successfully attacked in collateral proceeding because of imperfect or defective complaint in action in which rendered; judgment in accord with prayer of such complaint being nothing more than error.

11. Divorce \S 168—Failure to allege plaintiff's residence for statutory time does not affect court's jurisdiction as respects collateral attack (Civ. Code, \S 128).

As respects collateral attack, failure to allege that plaintiff in divorce suit resided in state and county in which brought for time prescribed by Civ. Code, \S 128, does not affect court's jurisdiction to hear and determine action, if it obtained jurisdiction of defendant.

12. Divorce \S 327—Divorce obtained on substituted service outside state of matrimonial domicile by simulating residence therein may be held void in any other state.

Where one spouse goes to another state than that of matrimonial domicile, and there obtains divorce under residence simulated for such purpose and not in good faith, judgment is not binding on courts of other states, and may be held void therein on proof of fraudulent residence and substituted service only.

13. Marriage \S 40(1), 50(1)—Proof of prior marriage and parties' continued life is insufficient to make case against second ceremonial marriage but proof that first marriage was not set aside is required.

Mere proof of prior marriage and continued life of both spouses is not sufficient to make a case against second ceremonial marriage, but there must be further showing that first marriage had not been set aside by judicial decree.

14. Marriage \Rightarrow 40(1)—Legality of marriage regularly solemnized is presumed.

There is a very strong presumption in favor of the legality of a marriage regularly solemnized.

15. Marriage \Rightarrow 40(1)—In view of burden of proof, parties to regular marriage in state were husband and wife, absent evidence that husband was not divorced from former wife.

In absence of testimony in former wife's deposition as to whether she had obtained divorce decree or affirmative showing that husband had not obtained valid decree against her, he, and one whose marriage to him was regularly solemnized in California after foreign divorce decree assailed as void were husband and wife under laws of such state whatever their marriage status before, in view of burden of proof on one attacking second marriage.

16. Divorce \Rightarrow 168, 172—Final divorce decree is binding on all as to determination of marital status, and immune from collateral attack on other than statutory grounds (Code Civ. Proc. \S 1916).

Final divorce decree, being a judgment in rem establishing and dissolving matrimonial status is binding on all the world as to determination of such status and immune from collateral attack on grounds not specified by Code Civ. Proc. \S 1916.

17. Divorce \Rightarrow 1—Marriage \Rightarrow 2—Marriage and divorce are questions of public policy largely within state's sound discretion.

Marriage and divorce are questions of public policy committed largely to sound discretion of the several states.

18. Marriage \Rightarrow 40(1)—Judgment upholding marriage status of persons seriously affected must be sustained, if reasonably possible.

Policy of law requires that trial court's judgment upholding marriage status of persons seriously affected thereby be sustained, if reasonably possible.

19. Witnesses \Rightarrow 204(1)—Letter instructing attorney to get writer's share of property for his children by former marriage if anything happened to him and wife held inadmissible as privileged.

In action to annul joint tenancy deed to plaintiff's decedent and her husband, letter from husband to his attorney, stating that he wanted latter to get husband's share for his children by former marriages, "for whom I am doing many of these things," if anything happened to him, and wife on automobile trip, held properly excluded from evidence as privileged and of little, if any, relevancy.

In Bank.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Frank M. Kelsey, special administrator of the estate of Mary Moore Miller, deceased, against Jared H. Miller. Judgment for defendant, and plaintiff appeals. Affirmed.

Anderson & Anderson, Victor T. Watkins, and John L. Richardson, all of Los Angeles, for appellant.

Kimball Fletcher, A. P. Thomson, MacDonald & Thompson, and Hunsaker, Britt & Cosgrove, all of Los Angeles, for respondent.

SEAWELL, J. This appeal, L. A. No. 8539, which will presently receive our attention, is the first in numerical order of three separate appeals pending in this court from judgments affecting the estate of Mary Moore Miller, deceased. The second appeal, L. A. No. 8894, 263 P. 213, is entitled "Frank M. Kelsey, as Special Administrator of the Estate of Mary Moore Miller, Deceased, Plaintiff and Appellant, v. Jared H. Miller, Defendant and Respondent, Security Trust & Savings Bank, a Corporation, Citizens' National Bank, a Corporation, and Citizens' Trust & Savings Bank, a Corporation, Defendants," and was taken by the special administrator from a judgment awarding plaintiff costs only in an action brought to compel Jared H. Miller to account to said estate for all moneys belonging to said Mary Moore Miller which might have come into his hands or that were received by him from her during a seven-year period of assumed marital relations, which was terminated by her death, and during which period of time said Jared H. Miller and Mary Moore Miller held themselves out to be and lived together as husband and wife. Said third appeal, L. A. No. 9013, 263 P. 214, entitled "George W. Moore, Contestant and Respondent, v. Jared H. Miller, as Executor of the Estate of Mary Moore, Deceased, Lillian Hays, Formerly Lillian Miller, and Russell C. Miller, Respondents and Appellants," was taken from a decree revoking the probate of the last will and testament of said Mary Moore Miller, deceased. All of said actions, including the instant case, were doubtless brought on behalf of the collateral kindred of said decedent and arise out of the same state of facts and involve many similar issues of law and fact.

The complaint herein L. A. No. 8539, which was twice amended, will be referred to as the "complaint," rather than as the "second amended complaint." The action was brought to obtain a decree of annulment of a certain deed, dated November 10, 1915, wherein the grantees, Mary Moore Miller, since deceased, and her husband, Jared H. Miller, defendant and respondent, were named as joint tenants, with the right of survivorship, in and to lot 35, Kensington Place, situate in the city of Los Angeles, and valued at \$16,500. The money furnished to pay the purchase price of said real property was taken from funds acquired by the wife before marriage. Incidental to the main purpose of the action, plaintiff prays, as the special administrator of said estate, to be let into the possession

to be compensated, under the evidence for pain and suffering and a loss of 22½ days wages, irrespective of prospective damages, which the jury and trial court evidently doubted. Obviously, the jury failed to consider these items of damage. The verdict was defective in form in that it did not comprehend all the items of damages contained in the instructions given by the court, it was therefore insufficient.

* * * * *

If counsel be permitted to remain mute when a verdict is insufficient or informal, he gains an unfair strategic advantage [and since] there must be reasonable rules to control the termination of litigation, if counsel has an opportunity to correct error at the time of its occurrence and he fails to do so, any objection based thereupon is waived.¹⁸

[8] In the present case the plaintiff alleges the verdict is insufficient as to damages suffered as a result of the delivery of the Warranty Deed. The plaintiff was under a responsibility to object to this patent insufficiency at the time the verdict was rendered. Since the plaintiff did not avail himself of the opportunity to object to the verdict before the jury was dismissed, any later objection to its insufficiency is waived.¹⁹

CROCKETT, C. J., and WILKINS, HALL and STEWART, J.J., concur.



18. *Id.*, 491 P.2d at 1214.

19. The plaintiff could realize definite advantage in the present case because of the complexity of the factual issues involved, the duration of the trial and the vast volume of evidence presented. The instructions given to the jury by the court apprised them of the applicable law governing the recovery of damages in this action. In those instructions the jury was told that in determining the liability of the defendant Sather the jury was to consider the possi-

Sheila Penrose Larsen LAND, Plaintiff
and Respondent,

v.

William Dennis LAND, Defendant
and Appellant.

No. 16238.

Supreme Court of Utah.

Jan. 22, 1980.

On cross motions to modify a divorce decree, the Third District Court, Salt Lake County, Christine M. Durham, J., entered an order for appraisal of certain real property and for conveyance by the husband to the wife. The husband appealed, and the Supreme Court, Hall, J., held that the trial court acted within its discretion in applying the commonly accepted definition of the term "equity" in interpreting a written stipulation of the parties which was incorporated into the divorce decree.

Affirmed.

Maughan, J., concurred in the result.

1. Divorce ⇐252.2

In dividing property between divorcing spouses, trial court is governed by general principles of equity. U.C.A.1953, 30-3-5.

2. Divorce ⇐164

Court which issues divorce decree retains continuing jurisdiction over the parties and may modify the decree due to a change in circumstances, equitable considerations governing.

bility of mitigation of damages by Ute-Cal's tender of the monies expended by Sather as guarantor of the loan. They were also instructed on the restrictions to awarding speculative damages and the plaintiff admitted the exact amount received as rents could not be calculated. The plaintiff had ample opportunity to present evidence concerning the damages suffered during the trial and no injustice is rendered by denying the plaintiff an opportunity to "try again" with a new jury.

3. Divorce ⇐ 249.2

When a divorce decree is based on a property settlement agreement devised by the parties and sanctioned by the court, equity must take the agreement into consideration.

4. Equity ⇐ 23

Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made.

5. Divorce ⇐ 249.2, 254(2)

The trial court has discretion to adopt or reject an agreement between divorcing parties as part of the original decree or a modification thereof, as equity may dictate.

6. Husband and Wife ⇐ 279(2)

The law limits the continuing jurisdiction of a divorce court where a property settlement has been incorporated into the decree and the outright abrogation of such an agreement may be resorted to only for compelling reasons.

7. Husband and Wife ⇐ 279(1)

Where parties to written stipulation that was specifically adopted in divorce decree used the term "equity" without equivocation or elaboration and, seemingly, in its usual and ordinary context, it was appropriate for the court to interpret the term in accordance with common usage.

8. Contracts ⇐ 147(2)

Where possible, the underlying intent of a contract is to be gleaned from the language of the instrument itself.

9. Contracts ⇐ 169

It is only when contractual language is uncertain or ambiguous that extrinsic evidence need be resorted to.

10. Contracts ⇐ 143(2)

Mere fact that parties urge diverse definitions of contract terminology is not sufficient to render the terminology ambiguous.

11. Husband and Wife ⇐ 279(1)

Trial court acted well within its discretion in applying the commonly accepted definition of the term "equity" to interpret

written stipulation, incorporated into divorce decree, wherein parties agreed that wife would receive as sole property a 50 percent interest in the "present equity" of certain real property and that the husband would receive as sole property a 50 percent interest in that "equity."

Paul N. Cotro Manes, Salt Lake City, for defendant and appellant.

Neils E. Mortenson, Salt Lake City, for plaintiff and respondent.

HALL, Justice:

Defendant appeals, challenging the district court's interpretation of the term "equity" as it appears in the stipulation and property settlement agreement of the parties.

Plaintiff obtained a decree of divorce from defendant on November 19, 1974. Said decree specifically adopted the provisions of the written stipulation in question, and, where pertinent to this appeal, the stipulation provided:

7. The parties agree that the business known as the Eat'n House located at Salt Lake City, Utah, shall be awarded entirely to Defendant with Defendant having full ownership of all assets and full responsibility for all debts arising therefrom.

8. The Defendant agrees to assume as his sole obligation all debts and obligations incurred by the parties up to the 29th day of October 1974 except those specifically mentioned herein and agrees to defend and hold the Plaintiff harmless therefrom.

9. The parties agree that the Plaintiff shall receive as her sole property a 50 percent interest in the present equity of the home and real property located at 5171 South 2870 East, Salt Lake City, Utah and the Defendant shall receive as his sole property a 50 percent interest in that equity. The value of the equity shall be determined not later than January 1, 1975 by at least two independent appraisers selected by the parties for that

purpose. Should the appraisals fail to agree, the two appraisers shall select a third appraiser and an average value shall be determined. The percentage interests shall be paid to the parties at the time of receipt of funds on any sale of the property, or shall be paid by the Plaintiff within two years following the date of majority or emancipation of the youngest surviving child of the parties. The 50 percent interest awarded to the Defendant shall bear interest at 3 percent per annum from January 1, 1975 until paid. Any increase in equity in the home and real property after the fixing of the interests described herein shall accrue to the benefit of the Plaintiff and Defendant shall have no rights over any such increase.

* * * * *

11. The Plaintiff specifically agrees to assume as her sole obligation the first mortgage on the home and to make the required payments on that mortgage. The Defendant specifically agrees to assume as his sole obligation the second mortgage on the home and to make the required payments until this mortgage is paid in full.

The debts and obligations recited in the stipulation (in addition to the two mortgages), were mostly associated with defendant's business establishment, the Eat'n House. Certain of said debts (totalling some \$27,000), had been reduced to judgment and hence constituted liens on the real property at that time.

