

1940

Gladys Wilsted v. Hugh Nation : Abstract of Record

Utah Supreme Court

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O. H. Matthews; Attorney for Defendant and Appellant;

Duncan & Duncan; Attorneys for Plaintiff and Respondent

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No. 6235

In
The Supreme Court
of the
State of Utah

GLADYS WILSTED,

Plaintiff and Respondent

vs.

HUGH NATION,

Defendant and Appellant

Appeal From Third Judicial District State of Utah
Salt Lake County
Honorable P. C. Evans, Judge.

ABSTRACT OF RECORD

O. H. MATTHEWS,
Attorney for Defendant
and Appellant.

DUNCAN & DUNCAN,
Attorneys for Plaintiff
and Respondent.

FILED
MAR 5 1940

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Appeal From Third Judicial District State of Utah
Salt Lake County
Honorable P. C. Evans, Judge.

ABSTRACT OF RECORD

COMPLAINT

(TITLE OF COURT AND CAUSE).

PLAINTIFF ALLEGES:

1

- 1 That at Salt Lake City, Salt Lake County, State of Utah, on or about the 15th day of April, A. D. 1939, in consideration that the plaintiff, who was then unmarried, would

marry the defendant, the defendant promised to marry the plaintiff within a reasonable time.

2.

That the plaintiff, relying upon said promise, has always since remained unmarried and ready and willing to marry the defendant and so remained until the marriage of the defendant to another woman as hereinafter set forth, made it impossible.

3.

That afterwards, to wit, on or about the 25th day of July, A. D. 1939, the defendant married another woman, namely, Sophie Laughlin, contrary to and in violation of his promise to the plaintiff.

4.

That by reason of the said promise of marriage so made by the defendant to the plaintiff, as aforesaid, the defendant was enabled to and did debauch the plaintiff and thereby and because of the action of the defendant in so violating his promise to marry the plaintiff, the plaintiff has suffered damage in the sum of Five Thousand Dollars.

WHEREFORE, the plaintiff demands judgment against the defendant for the sum of Five Thousand Dollars and for costs of this action.

DUNCAN & DUNCAN,
Attorneys for Plaintiff.

Duly verified.

Filed Sept. 22, 1939.

ANSWER

(TITLE OF COURT AND CAUSE).

6 Comes now Hugh Nation, the above named defendant, and for answer to plaintiff's Complaint herein, admits, denies, and alleges as follows:

1.

Admits the allegation contained in paragraph one, that defendant was unmarried on April 15, 1939, denies each and every other allegation in said paragraph.

2.

Denies the allegations contained in paragraph two of said Complaint.

3.

Answering paragraph three, defendant admits the first three lines of said paragraph, but denies that said marriage was in violation of his promise to the plaintiff.

4.

Denies the allegations contained in paragraph four of said complaint.

WHEREFORE, the defendant prays that plaintiff's Complaint herein be dismissed and that she have none of the relief prayed for herein.

O. H. MATTHEWS,

Attorney for Defendant.

Duly verified.

Filed Oct. 4, 1939.

ENTERED ORDER

(TITLE OF COURT AND CAUSE).

9 This case comes now on for trial, A. A. Duncan appearing in behalf of the plaintiff, and O. H. Matthews appearing in behalf of the defendant. Whereupon a jury of eight persons is impaneled and sworn to try the within case as follows, to wit:

L. C. Olpin	Carl Morandi
Drecksel, Carl O.	A. E. Olsen
Samuel Brown	Archie G. Anderson
F. C. Armour	C. Ernest Bowers

A. A. Duncan makes his opening statement to the jury in behalf of the plaintiff. Gladys Wilsted is sworn and examined in her own behalf. Documentary proof is offered and received in evidence in behalf of the plaintiff. Plaintiff rests. Comes now O. H. Matthews, counsel for the defendant and moves the court for a judgment of no cause of action upon the complaint. Said motion is argued to the court by respective counsel and submitted and is by the court taken under advisement. Comes now A. A. Duncan and requests and is given permission to reopen this case. It being now the hour of adjournment, it is ordered that the further trial of the within case is hereby continued to Tuesday, December 5, 1939 at the hour of ten o'clock A. M.

Dated December 4, 1939.

P. C. EVANS, Judge.

ENTERED ORDER

(TITLE OF COURT AND CAUSE).