This matter came before the district court on cross-motions to modify the decree of divorce for various reasons not pertinent here. In addition, plaintiff's motion sought to compel defendant to quit-claim to her all of his interest in the subject real property. Plaintiff asserted that defendant had no

actual interest in the property by reason of the fact that no equity existed therein. This was so, explained plaintiff, because the total of the mortgages and the other liens exceeded the value of the property at the time of the stipulation and decree of divorce.¹

The court below ordered that appraisal be made as of January 1, 1975, and that defendant convey to plaintiff (upon payment to him of the value, if any, of the interest granted him by the stipulation), all interest in the property. This interest was to be measured by calculating the "equity" in the property as the market value as of January 1, 1975, less any liens, mortgages, obligations or other encumbrances as of that date. It is only from that order that defendant appeals.

Defendant's sole contention on appeal is that the court below failed "to do equity" in interpreting the stipulation. However, he concedes that the record is silent "as to just what was meant by the parties for the calculation of the equity in the real property." He simply asserts that the trial court should have calculated the equity as the appraised value, less the amount of the first and second mortgages only.

[1-6] Defendant's contention that the court must look behind his stipulation in order to do equity is without merit. True it is that, in making a division of property by a decree of divorce a trial court is governed by general principles of equity.² It is likewise true that the court retains continuing jurisdiction over the parties and may modify the decree due to a change in circumstances, equitable considerations again to govern.³ It must, however, be added that, when a decree is based upon a property settlement agreement, forged by the parties and sanctioned by the court, equity must

1. Despite the provisions of paragraph 9 of the stipulation, no appraisal of the property was undertaken. However, the undisputed affidavit of plaintiff estimated the value of the property at the time of the divorce to be \$52,000. Inasmuch as the liens on the property totalled \$27,000 and the two mortgages totalled \$25,000, the remaining equity would be nominal at best,

assuming the accuracy of the trial court's interpretation (discussed *infra*).

2. U.C.A., 1953, 30-3-5.

3. *Id.* See also, *Carson v. Carson*, 87 Utah 1, 47 P.2d 894 (1935).

take such agreement into consideration.⁴ Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made.⁵ Accordingly, the law limits the continuing jurisdiction of the court where a property settlement agreement has been incorporated into the decree,⁶ and the outright abrogation of the provisions of such an agreement is only to be resorted to with great reluctance and for compelling reasons.⁷

[7] The parties chose to use the term "equity" without equivocation or elaboration, and, seemingly, in its usual and ordinary context. Consequently, we deem it appropriate for the trial court to have placed a common usage meaning upon the term and that is precisely what it did. By interpreting the term "equity" as it did, the court made an effort, not to supplant the original agreement, but simply to construe it in the manner as contemplated by the parties at the time it was drafted.

The term "equity" is described as the money value of a property or of an interest in property in excess of claims or liens against it.⁸ It is the amount of value of a property above the total liens or charges.⁹ It is the value in excess of mortgage or

other liens.¹⁰ The courts have generally followed the foregoing definitions of the term.¹¹

[8-10] Where possible, the underlying intent of a contract is to be gleaned from the language of the instrument itself; only where the language is uncertain or ambiguous need extrinsic evidence be resorted to.¹² No such ambiguity is present in this case, nor was it asserted. Also, the mere fact that the parties urge diverse definitions of contract terminology does not, per se, render it ambiguous.¹³

[11] The trial court acted well within its discretion in applying the commonly accepted definition of the term "equity" as used in the context of the stipulation¹⁴ and its judgment is therefore affirmed. No costs awarded.

CROCKETT, C. J., and WILKINS and STEWART, JJ., concur.



4. 47 Am.Jur.2d Judgments, Sec 1082, *Niemi v. Pitzer*, 281 Or. 53, 573 P.2d 1227 (1978)

5. Defendant concedes that he would normally be bound by his stipulation but cites the case of *Klein v Klein*, Utah, 544 P.2d 472 (1975) as supportive of his position. Such reliance is misplaced. That decision dealt with a situation wherein an original decree of divorce, not itself the product of any agreement, was modified by the trial court according to the terms of an alleged stipulation which the appellant denied making. The trial court has discretion to adopt or reject an agreement between the parties as part of the original decree (or a modification thereof), as equity might dictate. See *Nelson on Divorce*, (2d ed., 1945), § 13.45.

6. *Callister v. Callister*, 1 Utah 2d 34, 261 P.2d 944 (1953); see also Clark, *The Law of Domestic Relations*, Sec. 18.13.

7. See *LeBreton v. LeBreton*, Utah, 604 P.2d 469 (1979).

8. Webster's Third New International Dictionary, Unabridged, 1961.

9. Black's Law Dictionary, 5th Ed., 1979.

10. Funk & Wagnall's Standard Comprehensive International Dictionary, 1976.

11. See e. g., *Comstock v. Fiorella*, 260 Cal. App.2d 262, 67 Cal.Rptr. 104 (1968), *Pierson v. Bill*, 138 Fla. 104, 189 So. 679 (1939); *Des Moines Joint Stock Land Bank v. Allen*, 220 Iowa 448, 261 N.W. 912 (1935).

12. *Oberhansly v. Earle*, Utah, 572 P.2d 1384 (1977); *Bennett v. Robinson's Medical Mart*, 18 Utah 2d 186, 417 P.2d 761 (1966).

13. *Camp v. Deseret Mutual Benefit Ass'n*, Utah, 589 P.2d 780 (1979).

14. *Pugh v. Stockdale*, Utah, 570 P.2d 1027 (1977); *Commercial Bldg. Corp. v. Blair*, Utah, 565 P.2d 776 (1977).

OSMUS v. OSMUS.

No. 7152.

Supreme Court of Utah.

Oct. 14, 1948.

that when owner paid off her capital investment, he should have a half interest in the business, did not excuse payment of alimony and support money in accordance with divorce decree.

1. Divorce \Rightarrow 269(12), 311

Before a divorced husband can be found guilty of contempt for failure to comply with alimony and support provisions of divorce decree, and can be committed to jail, it must be found that he was able to comply with court's order or that he intentionally deprived himself of ability to comply with such order.¹

2. Divorce \Rightarrow 269(9), 311

Fact that divorced wife received \$5,000 for equity in home of parties did not excuse divorced husband from complying with court order with respect to alimony and support money for support of children.

3. Divorce \Rightarrow 164, 269(9), 311

If, because of change in circumstances of parties, divorce decree is inequitable or impossible to comply with, divorced husband may petition for modification, but, so long as decree stands, he must comply with it, or make every reasonable effort to do so, or be subject to punishment for contempt, regardless of how financial situation of divorced wife may have improved.

4. Divorce \Rightarrow 269(9), 311

Fact that divorced husband, instead of accepting employment as a fry cook for \$8 a day, took work at an eating place where he received board, room, and \$1 a day for spending money, and a promise

5. Divorce \Rightarrow 269(9), 311

Fact that if divorced husband worked for wages, he would be annoyed with creditor's bills and garnishments, was no excuse for husband's failure to take employment so as to be able to pay alimony and support money as required by divorce decree.

6. Divorce \Rightarrow 269(1), 311

Where divorced husband, instead of securing employment as fry cook at \$8 a day, took work at eating place for board, room, and \$1 a day spending money because he was promised a half interest in the business after capital investment was recouped, because wife had received \$5,000 for equity in home of the parties, and because he feared that creditors would garnishee his pay checks if he took regular employment, and he failed to pay alimony and support required by divorce decree, he was guilty of contempt of court.¹

7. Divorce \Rightarrow 245(3), 309

To entitle either party to modification of alimony or support provision of divorce decree, such party must plead and prove a change in circumstances, such as to require, in fairness and equity, a change in terms of decree.²

8. Divorce \Rightarrow 245(2), 309

Where there were no changed conditions between date of divorce decree and petition for modification of alimony and support provisions of decree, no modification of decree was proper.²

¹ Hillyard v. District Court, 68 Utah 220, 249 P. 806, 809.

² Cody v. Cody, 47 Utah 456, 154 P. 952; Chaffee v. Chaffee, 63 Utah 261, 225 P. 76; Rockwood v. Rockwood, 65

Utah 261, 236 P. 457; Carson v. Carson, 87 Utah 1, 47 P.2d 894; Jones v. Jones, 104 Utah 275, 139 P.2d 222; Gardner v. Gardner, Utah, 177 P.2d 743.

Appeal from District Court, Third Judicial District, Salt Lake County; J. Allan Crockett, Judge.

Suit for divorce by Faye Walker Osmus against Harry Osmus, wherein the plaintiff was awarded a decree a divorce requiring defendant to pay alimony of \$100 a month and \$150 a month for support of the three children of the parties. From a judgment holding the defendant in contempt of court for failure to pay alimony as required by the divorce decree, the defendant appeals.

Judgment affirmed.

C. Vernon Langlois, of Salt Lake City (Ray S. McCarty, of Salt Lake City, of counsel), for appellant.

Benjamin Spence, of Salt Lake City, for respondent.

WOLFE, Justice.

Appeal by the defendant from an order and judgment of the Third District Court holding defendant in contempt of court for failure to pay alimony as required by the terms of an interlocutory divorce decree entered by that court, and from the court's order denying defendant's petition for modification of the alimony decree. The parties are referred to as they appeared in the court below.

The undisputed facts are that the plaintiff and defendant were married in March, 1940 and that three children, all of whom are now living, were born to them. On March 14, 1947, plaintiff commenced an action against defendant for separate maintenance, and on July 15, 1947, the parties entered into a stipulation whereby defendant agreed to pay to plaintiff \$100 per month as alimony and support money, payable \$25 per week, and the further sum of \$50 for attorney's fees. Pursuant to that stipulation, Hon. Roald A. Hogenson, judge of the Third District Court, signed an order providing for payment of temporary alimony and support money as stipulated.

On October 7, 1947, plaintiff filed her second amended complaint wherein she prayed for a divorce and alimony in the sum of \$250 per month, and on the same day defendant filed his appearance and consent that his default might be entered

forthwith, upon the condition that the alimony and support money to be awarded should be not more than the total amount of \$250 per month. The matter was heard upon the same day, and the court granted plaintiff an interlocutory decree of divorce, providing for alimony in the sum of \$100 per month and \$50 per month support money for each of the three children, or a total of \$250 per month.

Defendant paid plaintiff \$50 in October, but made no other payments between the time the interlocutory decree was entered and December 18, 1947, when defendant was served with an order to show cause why he should not be punished for contempt, for failure to make the payments of alimony and support money required by the interlocutory decree. At about the same time defendant filed a petition for modification of the alimony decree. The two matters were heard at the same time. The evidence at the hearing was as follow:

Defendant testified that he was and always had been a fry cook; that up to February 15, 1947, he had been employed by one D. F. Anderson on a profit-sharing arrangement whereby he earned about \$800 per month; that on that date (about a month before plaintiff first filed suit against him) his employment with Anderson terminated; that between February 15th and May 16th he had not worked at all; that on the last mentioned date he went to work for Mrs. Theo. Carlson, who operated an eating establishment on south State Street; that all that he received from this employment was board and room, and spending money to an amount not to exceed \$1 per day; that Mrs. Carlson's business had not, up to that time been profitable, but that it was hoped and expected that it would eventually become profitable; that when it did become profitable and Mrs. Carlson had recouped her capital investment, defendant was to receive a fifty per cent interest in the business.

Defendant further testified that the prevailing wage scale for fry cooks was \$8 per day; that union men worked five and non-union men worked six days a week; that he had not attempted to secure employment as a fry cook because he had several

bills outstanding, and he feared that if he accepted employment for wages that his wages would be garnisheed, and for the further reason that he expected that Mrs. Carlson's business could be built up to a very profitable business, and that he would then be in a much better financial position than he would be if he were working for wages.

He testified that he stipulated to the sum of \$250 per month as alimony and support money upon the advice of his attorney, who had assured him that such amount could later be reduced to an amount consistent with his ability to pay. (It should be noted here that counsel for both parties in the present proceedings are not the same counsel who represented them in the original divorce proceedings). Defendant also admitted that he was more interested in Mrs. Carlson than he was in his own welfare.

Plaintiff testified that prior to the time the divorce proceedings were commenced, she and her husband had contracted to purchase a home; that the home was in her name; that she sold the equity in the home for \$5,000; that she used \$2,000 as a down payment on a home, and used up the balance of the \$3,000 for living expenses for herself and her family; that the entire \$5,000 was exhausted in October, 1947, and during November and December, plaintiff had had to have financial aid from the County Welfare Department.

Mrs. Theo. Carlson substantially corroborated the testimony of defendant as to the terms of his employment by her.

Four assignments of error are raised by defendant, but only two substantial questions are involved:

1. Did the court err in finding defendant in contempt of court for failure to make the payments of alimony and support money during the months of October, November, and December, 1947, as required by the terms of the interlocutory divorce decree?

2. Did the court err in denying defendant's petition for modification of the decree in respect to alimony and support money?