10 The jury heretofore impaneled, the respective counsel and all necessary parties hereto being present and ready, the further trial of the within case is now resumed. Gladys Wilsted and A. A. Duncan are sworn and examined in behalf of the plaintiff. Plaintiff rests. Comes now O. H. Matthews and renews his motion for a judgment of non-suit of the plaintiff's complaint. Said motion is by the court denied. Hugh Nation and Harold Nation are sworn and examined in behalf of the defendant. Defendant rests. Gladys Wilsted is recalled and further examined in her own behalf. Both sides rest. Comes now O. H. Matthews, counsel for the defendant, and moves the court for an order directing the jury to return a verdict in favor of the defendant and against the plaintiff, no cause of action. Said motion is by the court denied. The court instructs the jury in writing. The case is argued to the jury by respective counsel and submitted. Whereupon the jury retires from the courtroom to consider of its verdict, and subsequently returns into open court and says by its foreman as follows, to wit:

“We, the Jurors impaneled in the above case, find the issues in favor of the plaintiff and against the defendant on the plaintiff's complaint and assess her damages in the sum of \$1250.00.

SAMUEL BROWN, Foreman.”

Dated December 5, 1939.

The jury is excused from further considera-

tion of the within case and excused until called by the clerk.

P. C. EVANS, Judge.

Dated December 5, 1939.

PLAINTIFF'S REQUESTS FOR IN-
STRUCTIONS TO JURY

(TITLE OF COURT AND CAUSE).

12 Comes now the plaintiff and requests the court to instruct the jury in the above entitled action as follows:

1.

The defendant admits that on the 15th day of April, 1939, he was unmarried and that he remained unmarried until the 23rd day of July, 1939, and that on that day he married a woman other than the plaintiff, namely Sophie Laughlin. You are, therefore, instructed that if you find from the evidence that on or about the 15th day of April, 1939, or on any other day between that time and the 23rd day of July, 1939, the defendant promised to marry the plaintiff, Gladys Wilsted, within a reasonable time, and that she promised to marry him, and that relying upon the said promise the plaintiff has since remained unmarried and during all of said time was ready and willing to marry the defendant, then you are instructed that the marriage of the defendant to said Sophie Laughlin was a breach by him of his promise

to marry the plaintiff and your verdict should be for the plaintiff. Refused.

2.

You are further instructed that no particular form of words is necessary to give rise to a contract to marry, it being sufficient that the minds of the parties have met and that an engagement to marry is mutually agreed to. Such a promise or contract may be unspoken or unwritten. All that is necessary is that the minds of the parties have met and fixed the fact that they promised to marry each other to the same extent as if put in formal words of offer and acceptance. And if you find from the evidence that there was such an understanding and meeting of minds by the plaintiff and defendant, your verdict should be in favor of the plaintiff. Given.

3.

If you find from the evidence that there was such a mutual promise to marry by and between the plaintiff and defendant you should award the plaintiff such amount in damages as will compensate her for her loss of prospects in life because of defendant's breach of said promise; the effect of such breach upon her feelings, mental suffering, wounded pride, pain, mortification, humiliation, the blighting of her affections, her anxiety of mind, or loss of reputation, you find from the evidence the plaintiff suffered because of the act of the defendant in breaking his promise to marry the plaintiff. Given.

DUNCAN & DUNCAN,
Attorneys for Plaintiff.

Filed Dec. 5, 1939.

INSTRUCTIONS TO THE JURY

(TITLE OF COURT AND CAUSE).

Gentlemen of the Jury:

Instruction No. 1

- 14 Plaintiff alleges in her complaint against the defendant that at Salt Lake City, Salt Lake County, State of Utah, about April 15, 1939, in consideration that plaintiff, then unmarried, would marry the defendant, the defendant promised to marry plaintiff within a reasonable time; that plaintiff relying upon said promise has always since remained unmarried and ready and willing to marry defendant and so remained until defendant's marriage to another woman, towit, Sophie Laughlin, about July 25, 1939; that by reason of defendant's promise to plaintiff he was enabled to and did debauch her, and thereby and because of the defendant's action in violating his promise, plaintiff has been damaged in the sum of \$5,000.00.

Wherefore, she demands judgment against him for said amount.

Instruction No. 2

The defendant, by way of answer, admits he was unmarried on April 15, 1939; that afterwards, on or about July 25, 1939, he was married to Sophie Laughlin, and denies each and every other allegation contained in plaintiff's complaint, and prays that her complaint be dismissed.

Instruction No. 3

- 15 You are instructed that in this case the plaintiff founds her action upon an alleged

breach by the defendant of an oral express contract to marry. In order to constitute a contract to marry there must be a meeting of the minds of the alleged contracting parties, that is, there must be an offer on the part of one and an acceptance on the part of the other, and said acceptance must be in good faith with a bona fide intention of carrying out the contract.

Instruction No. 4

- 16 You are instructed that no particular form of words is necessary to give rise to a contract to marry, it being sufficient that the minds of the parties have met and that an engagement to marry is mutually agreed to. Such a promise or contract may be unspoken or unwritten. All that is necessary is that the minds of the parties have met and fixed the fact that they promised to marry each other to the same extent as if put in formal words of offer and acceptance. And if you find from the evidence that there was such an understanding and meeting of minds by the plaintiff and defendant, your verdict should be in favor of the plaintiff.