We shall consider the questions in the order stated.

[1] There is no dispute between the parties that "it is a prerequisite in contempt proceedings of the nature here under review to an order committing to jail that the one charged should be found able to comply with the court's order *or that he had intentionally deprived himself of the ability to comply with such order.*" (Italics added.) Hillyard v. District Court, 68 Utah 220, 249 P. 806, 809. The question which divides the parties is whether there was evidence to support the court's finding of fact No. 5 that defendant "is still able, with a reasonable effort to earn sufficient to comply with the terms of said decree, but disregarding the order of the court and decree herein, has wilfully failed and neglected to find employment or seek employment or earn money with which to meet his obligations under said decree; * * *

There is no conflict in the testimony that during the months in question the defendant worked for Mrs. Carlson for board and room and received in addition thereto a small amount of cash for spending money. It is likewise undisputed that defendant had not attempted to secure employment at regular wages. The reason or excuses he gave for not so doing were these:

(1) He knew that his wife, plaintiff, had received \$5,000 for the equity in the home, and he did not think that she had immediate need for the alimony and support money.

(2) That he anticipated in the "long run" it would be to his financial advantage to stay with Mrs. Carlson and have a one-half interest in her business.

(3) That he had bills outstanding in the total sum of about \$366 and he feared that creditors would garnishee his checks if he took a job for wages.

[2, 3] The fact that plaintiff received \$5,000 for the equity in the home did not excuse the defendant from complying with the order of the court. The existence of independent means might be a factor to be considered by the court in fixing alimony, or in considering a petition for modification of a decree, or perhaps, under certain circumstances, in mitigation of punishment for contempt. But no discretion is left, to a divorced husband, to determine whether

he should or will comply with an alimony decree. So long as such decree stands, it is incumbent upon him to comply with it, or at least to exercise every reasonable effort to comply with it. If because of change in the circumstances of the parties it appears that the decree is inequitable, or impossible to comply with, he may petition for modification. But so long as that decree stands, the husband must comply with it, or make every reasonable effort to do so, and this is true regardless of how the financial situation of his former wife may have improved. Any failure to comply or to make a reasonable effort to comply is contempt, and punishable as such.

[4] Nor does a man have a right to sacrifice the present needs and welfare of his family, and particularly of his infant children, to the end that at some indefinite future time he may better his own financial status. His first duty is to provide for those whom he is legally and morally obligated to support, and if it becomes necessary for him to forego business opportunities with bright future prospects but with no present realization, in order to perform his obligations, the law, in the absence of exceptional circumstances, will require him so to do. From all the evidence and all the fair inferences therefrom, the court could reasonably find that defendant entered into his business relationship as much for the purpose of depriving his wife of the alimony and support money to which she was lawfully entitled, as for the purpose of bettering his future from a financial point of view. But if the defendant be given the benefit of all doubts, and his explanation that he expected eventually to receive profits from the business which would considerably exceed what he would earn as wages, be accepted as true, defendant's legal position would not be improved. He has neither the right nor the privilege, to ignore, for a protracted period of time, his legal obligations to his family for the selfish purpose of advancing his own financial benefit.

[5] The argument of defendant that if he worked for wages, he would be annoyed

with creditor's bills and garnishments is so flimsy as to be hardly worthy of notice. It is altogether probable that if defendant indicated a genuine desire on his part to meet these obligations, his creditors would be willing to inter into some mutually satisfactory arrangement for the payment of these bills in small installments. But be that as it may, whatever inconvenience, annoyance, or embarrassment might be occasioned to defendant by these outstanding claims, he was not thereby excused from meeting, or at least making a reasonable attempt to meet, his legal obligations to his family.

[6] There was no error in the court's ruling and order adjudging defendant in contempt of court.

[7,8] The second question, namely, whether the court erred in denying defendant's petition for modification of the decree, poses no difficulty. It is a principle now firmly established in this jurisdiction that to entitle either party to modification of a decree of alimony or support money, that such party plead and prove a change in circumstances such as to require, in fairness and equity, a change in the terms of the decree. *Cody v. Cody*, 47 Utah 456, 154 P. 952; *Chaffee v. Chaffee*, 63 Utah 261, 225 P. 76; *Rockwood v. Rockwood*, 65 Utah 261, 236 P. 457; *Carson v. Carson*, 87 Utah 1, 47 P.2d 894; *Jones v. Jones*, 104 Utah 275, 139 P.2d 222; *Gardner v. Gardner*, Utah, 177 P.2d 743. In this case there has been neither pleading nor proof of change of circumstances. On the contrary, defendant expressly concedes, in his brief, that there were no changed conditions between the date of the divorce decree and the petition for modification. Under the rule of the cases above cited, the trial court could not properly make an order modifying the decree.

What defendant is really contending is that the alimony awarded by the interlocutory divorce decree was excessive. Defendant is in a poor position to complain. He stipulated to an alimony decree of \$250 per month, apparently without any expectation of ever complying with it. He is hard-

ly in a favorable position now to assert that the alimony awarded is excessive.

Courts are not to be trifled with by litigants. This is particularly true in divorce cases, which, although not ordinarily involving problems of great legal magnitude, quite frequently involve social problems of the utmost delicacy and importance—problems of such nature that the state, as well as the litigants, has an interest in their solution. A freedom-seeking spouse may not, in his eagerness to be speedily released from his matrimonial bonds, make rash and reckless agreements and promises, upon which the court may rely in fixing the amount of alimony, and then return a few months later and complain that the award for alimony is excessive or unfair. Such is apparently what was attempted in this case.

The judgment is affirmed.

McDONOUGH, C. J., and LATIMER, J., concur.

PRATT, Justice (concurring in the result).

I concur in the result. One cannot escape the conclusion that appellant has not acted in good faith in this matter. His relegation of his family obligations to a position of least importance in his scheme of life and his desire to acquire the divorce even at the expense of creating, by stipulation, false impressions in the mind of the lower court as to his ability to pay alimony evidence a character weak in moral and ethical standards. As a result his incarceration for contempt does not strike any sympathetic chord in the hearts of those who read about his case. However, if we are not careful we may confuse matters in our analysis by burying important points under a barrage of punitive ideas aimed at appellant. To overemphasize the idea that he has made his thorny bed and now he should lie in it, loses sight of the fact that if he does lie in it, his children may be the real sufferers. Be his character ever so weak, it is not bread and butter in their mouths to carry on the fiction of his ability to support to the extent the lower court found merely because he, in his selfishness

was very instrumental in initiating that fiction. They are certainly innocent victims in the case.

It is true that there is no actual change of circumstances shown that would support a modification of the decree, and for that reason I am constrained to concur in affirming the lower court's decision; but I do not feel that under proper circumstances it should require a great deal of evidence to change this decree to fit actual facts rather than possibilities, if it will be to the interests of the children to do so.

In other words, if appellant in good faith acquires a position as fry cook that pays him only union wages, although it will not support alimony of \$250 a month, should he not be allowed a modification of the decree upon the theory of a change of circumstances; or is he to be limited in his employment to enough to pay \$250 per month alimony, simply because the lower court accepted the implications of the stipulation without inquiry into the actual facts of the case? It would seem to be to the best interests of all concerned to consider actualities in preference to possibilities.

WADE, Justice (concurring in the result).

I concur with the result for the reasons herein stated.

I think the allegations of the petition of the defendant were sufficient to justify a finding that there has been a change in circumstances since the decree was entered requiring a reduction in the amount of the award of alimony and support money, but I do not think the evidence supports such a finding. Defendant's petition alleges in substance that the decree was entered on October 7, 1947, ordering petitioner to pay \$250 per month alimony and support money; that the court made no findings of the amount of petitioner's earnings at the time but found him capable of earning \$500 per month; and alleged that he was then not capable of earning in excess of \$40 per week and that since February 15, 1947, he has earned less than \$100 per month. This is not a statement that he was incapable of earning \$500 per month at the time of

the decree and even if it were, the decree judicially determined that question and for the purpose of this appeal neither the parties thereto or the courts can go behind that determination. But the petition alleges that he is now incapable of earning in excess of \$40 per week. In my opinion, that is a sufficient allegation of a change of circumstances since the decree.

However, I do not believe that the evidence would justify a finding that there has been such a change in the circumstances since the decree to justify a reduction in the amount of the alimony and support money award. Plaintiff, in her original complaint, asked for separate maintenance. Therein she alleged that defendant is a capable manager of eating establishments and for a long time as such has earned in excess of \$800 per month. Defendant answered by admitting that in the year 1946, as a manager of eating establishments, *he had earned* an average of \$760 per month, but alleged that he was then out of steady employment. Later plaintiff filed an amended complaint wherein she asked for a divorce but still retained the allegations as to his earning capacity, and defendant thereupon stipulated that his default might be entered on condition that the award of alimony and support money should not exceed \$250 per month. If the proof was in harmony with these allegations, the court could reasonably find that he was capable of earning \$500 per month even though he was not steadily employed at the time.

But now he testifies that he is only a fry cook with a union wage scale of only \$40 per week and actually not earning that much. He says that his girl friend, with whom he was keeping company prior to the divorce, purchased an eating establishment on May 16, 1947, and since that time he has worked in that establishment for his room, board, and clothing and a little spending money. He says that when this business gets on a paying basis, and his girl friend gets her bills paid off and he gets his bills paid off, he will then become a partner in the business and then he will be able to pay as much as \$25 per week to the support of his former wife and children. In the meantime, he is only a fry cook, not a capable manager of eating establish-

ments and his earning capacity is limited to \$40 per week. He makes no claim that he has ever tried to obtain the kind of employment which he used to have or to get any other work than to work for his board and room and clothing where he now works. He says he owes about \$200 in debts and indicates that he is not going to have any earnings until he gets that paid off. He also indicates that in the summer of 1948, which is now past, he will be able to pay something to his former wife and children. But that at the time of the hearing the business was not paying sufficient to justify him paying anything to that end.

Under these circumstances the trial court was justified in holding that he had made no reasonable effort to comply with the order of the court and that there is no showing that he is not capable of earning \$500 per month if he tried to do so. In other words, *he is obviously acting in bad faith* and the court was justified in refusing to believe that he is doing all he can or that his earning capacity has so suddenly decreased.

I therefore concur with the result.



ERKMAN v. CIVIL SERVICE COMMISSION OF PROVO CITY et al.

No. 7120.

Supreme Court of Utah.

Oct. 7, 1948.

I. Municipal corporations ☞185(7)

Charges filed with city civil service commission by police chief against discharged officer, sufficiently informed officer that conduct which would be relied upon to support order of chief discharging officer was officer's appearance before and statement to city commission demanding the removal of chief and another officer for admitted parts in transactions whereby tires no longer usable on emergency vehicles, were placed in hands of persons not entitled to have tires. U.C.A.1943, 15—9—21.

selling of reasons.⁷ Consistent with that policy, upon our analysis of the undisputed facts shown here, it is our opinion that it should be ruled as a matter of law that because of his failure to timely act thereon, the executor should be deemed to have waived any right conferred in the will to direct the disposal of the deceased's remains and that he should remain buried where he is.⁸

Our conclusion as just stated on the issue of waiver renders it unnecessary to consider the appellant's (objector's) further contentions.

Reversed. The parties to bear their own costs.

MAUGHAN, WILKINS and HALL, JJ., concur.

ELLETT, C. J., concurs in result.



Anne W. PORTER, Plaintiff
and Respondent,

v.

Don L. PORTER, Defendant
and Appellant.

No. 15073.

Supreme Court of Utah.

March 15, 1978.

Appeal was taken from an order of the Fourth District Court, Utah County, Allen B. Sorensen, J., granting judgment in favor of a wife in a divorce action, and awarding custody of the two children of the parties and child support to the wife, and visitation privileges to the husband. The Supreme

Court, Maughan, J., held that: (1) the trial court properly found jurisdiction on the basis of the husband's bona fide residency in the county, but (2) considering that the husband would be required to travel from Utah to Texas in order to visit the children, the allowed visitation hours, occurring only the first and third Saturdays of each month between the hours of 2 p. m. and 8 p. m., were too restrictive and the cause would be remanded for the purpose of having the trial judge order periods long enough to justify the husband making the long trip required.

Remanded.

1. Divorce ⇐ 139½

In divorce action, district court in Utah County properly found jurisdiction on basis of bona fide residency of husband in Utah County, even though wife's complaint alleged only that she was herself bona fide resident of Utah County and husband, in his answer, admitted such allegation, where, had court's ruling on residency been adverse to wife, she could have immediately filed another complaint based on husband's residency. Rules of Civil Procedure, rule 15(b).