Instruction No. 5

- 17 You are instructed that the burden of proving the offer of marriage by the defendant to the plaintiff, if any, and her acceptance of said offer, if any, and the breach of said contract, if any, is upon the plaintiff, but that in order to determine whether the plaintiff has met such burden, you are not restricted to the evidence of the plaintiff only, but you

may determine such question from all of the evidence.

Instruction No. 6

- 18 In this case there has been evidence on the part of plaintiff that she and the defendant had illicit intercourse after the alleged promise to marry. You are instructed that if you find that there was such illicit intercourse, that alone does not constitute an offer and an acceptance of marriage, or a marriage contract. On the other hand, if you find that there was a contract to marry, then the fact that the parties had illicit sexual intercourse, if you believe they had such, would not justify the defendant in refusing to marry the plaintiff, if you believe there was a marriage contract and that the defendant refused to marry the plaintiff.

Instruction No. 7

- 19 If you find from the evidence that there was such a mutual promise to marry by and between the plaintiff and defendant, then you should award the plaintiff such amount in damages as will compensate her for her loss of prospects in life because of defendant's breach of said promise; the effect of such breach upon her feelings, mental suffering, wounded pride, pain, mortification, humiliation, the blighting of her affections, her anxiety of mind, or loss of reputation, you find from the evidence the plaintiff suffered, if any, because of the act of the defendant in breaking his promise to marry the plaintiff.

P. C. EVANS, Judge.

Dated December 5, 1939.

VERDICT

(TITLE OF COURT AND CAUSE).

- 21 "We, the Jurors impaneled in the above case, find the issues in favor of the plaintiff and against the defendant on the plaintiff's complaint and assess her damages in the sum of \$1250.00.

SAMUEL BROWN, Foreman."

Dated December 5, 1939.

Filed Dec. 5, 1939.

JUDGMENT ON VERDICT

(TITLE OF COURT AND CAUSE).

- 23 This action came on regularly for trial. The said parties appeared by their attorneys. A jury of 8 persons was regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and being called, answered to their names, and say they find a verdict as follows, towit:

"We, the Jurors impaneled in the above case, find the issues in favor of the plaintiff and against the defendant on the plaintiff's complaint and assess her damages in the sum of \$1250.00.

SAMUEL BROWN, Foreman."

Dated December 5, 1939.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is

ordered, adjudged and decreed that said plaintiff have and recover from said defendant the sum of One Thousand, Two Hundred & 50/100 (\$1250.00) Dollars, with interest thereon at the rate of.....percent per.....from the date hereof till paid, together with said costs and disbursements incurred in this action, amounting to the sum of.....Dollars.

Judgment entered December 5, A. D. 1939.

NOTICE OF MOTION
(TITLE OF COURT AND CAUSE).

To Messrs. Duncan & Duncan, Attorneys for
Plaintiff:

25 Take notice that the Defendant, Hugh Nation, intends to move the court to vacate and set aside the verdict rendered in the above cause, and to grant a new trial of said cause, upon the following grounds, towit:

1.

Surprise, which ordinary prudence could not have guarded against;

2.

Newly discovered evidence, material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial;

3.

Insufficiency of the evidence to justify the verdict;

4.

Excessive damages appearing to have been

given under the influence of passion or prejudice.

Said motion will be made upon pleadings heretofore filed in this cause.

O. H. MATTHEWS,
Attorney for Defendant.

Filed Dec. 11, 1939.

26 Affidavit of New Evidence.

MOTION FOR A NEW TRIAL
(TITLE OF COURT AND CAUSE).

To Messrs. Duncan & Duncan, Attorneys for
Plaintiff:

27 Take notice that upon affidavit of Hugh Nation, the above-named defendant, copy of which is herewith served upon you, and upon the pleading and proceedings on file in said action, the undersigned will, on the 22nd day of December, 1939, at the hour of 10 o'clock A. M. of that day move the above-entitled court for an order setting aside the verdict in this action, and the judgment entered therein, and for a new trial herein, upon the following grounds, towit:

1.

Surprise, which ordinary prudence could not have guarded against;

2.

Newly discovered evidence, material to the defendant, which could not with reasonable

diligence have been discovered and produced at the trial;

3.

Insufficiency of the evidence to justify the verdict;

4.

Excessive damages appearing to have been given under the influence of passion or prejudice.

O. H. MATTHEWS,
Attorney for Defendant.

Filed Dec. 18, 1939.

29 Affidavit of Della May Nielson.

30 Affidavit of Edith Willis.

31 Affidavit of LaMar Duncan.

32 Affidavit (Counter) of Gladys Wilsted.

33 Affidavit (Counter) of Gladys Wilsted.

MOTION FOR NEW TRIAL OVERRULED
(TITLE OF COURT AND CAUSE).