2. Divorce ⇐ 299, 312.7

Trial court order, which was no doubt influenced by ages of children at time of trial, permitting former husband total of 26 visitation days per year, on first and third Saturdays of each month between hours 2 p. m. and 8 p. m., was too restrictive and would be remanded for purposes of having trial judge order other and more reasonable visitation privileges, in view of increased ages of children and considering fact that former husband would be required to travel from Utah to Texas in order to see children; visitation periods should be long enough to justify former husband making long trip.

Don L. Bybee, Salt Lake City, for defendant and appellant.

7. See *King v. Frame*, 204 Iowa 1074, 216 N.W. 630 (1927), cited in 21 A.L.R.2d at page 476, see also annotation commencing at 472.

8. *Fowlkes v. Fowlkes*, Tex.Civ.App., 133 S.W.2d 241 (1939), cited in Jackson, *The Law of Cadavers* 2d 1950, at page 117.

Cullen Y. Christensen, Provo, for plaintiff and respondent.

MAUGHAN, Justice:

Before us is a judgment granting to plaintiff a divorce, custody of the two children of the parties, child support, and visitation privileges to defendant. We affirm, but remand for modification of visitation privileges. No costs awarded. All statutory references are to U.C.A. 1953, the rule citation is to Utah Rules of Civil Procedure.

The principal issue here is whether the court had jurisdiction. We deal only with that and the visitation issue, the issue as to the propriety of the divorce and custody is without merit.

In May 1976 plaintiff paid a visit to her parents in Dickinson, Texas. While there she decided to obtain a divorce. The record also indicates that sometime, about the second week in June 1976, she decided to relocate permanently in Dickinson. Nevertheless, on July 2, 1976, she filed her complaint in Utah County alleging herself to be an actual and bona fide resident of Utah County, and for a period of more than 3 months immediately preceding the filing of the complaint. Defendant, in his answer, admitted this allegation. He now calls into question plaintiff's residency, and claims the court lacked jurisdiction because of it.

If there is any question about jurisdictional residency of plaintiff, there can be absolutely no question about the bona fide residency of defendant in Utah County, and the state of Utah, for the required period of time; and the court so found.

Pursuant to Rule 15(b) issues which are not raised by the pleadings but "are tried by express or implied consent of the parties . . . shall be treated in all respects as if they had been raised in the pleadings." The evidence before the trial court concerning defendant's residency showed clearly the statute had been satisfied, and such evidence was unrefuted. In the *General*

*Ins. Co. of America v. Carnicero Dynasty Corp.*¹ we said "implied consent may be found where one party raises an issue material to the other party's case, or where evidence is introduced without objection."

[1] Had the court's ruling on residency been adverse to plaintiff, she could have immediately filed another complaint based on defendant's residency.² Thus, the trial court's ruling expedited the judicial process since the issue could be "conveniently and effectively handled in one trial without injury to substantive rights."³

The court allowed defendant a total of 26 visitation days per year. These days could only occur on the first and third Saturdays of each month between the hours of 2 p. m. and 8 p. m. Considering the distance defendant must travel from Utah to Texas, and the limited time he is allowed to see his children, we think such an arrangement is too restrictive. No doubt the court was influenced by the ages of the children at time of trial.

[2] In view of the increased ages of the children, we remand for the purpose of having the trial judge order other and more reasonable visitation privileges. Such periods should be long enough to justify defendant making the long trip from his home to Dickinson, Texas. But for this modification the decree is affirmed.

ELLETT, C. J., and CROCKETT, WILKINS and HALL, JJ., concur.



1. Utah, 545 P.2d 502, 506 (1976).

2. *Buehner Block Co. v. Glezos*, 6 Utah 2d 226, 310 P.2d 517, 519 (1957).

3. *Jackson v. Cope*, 1 Utah 2d 330, 266 P.2d 500, 503 (1954).

teen, had the effect of imposing majority upon *both* males and females at age eighteen. The amendment to Section 15-2-1 has served to further clarify the status of Utah law and establishes as a matter of public policy the age of majority for both sexes at age eighteen.

The Court again holds, *for the purposes of this case only*, males are to be treated as adults at age eighteen, rather than withholding the privilege of adulthood to the female person in this lawsuit until age 21, *and this case shall have no retroactive effect.*

Reversed and remanded with direction to enter judgment in favor of plaintiff for costs only in the amount of \$437.38.

WILKINS, J., concurs.

CROCKETT, Justice: (concurring with the decision, but with separate comments.)

It is my conviction from which I am unwilling to depart, that the setting of the age of attaining majority is a legislative function. Furthermore, that so long as the legislature has determined that there is a reasonable basis for differentiation of classes, and all persons within the same class are treated equal, there is no impermissible discrimination. It is not my understanding that our "age of majority statute" has been declared invalid, but rather that the Stanton I decision said that our statute should be applied without discrimination on the basis of sex.

This court remanded this case to our district court under that mandate. That court ruled that in applying the statute equally to both sexes the age of majority should be 21. My agreement with the instant opinion that that ruling was not properly applied in this case is based on two propositions: First, the reasons stated therein. Second and more important in my mind is something which seems to have been forgotten or overlooked.

This is a case in equity, a controversy between two individuals, not as to current and ongoing support money for a minor child, but for an alleged accumulation of past due support money of \$100 per month

for three years, totalling \$3,600, claimed to have accrued under a divorce decree which made no such order; and which could not by any logic or reason in law or equity be construed to have so provided.

I reiterate with the firmest possible conviction that in my judgment it would be wholly discordant to principles of equity and justice to impose such an unexpected and unplanned for burden upon the defendant by an *ex post facto* change of the rules after the entry of the decree. To avoid repetition here, in support of what I have said herein I refer to the main and concurring opinions in our prior decision in this case, Utah, 1976, 552 P.2d 112, and authorities therein cited.

ELLETT, Chief Justice: (concurring and dissenting).

I concur, except that I think costs should be awarded to the prevailing party pursuant to Rule 54(d)(1), U.R.C.P. The defendant is the prevailing party and should have his costs.

MAUGHAN, Justice: (dissenting).

For reasons stated in my dissenting opinion in *Stanton v. Stanton*, Utah, 552 P.2d 112, 116 (1976), I again dissent.



Glenn A. RICE, Plaintiff and Respondent, -

v.

Kristie Lee RICE, Defendant and Appellant.

No. 14748.

Supreme Court of Utah.

May 5, 1977.

Natural mother, who had remarried, sought custody of two-year-old daughter,

custody of whom had been awarded to father on divorce. The Second District Court, Davis County, J. Duffy Palmer, J., left control with the father, and the mother appealed. The Supreme Court, Ellett, C. J., held that although both parties had remarried and established similarly modest living styles the mother was not entitled to any statutory presumption of preference.

Affirmed.

Crockett, J., filed concurring opinion in which Maughan, J., joined.

Wilkins and Hall, JJ., concurred in result.

1. Infants ⇐ 19.2(2), 19.3(2)

Considerable discretion is allowed the trial court in child custody matters; controlling factor is the best interest and welfare of the child. (Per Ellett, C. J., with one Judge concurring, two Judges concurring in result and one Judge specially concurring.) U.C.A.1953, 30-3-10.

2. Infants ⇐ 19.1

Child custody proceedings are and should be equitable in the highest degree. (Per Ellett, C. J., with one Judge concurring, two Judges concurring in result and one Judge specially concurring.)

3. Divorce ⇐ 303(2)

Although following divorce both mother and father remarried and reestablished similarly modest living styles, the mother, seeking custody of two-year-old daughter, was not entitled to any statutory presumption or preference of custody; likewise, no special preference was available to the mother since all factors were not comparatively equal in that division of family services report expressed serious reservations about the mother's ability to adequately meet the child's needs. (Per Ellett, C. J., with one Judge concurring, two Judges concurring in result and one Judge specially concurring.) U.C.A.1953, 30-3-10.

Brian R. Florence, Florence & Hutchison, Ogden, for defendant and appellant.

Melvin C. Wilson, Kaysville, for plaintiff and respondent.

ELLETT, Chief Justice:

The parties to this appeal were divorced on August 26, 1975, at which time the father, respondent here, was awarded the temporary care, custody, and control of their then two-year-old daughter. The mother subsequently, pursuant to the terms of the divorce decree, requested an order to show cause why she should not be awarded custody of the child. At the second hearing the lower court refused to change the control of the minor child and left her with the father. The mother appeals that decree.

The precise issue before this Court is whether or not the district court abused its discretion by granting custody of the minor child to the respondent.

[1] Our statutes and case law are consistent and clear with respect to the considerable discretion allowed the trial court in child custody matters, with the controlling factor being that which is in the best interest and welfare of the minor child.¹

[2] Child custody proceedings are and should be equitable in the highest degree. At the hearing from which this appeal was taken, the trial court received evidence inter alia from the Division of Family Services which investigated the family conditions of both appellant and respondent. Two separate reports were filed, one endorsing the extremely good job respondent has done in raising his daughter; and the second expressing serious reservations about the mother's present and future ability to adequately meet the child's needs. The first report concluded that to remove the daughter from her present environment and ask her to adjust to a new one would

1. Section 30-3-10, U.C.A. 1953, 2d Replacement Vol. 3, *Hyde v. Hyde*, 22 Utah 2d 429, 454 P.2d 884 (1969), *Arends v. Arends*, 30 Utah 2d 328, 517 P.2d 1019 (1974); *Baker v.*

Baker, 25 Utah 2d 337, 481 P.2d 672 (1971), *Sampsell v. Holt*, 115 Utah 73, 202 P.2d 550 (1959)

only be foolhardy at best. The court apparently chose to believe the evidence presented by the agents of the Division of Family Services.

[3] While the evidence shows that both parties have remarried and reestablished similarly modest living styles, we do not feel that the mother as such is entitled to any statutory presumption of preference. We have formerly held² that this presumption in Section 30-3-10³ does not apply to divorce cases.

We also recognize that no special preference is available to the mother in this case because all factors are not comparatively equal⁴ according to the Division of Family Services' evaluation and other evidence before this Court.

On the basis of the standard rules favoring the findings and determination of the trial court in such matters, the decree of the district court is affirmed. Costs are awarded to the respondent.

MAUGHAN, J., concurs in main opinion and also in concurring opinion of CROCKETT, J.

WILKINS and HALL, JJ., concur in result.

CROCKETT, Justice: (concurring, with added comment).

It is true that this court has pointed out that Sec. 30-3-10, U.C.A.1953, relates expressly to cases of separation;¹ however, as clearly pointed out in *Steiger v. Steiger*² through Chief Justice McDonough in applying the general equitable powers granted in Sec. 30-3-5, U.C.A.1953:

This court has stated that a divorced mother has no absolute right to the custody of minor children . . . but the policy of our decisions has been to give weight to the view that all things being equal, preference should be given to the

mother in awarding custody of a child of tender years, And this view is based upon the oft-stated purpose of the award of custody to provide for the child's best interests and welfare, [Citing authorities.]

In my opinion this is the sound view on the problem and represents a correct statement of law.



Randy SMITH, Plaintiff and Appellant,

v.

Linda K. Jacobson SMITH, Defendant
and Respondent.

No. 14695.

Supreme Court of Utah.

May 6, 1977.

Former husband appealed from an order of the Second District Court, Weber County, Calvin Gould, J., taking custody of two children from him and awarding custody to his former wife. The Supreme Court, Crockett, J., held that: (1) evidence that the former wife was sick and upset at the time she consented to the divorce, but was subsequently in good health, was married to a man who loved her and the children and would treat them well and had a suitable home and sufficient income to provide for the children, was sufficient to establish a change of circumstances and warrant modifying the divorce decree; however, (2) the trial judge was in error in referring to a statutory presumption of a natural mother to custody of children of tender years and she had no absolute right to their custody.

2. *Arends v. Arends*, *supra*, Note 1.

3. U.C.A 1953, Replacement Vol. 3.

4. *Smith v. Smith*, Utah, 564 P.2d 307 (1977).

1. See *Arends v. Arends*, footnote 2 main opinion, and cases therein cited including *Sampsell v. Holt*, 115 Utah 73, 202 P.2d 550, exposition thereon by Justice Wolfe.

2. 4 Utah 2d 273, 293 P.2d 418.

only be foolhardy at best. The court apparently chose to believe the evidence presented by the agents of the Division of Family Services.

[3] While the evidence shows that both parties have remarried and reestablished similarly modest living styles, we do not feel that the mother as such is entitled to any statutory presumption of preference. We have formerly held² that this presumption in Section 30-3-10³ does not apply to divorce cases.

We also recognize that no special preference is available to the mother in this case because all factors are not comparatively equal⁴ according to the Division of Family Services' evaluation and other evidence before this Court.

On the basis of the standard rules favoring the findings and determination of the trial court in such matters, the decree of the district court is affirmed. Costs are awarded to the respondent.

MAUGHAN, J., concurs in main opinion and also in concurring opinion of CROCKETT, J.

WILKINS and HALL, JJ., concur in result.

CROCKETT, Justice: (concurring, with added comment).

It is true that this court has pointed out that Sec. 30-3-10, U.C.A.1953, relates expressly to cases of separation;¹ however, as clearly pointed out in *Steiger v. Steiger*² through Chief Justice McDonough in applying the general equitable powers granted in Sec. 30-3-5, U.C.A.1953:

This court has stated that a divorced mother has no absolute right to the custody of minor children . . . but the policy of our decisions has been to give weight to the view that all things being equal, preference should be given to the

mother in awarding custody of a child of tender years, . . . And this view is based upon the oft-stated purpose of the award of custody to provide for the child's best interests and welfare, . . . [Citing authorities.]

In my opinion this is the sound view on the problem and represents a correct statement of law.



Randy SMITH, Plaintiff and Appellant,

v.

Linda K. Jacobson SMITH, Defendant
and Respondent.

No. 14695.

Supreme Court of Utah.

May 6, 1977.

Former husband appealed from an order of the Second District Court, Weber County, Calvin Gould, J., taking custody of two children from him and awarding custody to his former wife. The Supreme Court, Crockett, J., held that: (1) evidence that the former wife was sick and upset at the time she consented to the divorce, but was subsequently in good health, was married to a man who loved her and the children and would treat them well and had a suitable home and sufficient income to provide for the children, was sufficient to establish a change of circumstances and warrant modifying the divorce decree; however, (2) the trial judge was in error in referring to a statutory presumption of a natural mother to custody of children of tender years and she had no absolute right to their custody.

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4. *Smith v. Smith*, Utah, 564 P.2d 307 (1977).

1. See *Arends v. Arends*, footnote 2 main opinion, and cases therein cited including *Sampsell v. Holt*, 115 Utah 73, 202 P.2d 550, exposition thereon by Justice Wolfe.

2. 4 Utah 2d 273, 293 P.2d 418.

Remanded.

Hall, J., filed a dissenting opinion, the result of which was concurred in by Wilkins, J.

1. Divorce ⇐172

Even in divorce matters, where court has continuing jurisdiction to make subsequent orders with respect to children and property rights as may be equitable and just, where there has been adjudication upon one set of facts, that should be res judicata thereon and there should be no modification of such adjudication unless it is shown that there is some substantial change in circumstances that would warrant doing so.

2. Divorce ⇐303(7)

Evidence that former wife was sick and upset at time she consented to divorce, but was subsequently in good health, was married to man who loved her and children and who would treat them well and that she had suitable home and sufficient income to provide for children, was sufficient showing of change of circumstances to warrant changing custody of children from former husband to former wife.

3. Parent and Child ⇐2(3.2, 8)

There was no statutory presumption that natural mother had right to custody of children of tender years, nor did she have any absolute right to their custody.

4. Divorce ⇐303(1)

Award of custody of children in divorce proceeding is not permanent, but if circumstances change so that their welfare and best interests would be served thereby, court has continuing jurisdiction and authority to make appropriate changes.

Pete N. Vlahos, of Vlahos & Knowlton, Ogden, for plaintiff and appellant.

Russell J. Hadley, Salt Lake City, for defendant and respondent.

CROCKETT, Justice:

Plaintiff, Randy Smith, appeals from an order in proceedings supplemental to a divorce in which the trial court took custody of the couple's two children, now aged 8 and 3, from him and awarded custody to his former wife, Linda K. Jacobson Smith (now Moore).

Plaintiff contends (1) that there was not a sufficient showing of a change of circumstances to warrant modifying the decree; (2) that defendant has no absolute right to custody of minor children under ten years of age.

The plaintiff and defendant were married in North Salt Lake, Utah on March 23, 1968. Plaintiff filed this divorce action on August 23, 1975. On that same day, defendant signed a waiver consenting to the entry of her default and that custody of the children be awarded to the plaintiff; and upon an ex-parte hearing, Judge Ronald O. Hyde of the Second District Court granted plaintiff a divorce, made a division of the parties' property and awarded him custody of the two children. A motion by the defendant Linda to set aside the judgment, seeking modification of the decree as to property, and asking for custody of the children, was denied.

On October 10, 1975, plaintiff remarried to Vickie Smith. On November 1, 1975, defendant remarried to Randy Moore. On November 10, 1975, defendant filed a petition to modify the decree. The matter came before Judge Calvin Gould of the same court and he ordered an investigation of both homes. The report gave them both a favorable evaluation as to custody of the children; and showed the plaintiff's home to have a combined monthly income of \$1,296 and the defendant's \$1,380. Both parties rely on the report as supporting their claims to custody of the children.

Upon his appraisal of the total situation, Judge Gould concluded that it would be in the best interest of the children to be in the custody of their mother, defendant Linda, but with liberal visitation rights to their father, plaintiff Randy, which includes as minimums: one 24-hour period each week-

end, one 2-hour evening period each week, one month during the summer school recess, with an equal division of holidays.

" [1] As to (1) above, we agree that even in divorce matters, where the court has continuing jurisdiction to make subsequent orders with respect to the children and property rights as may be equitable and just,¹ when there has been an adjudication upon one set of facts, that should be res adjudicata thereon; and there should be no modification of such an adjudication unless it is shown that there is some substantial change in circumstances that would warrant doing so.²

[2] The trial judge appears to have acted in full awareness of and in conformity with this rule. The changes of circumstances claimed by the defendant Linda upon which the trial court based the change in the decree are: that whereas defendant was sick and upset at the time she consented to the divorce, she is now in good health; is married to a man who loves her and the children and who will treat them well; that they have a suitable home and sufficient income to provide for them.

[3] As to (2) above: there is no doubt about the correctness of the plaintiff's contention that the trial judge was in error in referring to the "statutory presumption of a natural mother" to custody of children of tender years; and that she has no absolute right to their custody. However, appropriate to be considered on this problem is the fact that, irrespective of any statute, the invariably declared policy stated in our decisions is that "all things else being equal, preference should be given to the mother in awarding custody of children of tender years . . . [and this is true even when] . . . the divorce is granted to the father."³

1. Sec. 30-3-5, U.C.A. 1953.

2. *Anderson v. Anderson*, 13 Utah 2d 36, 368 P.2d 264; *Perkins v. Perkins*, 522 P.2d 708 (Utah).

3. So stated for this court through Justice Ellett in *Hyde v. Hyde*, 22 Utah 2d 429, 454 P.2d 884

[4] The trial court seems to have exercised considerable care to make what in his judgment was the best possible arrangement as to the custody of these children, in full awareness of the disappointing and disheartening effects it may have upon some of the parties involved, but with greater consideration for the welfare of the children. In that regard, it is further appropriate to have in mind that an award of custody of children in a divorce proceeding is not permanent. If circumstances change so that their welfare and best interests would be served thereby, the court has continuing jurisdiction and authority to make appropriate changes.⁴

We have no way of knowing whether the distinction between the "statutory presumption" and the natural presumption, or policy of the law, as explained above would make any difference to the determination and arrangement which appears to have been carefully considered and arrived at by the trial court. However, the plaintiff has correctly pointed out that the trial court was in error in stating that there is a "statutory presumption" in favor of the defendant in regard to custody of these children; and that he is entitled to have an adjudication thereon without applying any such statutory presumption. This controversy has been fully tried and considered by Judge Calvin Gould and it seems inadvisable that the parties and the courts be put to the necessity of a plenary re-trial. This case is therefore remanded to Judge Gould for the purpose of giving any further consideration to this matter he deems advisable, not inconsistent with the views expressed herein.

Remanded. No costs awarded.

ELLETT, C. J., and MAUGHAN, J., concur.

and authorities cited therein, and see also *McBroom v. McBroom*, 14 Utah 2d 393, 384 P.2d 961.

4. See Sec 30-3-5, footnote 1 above, and see also *Cox v Cox*, 532 P.2d 994 (Utah)

HALL, Justice (dissenting):

I respectfully dissent. One need only turn to the memorandum decision of Judge Gould to ascertain that the change of custody was made on a basis previously considered by this court and found to be wanting.¹ The provisions of Judge Gould's order that are pertinent here read as follows:

I find as a fact that the defendant mother did not sign her Stipulation under duress or coercion, but that her signature thereon was a free and voluntary act; but that this order of child custody is based on materially changed circumstances since the Decree, to wit:

1. The remarriage of the defendant;
2. The acquisition of the new home by defendant and her husband; and the decision is based upon what the court considers to be the best interest of the children on a finding that the parties are on an equal footing with respect to being able to care for the children, but the mother being accorded the statutory presumption of a natural mother. [Emphasis added.]

In *Arends*, supra note 1, Justice Ellett, speaking for a unanimous court, determined that the statutory provision of Section 30-1-10, U.C.A. 1953, relied upon by the trial court, has no application to divorce cases and that the section applicable is 30-3-5, J.C.A. 1953, which reads:

When a decree of divorce is made, the court may make such orders in relation to children, property and parties, and the maintenance of the parties and children as may be equitable, . . .

The court further stated that in divorce cases the welfare of the minor children is of paramount importance in determining custody, citing *Sampsell v. Holt*² wherein it was said:

Child custody proceedings are equitable in the highest degree, and this court has consistently held that the best interests and welfare of the minor child is the controlling factor in every case.

The case of *Johnson v. Johnson*³ is supportive of the same proposition and Justice Crockett, speaking for the court, stated it as follows:

. . . it likewise exemplifies the wisdom of the prior adjudications of this court that questions of custody are always equitable and that the controlling consideration is the welfare of the children involved. . . . Parental love must find expression, to some extent at least, in sacrifice for the happiness and welfare of the children, rather than in merely insisting upon privileges of parenthood. [Emphasis added.]

Moving now to the real issue of whether or not a substantial change of circumstances was shown as to warrant a change of custody, the main opinion aptly observes that when there has been an adjudication upon one set of facts that should be res judicata and there should be no modification unless it is shown there are some substantial changes that would warrant doing so. The cases are replete in regard to what constitutes a showing of substantial change of circumstances, but none say the acquisition of a new marriage partner and a house are adequate.⁴

The main opinion recites that at the time defendant consented and agreed that plaintiff should have custody she was "sick and upset." Such is contrary to the specific finding of Judge Gould, supra. Also, it is to be noted that defendant moved to vacate and set aside the initial decree on such grounds, and others, but was denied such relief by Judge Hyde, which prompted the

1. *Arends v. Arends*, 30 Utah 2d 328, 517 P.2d 1019 (1974).

2. 115 Utah 73, 202 P.2d 550 (1949).

3. 7 Utah 2d 263, 323 P.2d 16 (1958).

4. *Cody v. Cody*, 47 Utah 456, 154 P. 952 (1916), *Anderson v. Anderson*, 13 Utah 2d 36, 368 P.2d

264 (1962); *Johnson v. Johnson*, 7 Utah 2d 263, 323 P.2d 16 (1958); *Robinson v. Robinson*, 15 Utah 2d 293, 391 P.2d 434 (1964); *Perkins v. Perkins*, Utah, 522 P.2d 708; *Rogich v. Rogich*, 299 P.2d 91 (Idaho 1956); *Warnecke v. Warnecke*, 28 Wash.2d 259, 182 P.2d 699, *Henrickson v. Henrickson*, 358 P.2d 507 (Or.1960).

present proceeding to modify the decree. No appeal was taken therefrom.

In *Cody*, supra note 4, Justice Frick, speaking for the court, treated the issue as follows:

Where a party is dissatisfied with the original allowance or distribution of property, or the disposal of the children, he must prosecute a timely appeal to review the court's orders or decrees in that regard, and in such cases the review must be had upon the evidence adduced upon the original hearing.

Cody, supra, was referred to in *Anderson v. Anderson*, supra, note 4, and Justice McDonough stated:

. . . Title 30-3-5, U.C.A.1953, contemplates an opportunity for divorced litigants to come into court for modification of the original decree based on *changed conditions*, and that any dissatisfaction with such decree is a matter of appeal. Absent an appeal, it is not subject to modification except where changed conditions are demonstrated. [Emphasis added.]

The upshot of the main opinion is that if a mother does recognize the fitness of the father as a custodial parent, and consents thereto, and the court relies thereon, that it must thereafter alter custody if she later decides to exercise the claimed "natural presumption" as to her better fitness, and that same court is obligated to respect her change of heart. Such is not the law and this court should not now so hold.