34 Defendant's motion for a new trial having been heretofore argued to this court by respective counsel and submitted and by the court taken under advisement, it is now ordered that said motion is by the court denied.

P. C. EVANS, Judge.

Dated January 4, 1940.

NOTICE OF APPEAL
(TITLE OF COURT AND CAUSE).

To the Above Named Plaintiff and Her Attorneys, Duncan & Duncan:

36 You and each of you, will please take notice that the defendant hereby appeals to the Supreme Court of the State of Utah, from the judgment made and entered in favor of plaintiff and against the defendant and from the whole thereof.

O. H. MATTHEWS.

Attorney for Defendant.

Received a copy of the foregoing notice this, the 3rd day of February, 1940.

DUNCAN & DUNCAN.

Attorneys for Plaintiff.

Filed Feb. 6, 1940.

37 Clerk's Certificate to Transcript, in due form.

BILL OF EXCEPTIONS

(TITLE OF COURT AND CAUSE).

THE TESTIMONY

GLADYS WILSTED, plaintiff, testified:

3-4 I am 42 years old. Mr. Wilsted, my former husband, died in January, 1936. Knew who Mr. Nation was up to a year ago, then quite well acquainted with him. His first wife died in May, 1938. I was working for him at the time she died, started in January, 1938.

Q. Did Mr. Nation ask you out socially?

A. Not for two or three months after. He made love to me, in a way; that started on Decoration Day, (May 30), 1938, and continued for some time.

5 About April 15, 1939 marriage was mentioned. We were both unmarried. He said he loved me and wanted me to marry him. I hesitated, thinking it an imposition on his family, but he said that was all right. No objection came up. So we just drifted along without setting a definite date for marriage. I returned his love and was willing to wait until things could be fixed. I promised I would marry him, but no date was set. I continued to keep company with him. He came in the evenings after dinner and we went for rides, visiting friends, out to dances, or spend an evening at home with my family. That continued every night until he went east on May 14, 1939. While he was away I received a letter every day.

6-7 (Identifies defendant's letters to plaintiff Exhibits A, B-1, C, D, E, F; admitted in evi-

dence and read to jury. The letters are expressive of fondness and affection).

8-10 He returned home May 28, 1939 and came to see me that same night, and we went for a ride out to Bingham that night in an automobile, and I spent the evening with him. He said he sure would be glad when I was his wife. Next night, the 29th, we drove in his car up to Ogden, and visited at the home of one of his sons there, and came back home; we talked marriage. I talked with him all the way; he was wishing 'we could get married quickly, — that things would work out for us so that we could, but still we didn't set any definite date. He took me in his arms, kissed and loved me.

Q. When did you see him again?

A. Well practically every night the week following.

On May 30, 1939 he took my daughter and I out for a ride and he had supper with us that night. That night it was raining and we didn't bother to go far, just drove around the canyons. That night he kissed and loved me, said I was the only one and there never would be anyone else.

We saw each other just about every night after that, then he missed two or three nights; then about the 8th or 9th of June we went to Ogden to a dance. Between 5th and 10th of June he called at my home, probably every night, don't remember, he came so often. Spent the evening alone with me. We talked of our love for each other and our impending marriage. On Monday, 11th June, Monday,

we just rode around town that night. Had conversation that night.

Q. Did you have any relations with him?

A. Oh, we loved each other and kissed, and he stayed for two or three hours.

Q. Was there any night when he came to see you that he did not love and kiss you?

A. No, never, there wasn't a night he didn't kiss me.

12-13 I believe I next saw him the next Saturday, about June 17th, just can't remember the dates, we went to a dance or a show, and from then until the 24th June, he came to my home and we went for rides together every night. Then for two or three nights he didn't come. The night of July 3rd we went out to a dance at Lagoon; we drove out together alone. Usual conversation, how much we thought of each other, and we would be glad when we got married.

14-15 On July 4th, evening, he came to my home and stayed an hour, then left. He kissed me, all was pleasant. For two or three nights straight he came to see me after that; then on Saturday he came again and took me for a ride up Mill Creek Canyon, that was July 15th; we didn't speak of marriage that day; I was too glad to be with him, I guess. He kissed me, yes. On Monday night, July 17th, a short ride about the city. We arranged that night he would take me up to the State Capitol building, the night of 19th, but did not come. I saw him the morning of the 20th on Main street. I asked him why he didn't come up, and he said he had been invited out to dinner and forgot his engagement with me. I told him I didn't

like it. We watched the children parade, and he had to go back to work, and when he left me he said: "I will be seeing you," — and that is the last I seen or spoken to him since.

16-17 He never mentioned to me his intention of marrying another woman. I first learned of his marriage to another when I read it in a slip cut from a paper and given me on July 25th. He has not been to see me since.

18-19 I was in love with him and am now. When I learned that he had married another woman, I was just practically sick about it. I couldn't understand why he should leave me. It was a terrible shock. I just got so nervous and upset I didn't know what to do. I was terribly humiliated; I really hated to go outside of the house because we had been out together so much. I was mortified so, I really hated to answer the door. I felt as though everybody was laughing at me.

20 I haven't been able to work to same extent as before; I just go around in a kind of a haze. I had made plans for living with Mr. Nation and now my prospects were all blighted, and I am a widow and have to work for a living.

CROSS - EXAMINATION:

20-22 I went to live with the Nation household in January, 1938, as housekeeper and companion to Mrs. Nation who was then very ill. My services were dispensed with about three weeks after she died, around June 1st. Then I went to my own home. Mr. Nation made love to me while I was in his home; my first intimation of it was on Decoration Day, 1938. Later he asked me to marry him around the

middle of April, 1939. He had mentioned it before, but there were objections to it, so we didn't bother about it. He did marry me on July 13, 1938, and we were later divorced on September 8, 1938. He continued to see me. He had sexual relations with me after the interlocutory divorce of September 8th, which became final March 8, 1939.

23-24 He always said he would marry me, but no definite date was set; we talked about it but we never came to any conclusion at all. I can't recall exactly when he asked me to marry him the second time, but it was around in April, the middle of April I believe. My disappointment affected my ability to work, yes. I am a housekeeper; I haven't worked at all this year.

25 Q. Weren't you housekeeper for Mrs. Duke this year?

A. I was for a month, I was too ill to continue, so I stopped.

Q. Isn't it a fact that Mrs. Duke died?

A. Yes.

Q. And that they had no use for your services after her death?

A. I was with Mrs. Duke when she died. I didn't work for Mrs. Duke after September 12th, but did work for her a month after April.

RE--DIRECT EXAMINATION:

26-29 After I had been living at Mr. Nation's home for some time, and after his wife died, he proposed marriage to me, yes. That was at his home. I told him he better tell his family, and I told them; they objected, mainly be-

cause I was a young woman with a young family. When I left his home I didn't see Mr. Nation for two weeks. I made no effort to get in touch with him. He came to my house one night and waited for my return. That is the first I knew Mr. Nation was interested in me. That was about June 7, 1938. He asked forgiveness for not coming back to see me and asked if he could still come, and I told him yes. It went on like that until his family found he was coming down to see me, and they raised a ruckus about it, so that stopped him again for a little while. Then he came back again about two weeks later with the same plea that he be forgiven for neglecting me. I made no attempt to get in touch with him, never have. It went on until he took his vacation about July 1st, he wanted me to marry him before he went, but we decided against it. Then he was gone 11 days, and I received an air-mail letter from him every day that he was gone. He returned home July 12th. He spent the night at my home; his family didn't know he was in town. Next morning he went to his family. We arranged to go to town together on the 13th of July. One of his youngest sons walked with us to town, and all the way down town he created a fuss. On our way we passed the City and County building, and Mr. Nation said: "Let's go and get married right now, shall we?" I said, "Yes, if that's what you wish." We came in and were married right here in this building. Then we went to my home, then his, and told our families. He spent the night with me. Next day, the 14th of July, he went back to his home. I was never with Mr. Nation again as his wife. I was wife in name only. Then two weeks later his attor-

ney, Mr. Matthews, came and asked me to sign a waiver releasing Mr. Nation from that marriage. I refused.

So it went on till the latter part of August, and I finally listened to Mr. Nation's pleas to give him a divorce; I got it on grounds of non-support.

Q. What were his pleas?

A. That if we were divorced he could talk his family into being sensible about the matter, even if I was a young woman, and we were in love with each other. I listened to him and gave in to his pleading that I divorce him, which I did on the ground of non-support. He never supported me, never. I didn't ask for alimony; I had my name, Wilsted, returned. Divorce was granted September 8, 1938.

After that we talked of having the divorce set aside and living together as man and wife, and he promised to help take care of my family, and it went on. I worked during the winter for Mrs. Jukes (Duke?) from the middle of November until latter part of January, when I became ill. On February 20, 1939, I went to a hospital for six weeks, except one week out.

Every night during that six months period we met, and Mr. Nation wanted me to see my attorney about setting it aside.

30-31 While I was at the hospital he came to see me every night, and he took me to and from the hospital. He did not bring me flowers, no, nor anything, just talked to me. During that time he kissed and loved me and talked of our future relations, yes. And then after this six

months period went by, this promise I spoke of took place, yes.

There was never any break in our relations after we were married, so far as our affections were concerned, none whatever; never any ill will toward each other. When he spoke in these letters of "our troubles will soon be over" he was referring to the troubles of his family's objections to our marriage.

From the time he first proposed to me before we were married up to the time he was married on July 20th, or the last time I saw him, he avowed his affections for me every time, yes. There has never been any break in it.