Much is to be said for the ability of not only litigants to be able to rely upon custody orders, but also for children to be able to place reliance on them so that they will not be uprooted at the whim of one parent who may be only presently doing well with a new marriage. *Robinson v. Robinson*, supra note 4, is a case specifically in point. There the trial court denied a petition of a divorced wife to have custody of minor children taken from her former husband. On appeal, this court sustained the order adopting the following language:

Notwithstanding the desires and contentions of the parties, the welfare of the

children is one of the primary concerns of the courts. *Steiger v. Steiger*, 4 Utah 2d 273, 293 P.2d 418. In that regard important considerations are the facts that at the time of the divorce they were awarded to the father where they have since resided; and they have known no other home. Where the custody has been determined and the children appear to be comparatively well adjusted and happy, *they should not be compelled to change their home unless there appears some substantial reason for doing so*. Other circumstances being equal, this requirement would not be satisfied by the mere fact that economic circumstances may be better with the other spouse. [Emphasis added.]

The Oregon case, *Henrickson v. Henrickson*, supra note 4, holds that every child custody order is res judicata and in any later modification the moving party must bear the burden of showing that it would enhance the welfare of the child. The Idaho case, *Rogich v. Rogich*, and the Washington case, *Warnecke v. Warnecke*, supra, note 4, also adopt the same criteria, i.e., the welfare of the child is the sole matter with which the court is concerned and not with the whims of the parents.

Now looking back to the trial judge's order and deleting therefrom the statutory presumption indulged in that is not applicable, though lip service was made of materially changed circumstances, there actually are none since only the new marriage and the new house remain. Otherwise, each parent is on equal footing and the order changing custody should be reversed.

WILKINS, J., concurs in result of Justice HALL's dissent.



and reduce them to essential allegations, statutes to generally facilitate the line of procedure, and preclude defendants from taking advantage of mere technicalities, which do not prejudice them. Where there has been a legal conviction, but an erroneous judgment thereon, which resulted, according to the law, in a discharge of the convict on reversal of the judgment, a law enacted subsequent to the commission of the crime, that, on such a reversal, the court in which the conviction was had should, on return of the record, pass such sentence thereon as the appellate court should direct, was not an ex post facto law." *Marion v. State*, 20 Neb. 23, 29 N. W. 911; *Gut v. State*, 9 Wall. 35; *Duncan v. Missouri*, 152 U. S. 377, 14 Sup. Ct. 570; *Calder v. Bull*, 3 Dall. 386.

Upon examination of the record, we find no error in the ruling of the court admitting evidence objected to by the defendant, or in the portions of the charge excepted to. We do not deem it necessary to particularly examine in this opinion such alleged errors. We find no errors against the defendant in this record. Therefore the judgment of the court below is affirmed.

BARTCH and MINER, JJ., concur.

(Utah, 232)

STEVENS et al. v. SOUTH OGDEN LAND, BUILDING & IMPROVEMENT CO. et al.
(Supreme Court of Utah, Dec. 9, 1896.)

CORPORATIONS—OFFICERS—ACTION FOR FRAUD—PARTIES—RECEIVERS.

1. When the same persons, officers of several corporations, form a fraudulent design to use the property and credit of such corporations for their own advantage, to the injury of the other stockholders, and do fraudulent acts in carrying out such design, all the parties affected by such acts are proper parties to a complaint based upon such fraudulent design. The persons perpetrating the fraud, and all others whose gains or losses are traceable thereto, are proper parties to an action based upon fraud.

2. When a fraudulent conspiracy is the common point of litigation, the conspirators and all persons affected by the fraud are proper parties to a suit based upon it.

3. When the business of corporations is mismanaged, and their property is misappropriated by their officers, and such mismanagement and misappropriation is likely to continue, courts of equity will appoint receivers for them.

(Syllabus by the Court.)
Appeal from district court, Weber county; H. H. Rolapp, Judge.

Action by Sidney Stevens and others against the South Ogden Land, Building & Improvement Company and others, to set aside conveyances and for the appointment of a receiver. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Reversed.

L. R. Rhodes, for appellants. Evans & Rogers and A. G. Horn, for respondents.

ZANE, C. J. The court below having sustained a demurrer to the complaint, and plaintiffs having failed to amend, the court entered a judgment dismissing the action, from which the plaintiffs have taken this appeal. The complaint contains numerous allegations, among which are the following: That the South Ogden Land, Building & Improvement Company was incorporated on the 18th day of April, 1892, with authority to buy and sell real estate, build roads, parks, hotels, railways, boulevards, pleasure resorts, and do a general contracting and building business, to construct water ditches, canals, aqueducts, reservoirs, and lay and construct water works, and to build power dams for propelling machinery, and everything necessarily incident to the transaction of such business; that the business was required to be conducted according to the articles of incorporation, and its by-laws; that the number of shares in the company were 5,000, of which Sidney Stevens subscribed for 1,646 shares, Sidney O. and Frank J. Stevens 10 shares each, Solomon C. and William J. Stephens 1,666 shares each, and David Kay 2 shares; that the capital stock of the corporation consisted of numerous lots and tracts of real estate, described in the complaint; that it was further provided that Sidney Stevens, William J. Stephens, Solomon C. Stephens, Sidney O. Stevens, Frank J. Stevens, and David Kay should be directors until the first Monday in May, 1893, and until the election and qualification of their successors; that Sidney Stevens should be president, Sidney O. Stevens secretary, Frank J. Stevens treasurer, and William J. Stephens vice president. It was further alleged that the South Ogden Mercantile Company, on the same day, was also incorporated; that the object of this incorporation was a wholesale and retail mercantile business, and the acquisition of such land as might be essential to the business; that the capital stock of the corporation was divided into 250 shares, of which Sidney Stevens subscribed for 73½ shares, Frank J. and Sidney O. Stevens 5 shares each, William J. and Solomon G. Stephens 83½ shares each; that the officers of the corporation consisted of five directors, president, vice president, secretary, and treasurer; that, until the meeting of the stockholders on the first Wednesday in May, 1893, and the election and qualification of officers thereto, the board of directors should be Sidney Stevens, Solomon C. and W. J. Stephens, and Frank J. and Sidney O. Stevens; that Sidney Stevens should be president, William J. Stephens vice president, Sidney O. Stevens secretary, and Frank J. Stevens treasurer; that the capital stock consisted of real estate, described in the complaint. The plaintiffs further alleged that the South Ogden Clay & Manufacturing Company was also incorporated on the same day; that the purpose of the corporation was the manufacture of brick, tiling, sewer pipe, pottery, the erection and operation of flouring mills, the manufacturing of tinware, the erection and operation of woollen mills, manufacture of wagons and other vehicles and farming implements, and the erection and operation of iron foundries, glass factories, and manufacture of

wooden wares, that the capital stock of this corporation was divided into 5,000 shares, of which Solomon C. and W. J. Stephens subscribed 1,666 shares each, Sidney O. Stevens, 1,661 shares, and Frank J. and Sidney Stevens 2 shares each; that the officers of the corporation consisted of a board of five directors, a president, vice-president, secretary and treasurer; that, until the meeting of the stockholders on the first Tuesday in May, 1893, and the election and qualification of officers, the directors should be Solomon C. and William J. Stephens, and Sidney O. Frank J., and Sidney Stevens; that said Solomon C. Stephens should be president, Sidney Stevens vice president, Sidney O. Stevens secretary, and Frank J. Stevens treasurer; that the capital stock consisted of all the title and interest of William J. Stephens and Solomon C. Stephens to and in a certain option contract for certain lands described in the complaint. Plaintiffs also alleged that, in May, 1892, the South Ogden Water Company was incorporated, with authority to purchase water, to construct waterworks for South Ogden and a portion of Ogden City, and also to acquire and hold the necessary real and personal property, and to sell the same when necessary or desirable; that its capital stock was divided into 5,000 shares, of which Sidney Stevens subscribed for 1,646 shares, Solomon C. and William J. Stephens, 1,666 shares each, Sidney O. and Frank J. Stevens 10 shares each, and David Kay 2 shares; that the capital stock of this corporation consisted of the right to the waters of certain creeks and reservoirs mentioned in the complaint. The plaintiffs further alleged that the four corporations named were organized to prosecute one enterprise, and that they were to be, in effect, subject to one management, and that their business became so intermingled and connected that it was necessary to make them all parties to the same action; that all of the subscribers still own their stock, with the exception of one share assigned to John J. Hill, and a few shares assigned to Paul Beus. Plaintiffs further allege that Sidney Stevens turned over to the South Ogden Mercantile Company, soon after its organization, in payment for his stock, a stock of goods of the value of \$14,000, and that he placed to the credit of the South Ogden Land, Building & Improvement Company \$10,000 in payment for stock issued; that, after the organization of said corporations, Solomon C. Stephens became general manager of the business of the South Ogden Clay & Manufacturing Company, and William J. Stephens of the South Ogden Land, Building & Improvement Company, and Sidney O. Stevens of the business and affairs of the South Ogden Mercantile Company; that Solomon C. Stephens and William J. Stephens represented to these plaintiffs that they were interested in a large number of building contracts in various parts of the city of Ogden, Park City, Heber City, and other places in Utah territory, and that such business had been entered into by them under the firm name of Stephens Bros., but that they would turn over to the South Ogden Land,

Building & Improvement Company all benefits arising from said contracts, and that the goods and trade connected with said building operations should go to the benefit of the South Ogden Mercantile Company, and that all payments which they were to receive for the construction of such buildings should be paid into the treasury of the said South Ogden Land, Building & Improvement Company, in consideration of certain credits to which proposal plaintiffs agreed that thereupon William J. and Solomon C. Stephens began to use, in such building operations, the \$10,000 of credit in favor of the South Ogden Land, Building & Improvement Company placed there by plaintiff Sidney Stevens, and also began to use the \$14,000 worth of goods and merchandise of the South Ogden Mercantile Company, and they also began to purchase, from various firms in Ogden City and the East, goods, wares, and merchandise, to be used by them in and about said building operations; that, about the 1st day of September, 1892, plaintiffs ascertained that William J. and Solomon C. Stephens had drawn the full amount of the \$10,000 placed to the credit of the South Ogden Land, Building & Improvement Company, and that they had incurred obligations against that company to the extent of about \$17,000, all of which, to the amount of about \$20,000, had been used by S. C. and W. J. Stephens in the execution of said contracts and, in addition thereto, they drew from the stock of merchandise about \$10,000, and, besides this amount of about \$30,000, the said S. C. and W. J. Stephens had also contracted debts against the South Ogden Land, Building & Improvement Company to the amount of about \$17,000; that, upon their representations the last-named company borrowed the sum of \$15,000, and gave mortgages to secure the same on all of the property of the four corporations; that the said S. C. and W. J. Stephens refused to turn over any part of the proceeds to said companies, or either of them, and by means of force and violence took possession of the offices of the companies, and ejected plaintiffs therefrom, and held the same. The plaintiffs further alleged, in their complaint, that said W. J. and S. C. Stephens have a majority of the stock in each of the four corporations that they held elections of stockholders, and did not elect plaintiffs, or either of them; that the directors elected, intending to defraud plaintiffs, and to render their stock in the companies absolutely worthless, and for the purpose of transferring, in the end, all of the property of the said corporations to their own private use entered upon the books of said corporation various false entries, by which said Solomon C. and William J. Stephens were credited with false and fictitious credits; that they caused to be recorded, on the records of Weber county numerous mortgages and trust deeds, in favor of said S. C. and W. J. Stephens, on the property of said corporations, while they were indebted to the companies, and that they are still indebted; that said mortgages and deeds of trust were given without any consideration, and

upon a fraudulent understanding and conspiracy between said directors, that the defendants have sold the property of the said companies and the proceeds thereof have been converted to the use of S. C. and W. J. Stephens. The plaintiffs allege numerous other fraudulent designs and conspiracies of the defendants to the injury of the plaintiffs by means of which the four companies aforesaid have apparently been denuded and divested of their property so that the purposes of their creation cannot longer be prosecuted and carried out. And, finally, the plaintiffs allege that, by means of the conspiracies and acts alleged in their complaint, they have been defrauded of \$36,000, and that they never received anything from their investments in said corporations, and further, that the defendants refuse to consult with plaintiffs, or to pay any attention to their requests and demands, or to respect their rights. The plaintiffs prayed the court to appoint a receiver with power to take possession of all the property, books, and accounts due or to become due to said corporations, and with authority to bring all necessary suits to obtain the possession of the books, property, and evidences of indebtedness belonging to them, and to set aside all fraudulent conveyances, and require accountings, and, generally, to take charge of and wind up the business thereof.