RE-CROSS EXAMINATION:

When Attorney Matthews called to have me sign a waiver, I did not sign it, but I went to my attorney and Mr. Nation signed a waiver and the divorce was granted. The reason why Mr. Nation wanted a divorce was because his family objected very strongly to our marriage. He never told me that they had ceased objecting, no, not exactly, he always said things would soon straighten out for us.

Q. The thing that stood between you was the objections of Mr. Nation's family, is that correct?

A. Yes, absolutely.

Q. And that objection was never removed?

A. No.

Q. Is that correct?

A. Yes.

Q. And that is the reason you people never did reunite?

A. Yes, that is the main reason. It wasn't because of any ill feeling between us on either side, no.

Q. Isn't it a fact that when you and Mr. Nation talked about your future plans, it all hinged upon if the objections of Mr. Nation's family were removed; is that correct?

A. Yes.

Plaintiff rests.

32-33 Defendant moves the court for non-suit, that the action be dismissed, no cause of action, and because it appears that the parties were married, then divorced because of certain reasons and family objections, and if it be true, as stated, that they were to become remarried when those objections were removed, and plaintiff confesses that they have not been removed, — so long as they have not been removed there is no cause of action and no damage.

(The motion was argued by both sides, the jury being excused).

MR. DUNCAN (for plaintiff): Then I want to reopen the case.

35 THE COURT: You may withdraw your rest and reopen the case for further testimony tomorrow morning.

December 5, 1939, plaintiff further testified:

Q. Now in answering Mr. Matthews last night on the stand, did you mean to say, or

intimate, or give the jury the impression that the promise of marriage by Mr. Nation was dependent upon the objection of his family to the marriage?

A. No, I didn't understand it that way. As I understood Mr. Nation's proposal, the objections of his family were not to stand in the way at all.

Q. That is, you understood that he was not going to let the family stand in the way?

A. Yes.

Q. Then when you said that it was contingent upon the removal of that objection, you didn't mean that?

(Defendant objects to the question because it should be taken for granted she means what she says. The court overruled the objection).

A. I didn't understand Mr. Matthews' questions thoroughly last night. No, it was not understood in our engagement that the marriage would not take place at all unless the objections of his family were removed. We were going to be married anyway, regardless of whether his family still objected or not.

Q. Now during the time you were married to him did you have intercourse with him?

A. Yes.

Q. And afterwards?

A. Yes.

Q. After this last engagement?

A. Yes.

Q. After he resumed his relations, and

was that because of this promise that he was going to marry you again?

A. It was.

CROSS - EXAMINATION:

36-38 After we were married I did not go to Mr. Nation's home.

Q. Why not?

A. Mr. Nation's daughter was living in his home at the time, and she did not seem willing to find another residence for herself. And Mr. Nation didn't seem to care much whether I lived there or not. I never lived there after our marriage, no. I never did live with him in a home of my own, or in his home, after our marriage, nor after our divorce, no. The main reason for the divorce was the objections of Mr. Nation's children, that is correct. I resumed sexual intercourse with him after the divorce by reason of a promise to remarry, yes.

A. A. DUNCAN testified:

I am a practicing attorney in Salt Lake City. In April, 1939, Mr. Nation came to me during the 6-months period and asked me if we would set the divorce aside. He said they had composed their differences, were reconciled, that he loved her and wanted to resume the relations with her. Asked that several, a half dozen times, and I told him I would as soon as I could get his wife to come in.

In February, or when the time was getting close, I inquired and found she was sick and

couldn't come. I suppose I wasn't very diligent about it, anyway, I didn't do it.

39-40 In April Mr. Nation came in, and he rather upbraided me for not doing it. I told him I couldn't get her to come in, she was sick. He said, "Well it don't make any difference anyway; we are going to be married again." I said, "How about the objections of your family?" He said, "I am not going to let that or anything else stand in the way of my happiness." And that is all.

41-42 Defendant renews his motion for a non-suit, and I add this further, that the plaintiff in answer to a question put to her, that the promise to marry her, if the promise was made, was based on the ground that she had sexual intercourse with him. As a matter of law, that promise can not be availed, and it cannot be ground of an action of this kind; and in addition, that no damage has been shown here. And up to the present time, except her own statement based on an illegal consideration, the only promise or semblance of a promise that has been made.

43 The court overruled the motion for non-suit.

THE DEFENSE

HUGH NATION testified:

I live at 613 12th East St., Salt Lake City. Am a letter carrier, worked for the government 36 years. Am a married man. Was married before on February 1, 1899. Had a family by my first marriage, four children.

My first wife died May 11, 1938. I first became acquainted with Mrs. Wilsted in January, 1938, when she came to work at my house as a domestic to help care for my wife who was
 44 sick in bed at the time. I became engaged to her in June or first of July, 1938. After we were married I went to her house for one night; next day I went to my own home and stayed there. We were divorced September 8, 1938, final six months later. During the six months time I associated with her openly. It was not congenial because my family objected to this lady being in the family at all. I informed her of these objections. We consulted about it, and when we saw how strenuously the children objected, we agreed between us to go, — she said, in substance, in view of the children's objections, "You will go to your home and live the same as you have, and I will go to mine and live with my mother and family until such time as these objections are set aside, but I don't think they will ever be." She used those words, I remember very well. Those objections were never overcome or set aside, and I determined to my satisfaction that they never would be. No definite date was ever set for our re-marriage.

CROSS - EXAMINATION:

45-46 There was a promise to re-marry if the objections could be overcome, — under those conditions only. It was a promise with that qualification.

Q. You didn't put that qualification in your answer to the complaint, did you?

A. No.

Yes, I remember coming to your (Dun-

can's) office in winter of 1938 and asked you to have the divorce set aside.

Q. And you then said there were no objections to your marriage, didn't you?

A. The objections always stood as long as my children were alive.

Q. But you said you were not going to let any objections they had stand in your way?

A. If I could have overstepped them.

47-49 Q. And then afterwards, when the time went by, you came and complained about not having the divorce set aside?

A. Well, I put it in your hands to have it set aside, but you didn't take care of it. I did not complain, I just asked you why, or if you had had it done.

Q. And then you said you were going to marry her, anyhow, didn't you?

A. Yes.

Q. And when I asked you if the objections of your children had been removed, you said you were not going to let those things stand in the way of your happiness, didn't you?

A. Yes.

RE-DIRECT EXAMINATION:

50-51 When I went to Mr. Duncan's office and asked him to have the decree set aside so I would still be married, my family did not know of it.

Q. Now after the six months had elapsed

and the decree was not set aside, why did you change your mind and not marry her?

A. I wanted to be sure that sufficient time would elapse so that there would be no question about re-marrying anyone, — about the legality of any marriage. I took a trip shortly after, in the spring of 1939, yes. I went as a member of the Orpheus Club to sing at a convention in Baltimore and toured several cities. Returned May 28th.

I was married the last time on July 29, 1939.

RE-CROSS EXAMINATION:

53-54 I did write letters back to Mrs. Wilsted, the plaintiff, yes. After I came back, I went out with her, and up Mill Creek Canyon, to a dance at Ogden, and to different entertainments, yes. Every night I went out with her I kissed and loved her and expressed affection for her, yes, continuing to do so until, I don't remember the date. I had a date to take her out on July 19th, but did not, and then I saw her on July 20th, met her on the street, and she asked me why I didn't keep my date for the day before, yes. And I said, "I will be seeing you, I forgot about that engagement," yes. I didn't tell her I was going to marry this other woman, no. Three days later I got married, yes. When I saw her at her house, practically every night, before then, I loved and kissed her, yes.

55 I didn't think it necessary to tell her of my going to marry another woman in view of our agreement.

Q. What agreement?

A. We agreed before that, in view of the objections that had been raised by my family, and of the conditions as they still existed in that respect, that if at any time either one of us finds some one, or would take up with somebody that we felt we could go through life with, that there would be no objection whatever on the part of the other.

56-57 Plaintiff objects to such agreement as in the nature of a plea in confession and avoidance, not pleaded in the answer, and moves to strike it. The motion and objection are overruled by the court and plaintiff excepts.

HAROLD NATION testified:

58 I am a son of Hugh Nation, am an accountant, live at 1316 Kensington St. My mother died in the spring of 1938. After her death father frequently visited with me, and we were over there nearly every day. My father was suffering with a terrific shock, was broken up nervously and physically. Did not seem to know what he was doing. My mother and father had been happily married.

As time went on, father married Mrs. Wilsted. I had known her very slightly through association with her in the house there. She was in there as a servant, and my mother was ill and I visited my mother, and in that way became acquainted with her.

Q. After they were married, did you as

a member of the family object to her as your father's wife?

Plaintiff objects as incompetent, irrelevant and immaterial.

59-60 THE COURT: If it was material before it is still material. But there is no dispute about that at all, that the family objected to this marriage. Both testified to the objections by members of the family. It has been so assumed here, and no one disputes it.

MR. MATTHEWS: Then I won't question him further.

Defendant rests.

REBUTTAL

GLADYS WILSTED testified:

61-62 At no time after my engagement to Mr. Nation, did I have any agreement or understanding with him that if before, or until, the marriage between he and I took place, either one of us should see another person that we could go through life with as he says, that it was all right. There was no such agreement.

Plaintiff moves the court to order the jury to return a verdict in favor of defendant, no cause of action. The court denied the motion and defendant is allowed an exception thereto.

ASSIGNMENTS OF ERROR (TITLE OF COURT AND CAUSE).