Defendants demurred to the plaintiffs' complaint on two principal grounds: (1) Because it was multifarious,—that distinct and independent matters were blended; (2) that there was a misjoinder of parties as co-defendants. The immediate object sought by the complaint was the appointment of a receiver for the four corporate defendants, and, ultimately, compensation for the loss caused by the mismanagement and fraud of the defendants in conducting the business, disposing of the property, and using the credit of the said corporate defendants. It appears from the complaint that all the other parties to the action were owners of stock issued by the respective corporations, and that they were organized and intended to be used as instrumentalities in the prosecution of a general design,—that it was believed the enterprises contemplated could be more successfully carried out by the four corporations than by a less number. It further appears that a fraudulent design and conspiracy of the defendants, who are natural persons, caused losses to the corporate defendants, as well as the plaintiffs; that the defendants perpetrating the fraud affected injuriously all the other parties; that the losses of the other parties are traceable to and centered in the fraud of the natural defendants. The plaintiffs base the right to the remedy they ask on that fraud.

Assuming the allegations of the complaint to be true, as we must for the purposes of the demurrer, the defendants William J. Stephens, Solomon C. Stephens, David Kay, John Hill, Paul Beus, and J. O. Stevens formed a fraudulent design, and entered into a con-

spiracy to use the property and credit of the corporations named for their own benefit, to the injury of the other parties; and, in prosecuting that purpose, they did a number of acts by which the interests and rights of the other parties were affected. Therefore, the parties doing the fraudulent acts, and all other persons, natural or legal, were proper parties to the action, to investigate the entire fraud, and the transactions connected therewith, and to ascertain the respective rights and interests of the parties, that such orders and such a decree might be made as would secure the rights and interests of all those affected by the fraud; and this, though some of the defendants might have separate and distinct defenses. The ends of distributive justice manifested by this complaint call for a liberal application of the flexible principles of equity. The gist of the action, as set forth in the complaint, is the fraud and mismanagement of defendants William J. Stephens, Solomon C. Stephens, J. O. Stevens, David Kay, John J. Hill, and Paul Beus in controlling, disposing of, and appropriating the property of the corporations named, transacting their business, and using their credit, by which the rights and interests of all the other parties were affected. In this there is one common point of litigation. That being so, they were all proper parties; and, for the same or similar reasons, the complaint cannot be regarded as multifarious. *North v. Bradway*, 9 Minn. 183 (Gil. 169); *Donovan v. Dunning*, 69 Mo. 436; *Fellows v. Fellows*, 4 Cow. 682; *Bobb v. Bobb*, 76 Mo. 419; *Williams v. Bankhead*, 19 Wall. 563; *Phil. Code Pl. § 453*; *Cook, Stock, Stockh. & Corp. Law*, § 738; *Story, Eq. Pl. (9th Ed.) § 539*. It clearly appears, from the allegations of the complaint, that the natural persons named as defendants were directors and officers of the four corporations mentioned, and that they so mismanaged the business of the companies as to cause the plaintiffs, who were stockholders, great loss, and that they will sustain further loss unless a receiver is appointed. We are of the opinion that the order sustaining the demurrer and the judgment dismissing the action were erroneous. The judgment appealed from is reversed, and the cause is remanded, with directions to set aside the order sustaining the demurrer.

- BARTCH and MINER, JJ., concur.

(14 Utah, 265)

STEPHENS v. AMERICAN FIRE INS. CO.

(Supreme Court of Utah, Oct. 20, 1896.)

ACTION ON INSURANCE POLICY—PLEADING—SETTING FORTH INSTRUMENT IN FULL—DEMURRER.

1. Under our system, in a suit upon a written contract, it makes no difference whether a contract is set out in *hæc verba*, or whether it is annexed, and by proper reference made a part of the pleading. However, matters of substance, which are preliminary or collateral to the instrument, must be properly averred, so that the ulti-

"commercial" consumption (Sec. 59-15-4 (b) (2)) by its other subdivisions, (b), (d), (e), (f), and (g) also expressly taxes a wide gamut of other services such as transportation, amusements, hotels, motels, cafes and laundries, all of which are properly classified as "commercial" and includes with them "common carrier" operations. Subsection (e) imposes a sales tax on:

"* * * all services for repairs or renovations of tangible personal property, or for installation of tangible personal property rendered in connection with other tangible personal property."

Apart from specific activities which we held in the prior decision not to amount to "repair, renovation, or installation," the record amply supports the Commission's finding that plaintiff's business consists generally in rendering services to its parent common carrier companies, and that its use of coal was for a commercial purpose. That being so, and because under the Commission's findings the coal plaintiff uses does not qualify as exempt under the Sales Tax Act, the order of the Tax Commission is not disturbed in that regard. But the decision is modified as indicated herein, to the effect that exemptions under the Sales Tax Act also apply to the Use Tax Act. (All emphasis added)

No costs allowed.

HENRIOD, C. J., and McDONOUGH, WADE, and CALLISTER, JJ., concur.

399 P.2d 147

Frelida J. Wassom TOLMAN,
Plaintiff and Appellant,

v.

Albert M. WASSOM, Defendant
and Respondent.

No. 10229.

Supreme Court of Utah.

Feb. 15, 1965.

Habeas corpus proceeding by mother who had been awarded custody of children by Oregon divorce decree to obtain return of child taken by father. The Third District Court, Salt Lake County, Marcellus K. Snow, J., dismissed petition, and the mother appealed. The Supreme Court, Henriod, C. J., held that Oregon divorce decree was entitled to full faith and credit in Utah habeas corpus proceeding, in absence of claim or showing of any changed circumstances warranting either trial court's decision dismissing petition or its assumption of jurisdiction to make it under Utah selection statute.

Remanded with instructions.

1. Habeas Corpus \Rightarrow 99(6)

In habeas corpus proceeding instituted by mother, who had been awarded custody of children by Oregon divorce decree, to obtain return of child taken by father, Utah statute giving child over ten years of age

right to select which parent he chose to live with was not applicable. U.C.A.1953, 30-3-5.

2. Habeas Corpus §99(1)

District court erred in dismissing habeas corpus petition by mother, who had been awarded custody of children by Oregon divorce decree, to obtain return of child taken by father, in absence of claim or showing of changed circumstances warranting either court's decision or its assumption of jurisdiction to make it under Utah selection statute. U.C.A.1953, 30-3-5.

3. Divorce §402(1)

Oregon divorce decree awarding custody of children to mother was entitled to full faith and credit in Utah habeas corpus proceeding instituted by mother to obtain return of child taken by father in absence of claim or showing of changed circumstances warranting either court's decision dismissing petition or its assumption of jurisdiction to make it under Utah selection statute. U.C.A.1953, 30-3-5.

taken and retained custody of one of the children awarded by an Oregon court to the petitioner mother. It was not in accord with the visitation rights decreed by the Oregon divorce decree.

Petitioner took the position that full faith and credit must be accorded the Oregon judgment. We agree. The trial court questioned the 11-year-old girl in chambers who said she preferred to be with her father. That was all. There wasn't any evidence showing any changed circumstances since the Oregon decree, save the passage of time.

The trial court dismissed the petition on the argument of counsel and the preference of the girl, on the ground that a selection had been made by the child, who was over ten, as to which parent she chose with whom to live. This was based on the provisions of Title 30-3-5, Utah Code Annotated 1953.

[1-3] The trial court was in error for several good reasons: 1) The matter was not a divorce proceeding, and therefore the Utah statute with respect to selection was inappropos; 2) There was no claim of or showing of any changed circumstances warranting either the trial court's decision or its assumption of jurisdiction to make it under the Utah statute; 3) All this being so, full faith and credit must be accorded the judgment of the sister state of Oregon.

Dansie, Ellett & Hammill, Murray, for appellant.

Mitsunaga & Ross, Salt Lake City, for respondent.

HENRIOD, Chief Justice.

This matter was initiated by petition for writ of habeas corpus, the father having

It seems inescapable, therefore, to decide anything other than that the Utah court should have granted the petition, and we remand this case with instructions to do just that.

McDONOUGH, WADE, and CALLISTER, JJ., concur.

CROCKETT, J., concurs in the result.



399 P.2d 202

Benner J. CARLING, Plaintiff,

v.

INDUSTRIAL COMMISSION of Utah and
Consolidated Western Steel Division Unit-
ed States Steel Corporation, Defendants.

No. 10177.

Supreme Court of Utah.

Feb. 19, 1965.

Original proceeding to review order of Industrial Commission denying a claim for workmen's compensation for impairment of hearing which plaintiff claimed to have suffered as result of loud noise created while he was operating an air-tamping gun. The Supreme Court, Crockett, J., held that the Industrial Commission's conclusion that the plaintiff's loss of hearing did not result

from a single incident, nor from an "accident" arising out of and in the course of his employment, was supported by a reasonable basis in the evidence.

Affirmed.

1. Workmen's Compensation ⚡514

The term "accident" should be given a broad meaning; it connotes an unanticipated, unintended occurrence different from what would normally be expected to occur in usual course of events. U.C.A.1953, 35-1-45.

See publication Words and Phrases for other judicial constructions and definitions.

2. Workmen's Compensation ⚡514

An "accident" is not necessarily restricted to some single incident which happens suddenly at one particular time and does not preclude possibility that due to exertion, stress or other repetitive cause a climax might be reached in such manner as to properly fall within definition of accident but such occurrence must be distinguished from gradually developing conditions which are classified as occupational diseases and which are not compensable except as specifically provided. U.C.A. 1953, 35-1-45, 35-2-1 et seq.

3. Workmen's Compensation ⚡1946

Reversal of order denying workmen's compensation claim because of erroneous statement by Industrial Commission would

low, 102 Ill. 272; *Graham v. Scripture*, 26 How. Prac. 501; *Meyer v. Van Collem*, 28 Barb. 230; *McKerras v. Gardner*, 3 Johns. 137; *Lee v. Selleck*, 33 N. Y. 615; *Burckle v. Eckhart*, 3 N. Y. 132.

Counsel for the respondent cited *Wallace v. McConnell*, 13 Pet. 136, but it does not militate against the principles hereinbefore stated. Mr. Justice Thompson, delivering the opinion of the court, said: "The place of payment in a promissory note, or in an acceptance of a bill of exchange, is always matter of arrangement between the parties for their mutual accommodation, and may be stipulated in any manner that may best suit their convenience." Unquestionably, this is the law, and is just what was done by the parties in this case. They stipulated in the note that it should be paid at a certain place, but the promisor failed to do so, and this fact is admitted. Therefore immediately upon such failure the breach occurred, the wrong was done, and the cause of action then and there arose; and under the mandate of the constitution the action must be commenced where the cause arose. It is true, under the former practice, before statehood, a transitory action, like the one at bar, could be brought where the defendant resided, but that practice no longer exists in this state. The people in their sovereign capacity, by their fundamental law, have ordained otherwise, and neither by interpretation nor legislative enactment can the old practice be restored. Sess. Laws 1896, c. 93, in so far as it authorizes the bringing of an action upon a contract in the county where the defendant resides, when such contract, by stipulation therein, is to be performed in another, is in conflict with Const. art. 8, § 5, and is void.

From the foregoing considerations, we are of the opinion that the cause of action in this case arose in Salt Lake City and county where the note was made payable, and that the suit was improperly brought in Tooele county. The case must therefore be reversed and remanded, with direction to the court below to dismiss the action. It is so ordered.

ZANE, C. J., and MINER, J., concur.

(17 Utah, 341)

WILSON v. SULLIVAN.

(Supreme Court of Utah. June 11, 1898.)

ACTIONS—JOINDER—PARTNERSHIP—ASSIGNMENTS FOR CREDITORS—EXECUTION—ESTATE CONVEYED—POWERS OF ASSIGNEE—FRAUD—PLEADING—DAMAGES—INTEREST.

1. Plaintiff was assignee of property belonging to S. & Co., and in a complaint against defendant, alleges that defendant, as sheriff of Juab county, with notice of plaintiff's rights therein, broke into the store containing the goods assigned, and levied a writ of attachment upon the contents of said store (said writ having been issued in a suit of P. against S. & Co.), and continued to hold the property under the writ; that the writ was dissolved, by order of

the court, as improperly issued; that defendant continued to hold, wrongfully, the possession of said property, until a judgment was obtained in the suit of P. against S. & Co., when said defendant levied an execution issued on the judgment, and converted to his own use, as sheriff, the greater part of said property; that, while defendant was in possession of said property, he injured and damaged it,—and alleges damages for wrongfully holding the store, and for injuries to the goods and building, and for withholding accounts assigned, so that they became worthless. *Held*, on demurrer, that as the subject-matter was for a tort arising out of certain wrongful, continuous, official acts, the several causes of action are properly joined, and the complaint reaches substantial rights without resorting to a needless multiplicity of actions.

2. The right of a partnership to assign the firm's assets without including the individual property of each partner, under sections 2471 and 2472, includes the right of the creditor to proceed against the individual property of the parties composing the partnership, when the partnership property shall prove insufficient to pay the firm debts, and is reconcilable with the provisions of section 2470, Comp. Laws Utah 1888.

3. A deed of assignment of realty, containing the words, "grant, bargain, sell, convey, assign, and deliver to the party of the second part," is sufficient to convey a fee-simple interest, under section 1981, Rev. St. (Sess. Laws 1890, p. 88), without the use of words of inheritance, such as "heirs," etc.

4. The assignment of choses in action clothes the assignee with all the rights of the assignor; and he may collect debts, and give remittances, even though the deed of assignment contains no power of attorney.

5. Where partners execute a deed of assignment, and are described therein as comprising the firm, and each of the co-partners executes the deed by signing and acknowledging the same, it is not necessary that the assignment be signed by the partnership name.

6. Allegations in an answer that an assignment was made with intent to delay, hinder, and defraud creditors, and was void and of no effect, are insufficient for the introduction of evidence tending to prove fraud, which, when relied upon as a defense, must be specifically pleaded in an answer, as well as in a complaint, by setting forth the facts and circumstances relied upon, in order that the party charged may be prepared to meet the allegations, and the court may know that there is such fraud as will avail the pleader.

7. It was error to allow interest on goods returned to the plaintiff, after damages had been allowed for their injury and depreciation, and when no conversion thereof had been alleged.

(Syllabus by the Court.)

Appeal from district court, Fifth district; E. V. Higgins, Judge.

Action by R. G. Wilson against John T. Sullivan for conversion. Plaintiff had judgment, and defendant appeals. Modified.

Moyle, Zane & Costigan, for appellant. Dey & Street and W. H. Bramel, for respondent.

MINER, J. It appears from the complaint: That in August, 1896, W. F. Schriver and Hannah Tucker were co-partners doing a general merchantile business at Eureka under the firm name and style of W. F. Schriver & Co. On the 20th day of August, 1896, Schriver & Co. made a general

assignment of all their property, for the benefit of their creditors, to plaintiff, R. G. Wilson, as trustee. Wilson immediately took possession of the assigned property, consisting of a store building, with a large quantity of merchandise and other property. On the 25th day of August, defendant, Sullivan, as sheriff of Juab county, with notice of plaintiff's rights therein, broke into said store, and levied a writ of attachment upon said store and contents, issued in a suit of Parsons against Schriver & Co., and continued to hold possession of said property under said writ. On November 2, 1896, said writ of attachment was dissolved and discharged by order of court, as having been improperly issued. Thereafter defendant wrongfully continued to hold possession of said property until judgment was obtained in the suit of Parsons against Schriver & Co., when said defendant levied an execution issued on said judgment upon said property, and sold and converted to his own use, as such sheriff, the greater part of said goods, to satisfy said execution, amounting to \$5,212.88, and the remainder of said goods were afterwards returned by said defendant to the plaintiff, as assignee, in a damaged and worthless condition. That while said sheriff had possession of said goods he damaged and injured them, and they were depreciated in value to the amount of over \$1,000. Plaintiff claims damages for the wrongful withholding of the possession of the store building, and for injuries to the glass in the building while so occupied by him, and for detaining books of account, bills receivable, and accounts assigned for so long a time that the debtors became insolvent, and collections thereon lost, for which specific damages were claimed, and that said sheriff failed to perform his duty as such, to the total damages of plaintiff amounting to over \$6,000.

The defendant filed his demurrer to said complaint, and, among other grounds, alleged that the several causes of action are improperly joined, and not separately stated. It is plain that the subject-matter of the action was for a tort arising out of certain wrongful, continuous, official acts of the defendant as sheriff, whereby the rights of the plaintiffs were injuriously affected. The wrongful acts are set forth with some particularity, and the damages resulting therefrom are separately stated as arising from a breach of official duty. These acts are all connected, as being one continuous, tortious act, and all arising out of the same kind of action, and connected with the same subject of action, and are stated in ordinary and concise language. In serving a writ of attachment which directs the taking of property of a particular person, an officer acts officially. In taking the property of a person not named in the writ, the sheriff was guilty of a breach of official duty, and such act was wrongful, although it was an

attempt to perform an official duty. When an officer acts thus wrongfully, the act is official, and he is liable for such wrongful act. Counting as the complaint does upon official acts resulting in injury to the plaintiff simplifies the procedure, without violating its rules, and reaches substantial rights, without resorting to a multiplicity of suits for their redress. The demurrer was properly overruled. Rev. St. Utah, §§ 2960, 2961; *Lammon v. Feusier*, 111 U. S. 18, 4 Sup. Ct. 286; *Stevens v. Tuite*, 104 Mass. 334; *Irrigation Co. v. McIntyre*, 16 Utah, —, 52 Pac. 628; 5 Enc. Pl. & Prac. 719; *Frizzell v. Duffer* (Ark.) 25 S. W. 1111; *Razzo v. Varni*, 81 Cal. 289, 22 Pac. 848; *Pom. Code Rem.* § 20; *De La Guerra v. Newhall*, 53 Cal. 141; *Funk v. Funk*, 35 Mo. App. 246; *Johnson v. Smith*, 8 Johns. 383.

Plaintiff assigns error in allowing the deed of assignment to be introduced in evidence, for the reasons: (1) It does not assign individual property of the partners; (2) it only conveys a life estate in the real property assigned; (3) it contains no power of attorney to make collections, or give receipts or acquittances; (4) it is not executed by Schriver & Co., or in their behalf.

The deed of assignment purports to transfer to the assignee all the real and personal property of the firm, for the benefit of all the creditors of the partnership. With reference to the first objection, to the effect that the individual property of the partners is not assigned, reference may be had to the statute. Section 2471, Comp. Laws Utah 1888, provides, "that the assignment of any partner in trade made to secure or satisfy any creditor, shall be deemed valid in law." Section 2472, provides, "This act shall not be so construed as to authorize the assignment of any of the effects of such co-partnership to satisfy the individual claim of any of the parties, or other than such debts as are incurred for the effects or proceeds thereof thus assigned." This right of a partnership to assign firm assets without including the individual property of each partner has been questioned by some courts where the statute is silent upon the subject; but more recent decisions generally concur in holding such assignments valid with the right of a creditor to proceed against the individual property of the partnership. This view is now well established, and is entirely reconcilable with the provisions of section 2470, Comp. Laws Utah 1888, which provides "that the private property of persons engaged in co-partnerships shall be held liable for the debts of the firm, when the partnership property shall prove insufficient to pay them." *Burrill, Assignm.* (6th Ed.) § 47; *Bump, Fraud. Conv.* (4th Ed.) p. 369; *Bradley v. Bischel*, 81 Iowa, 80, 46 N. W. 755; *McFarland v. Bate*, 45 Kan. 1, 25 Pac. 238; *Ex parte Hopkins*, 104 Ind. 157, 2 N. E. 587; *Auley v. Osterman*, 65 Wis. 118, 25 N. W. 657, and 26 N. W. 568; *Drucker v. Well-*

house, 82 Ga. 129, 8 S. E. 40; Harris v. Fisscher, 57 Ga. 229.

The second contention of appellant is that the deed of assignment only conveys a life estate in the real property assigned, and that words of inheritance, such as "heirs," etc., are improperly left out of the assignment. The deed of assignment contains the words, "grant, bargain, sell, convey, assign, and deliver to the party of the second part." This objection is sufficiently answered by section 1981, Rev. St. (Sess. Laws 1890, p. 88), which, in prescribing the form of a warranty deed of conveyance, uses the words "grant and convey," and provides that such deed shall convey in fee simple to the grantee, his heirs and assigns, a title to the premises named therein, and that such conveyance shall include the usual covenants of seisin and warranty, more specifically recited in the act.

The third objection, that the deed of assignment contains no power of attorney to collect debts and give acquittances, is equally untenable. The deed assigns all notes, accounts, and credits of the firm to the assignee in trust. The assignment of choses in action clothes such assignee with all the rights of the assignor, whether legal or equitable, to collect a debt and give acquittances for the same, and such rights under the assignment will be protected against all persons having notice of the assignment. 2 Am. & Eng. Enc. Law, 1088.

Appellant's fourth contention, that the deed of assignment is not signed by Schriver & Co. or in their behalf, is also untenable. The two partners executing the deed are described therein as comprising the firm of Schriver & Co., and each of such co-partners executed the deed by signing and acknowledging the same. This was clearly sufficient. Comp. Laws Utah 1888, § 2471; Burrill Assignm. (6th Ed.) § 47; Bank v. Hackett, 61 Wis. 335, 21 N. W. 280. The defendant in his answer alleged that: "On said 20th day of August, 1896, said W. F. Schriver and Hannah C. Tucker attempted to assign or convey in writing to said plaintiff the property mentioned in said complaint; but that said conveyance or assignment in writing was made with intent to delay, hinder, and defraud the creditors of said W. F. Schriver and of said Hannah C. Tucker of their lawful debts and demands, and particularly the Arthur Parsons hereinafter mentioned, and was void and of no effect as against such creditors and each of them." Under this allegation the defendant offered certain testimony tending to show fraud on the part of the assignors, and knowledge on the part of the assignees. The testimony was rejected: (1) Because no fraud is set up in the pleadings, or pleaded in the answer; (2) because the answer contained no allegation connecting the plaintiff with fraud, or knowledge or notice thereof; (3) because the answer contained no allegation showing that defendant

was defrauded or in any wise injured by the assignment, and that the answer only pleads a legal conclusion. The appellant, in his answer, charges no fraud or knowledge of fraud on the part of the plaintiff, nor are the particular acts constituting the specific ground of fraud on the part of the plaintiff or the assignors alleged, nor is it charged that either the attaching creditors or the defendant was injured by any such fraud. Fraud, when relied upon as a defense, must be specifically pleaded in an answer, as well as in a complaint; and the facts and circumstances relied upon should be set out, in order that the court may know whether there was such fraud as will be of avail to the pleader, and also that the party charged with fraud may know the nature of the charge, and be prepared to meet it. The allegation referred to amounts to a legal conclusion as constituting fraud, and presents no issue of fact, as it does not set forth the specific fact which constituted the alleged fraud, nor is it charged that the plaintiff participated in, or had any knowledge of, any fraud. We are of the opinion that the evidence offered was properly excluded. Voorhees v. Fisher, 9 Utah, 303, 34 Pac. 64; Bliss, Code Pl. §§ 211-339; 2 Estee, Pl. & Prac. 2748; Boone, Code Pl. § 148; Eaton v. Metz (Cal.) 40 Pac. 947; Gleason v. Wilson (Kan. Sup.) 29 Pac. 698; Coal City C. & C. Co. v. Hazard Powder Co. (Ala.) 19 South. 185; Grocery Co. v. Stinson (Wash.) 43 Pac. 35; Albertoll v. Branham, 80 Cal. 631, 22 Pac. 404; Meeker v. Harris, 19 Cal. 279; Daniel, Neg. Inst. § 770; Pettit v. Parsons, 9 Utah, 223, 33 Pac. 1038; Kain v. Larkin, 131 N. Y. 300, 30 N. E. 105; Bump, Fraud. Conv. (4th Ed.) §§ 560, 337; 9 Enc. Pl. & Prac. 686, 687.

Under instructions from the court, the jury allowed interest on goods returned to the plaintiff, from August to December 15, 1896, amounting to \$9.13, after damages had been allowed, for their injury and depreciation in value, when no conversion thereof had been alleged. This was error, and the sum of \$9.15, allowed as interest, should be remitted and deducted from the judgment. We find no reversible error in the record. The cause is remanded, with instructions to the trial court to modify the judgment by striking out and remitting therefrom the sum of \$9.15, erroneously allowed as interest, hereinbefore referred to; and, as so modified, it is ordered that such judgment stand affirmed.

ZANE, C. J., and BARTCH, J., concur.

(17 Utah, 352)

TARPEY v. MADSEN.

(Supreme Court of Utah July 1, 1898)

RAILROAD LAND GRANT—WHEN TITLE VESTED—
TIME TO FILE NOTICE—FAILURE TO COMPLY
WITH LAW—REVERSION TO UNITED STATES

In an action to try title to certain land, it appears that plaintiff claims title through the