Defendant and appellant Hugh Nation says there is manifest error prejudicial to his rights and interests apparent on the face of the record in this action, necessitating reversal, in the following particulars, viz:

I.

There is not any evidence of any lawful contract or promise of marriage on the part of the defendant, or based upon a lawful consideration.

II.

If any such promise was made, it appears to have been based upon and was in consideration of illicit sexual relations between plaintiff and defendant preceding, attending and following such promise.

III.

If there was any such promise of marriage, it was expressly made conditional upon the removal or cessation of strenuous objections to such marriage on the part of defendant's children and others of his immediate kin.

IV.

There is no evidence, and insufficient evidence within the issues to sustain the verdict of the jury, in respect of any lawful or unconditional contract or promise of marriage, that was breached by defendant, or any damage or injury suffered by the plaintiff; the

evidence being deficient to sustain the verdict in the following particulars:

The complaint alleges a mutual promise to marry by plaintiff and defendant on April 15, 1939, breached on or about July 23, 1939, by defendant's marriage to another woman, whereby defendant was enabled to and did debauch plaintiff thereafter to her damage in \$5,000.00.

Plaintiff's testimony on direct examination was that defendant began his love-making on May 30, 1938, marriage mentioned but no date set because of family objections. She returned his love and promised to marry but was willing to wait. They kept continuous company nightly thenceforward; they went together in his automobile on automobile rides on country roads and in neighboring canyons, to dances and other places, visited friends and at her own home; that these nocturnal trips and visits continued steadily for more than a year until defendant went east on a short trip on May 14, 1939 and returned May 29, 1939, when he took plaintiff on auto drives almost every night to Bingham, Ogden or the mountain canyons; during which they kissed, loved and caressed each other constantly; talked marriage but set no date because of his family's objections thereto. This continued nightly for days and weeks at a time, with an occasional two or three days intermission to be resumed again and continued for long periods. On these nocturnal rides they were alone in his automobile on the country or canyon roads. That on these

rides they loved and kissed each other, and had "relations" by which she later explained that she meant sexual relations. And this sort of love-making continued on down to July 19th, 1939 when she says defendant failed to keep a "date" to be with her at the State Capitol on the night of that day. They met the next day on Main street when she chided him and he excused himself for failing to meet her the night before. They parted pleasantly, and a few days later she read in a newspaper clipping of his marriage to another woman. She was in love with him then and is now. And thus ended a courtship, love-making and "relations" extending from April, 1938 to July 20, 1939.

On cross examination plaintiff admitted that she first knew Mr. Nation when she went to his home to nurse his sick wife in January, 1938, who died May 11, 1938, but plaintiff remained in the home for about three weeks later, then went to her home, where defendant made love to her May 30th, 1938 (Decoration Day). But on April 15, 1939 he proposed, but they had been actually married on July 13, 1938, and she divorced him for non-support on September 8, 1938, became final on March 8, 1939, all many months before the alleged proposal of marriage on April 15, 1939 which she pleads and relies on in her complaint as the promise that was breached. (R. p. 1 to 20; Ab. 16-20).

She then resumes:

"He always promised he would marry me but no definite date was set. We talked

about it but came to no conclusion at all. (R. 23; Ab. 20).

“After I had been living at Mr. Nation’s home for some time (Jan.-May, 1938), he proposed marriage to me. I told them. They objected, etc. I went home; two weeks later he came to my home; that is the first I knew he was interested in me. His family found he was coming down to see me and they raised a ruckus about it. That stopped him a while; then he came back again in two weeks. It went on till July 1st he took his vacation, was gone 11 days, returned July 12th, spent the night at my home, his family not knowing he was in town, then went home to his family. We went down town together July 13th; one of his sons walked with us to town and all the way he created a fuss. As we passed the City and County Building, he said “Let’s go in and get married right now,” and so we did. Then we each went home and told our families. That night he spent with me. Next day, the 14th, he went to his home, and I was never with him again as his wife. Two weeks later his attorney came and asked me for a waiver to release him from that marriage. I refused; but later in August I listened to Mr. Nation’s plea to give him a divorce, which I got on grounds of non-support. His plea was that if we were divorced he could talk his family into being sensible about it. I gave in to his pleading that I divorce him. After that we talked of having the divorce set aside and living together as man and wife, and he promised to take

care of my family, and it went on. I worked for Mrs. Duke from middle November, 1938 to the latter part of January, 1939. On February 20, 1939 I went to a hospital for six weeks (except one week I was back home).

“Every night during that six months period (September 8, 1938 to March 8, 1939), we met, and Mr. Nation went to see my attorney about setting it aside. While I was at the hospital he came to see me every night, loved and kissed me and talked of our future relations. There was never any break in our relations after we were married, so far as our affections were concerned, none whatever. From the time he first proposed to me up to the time he was married on July 20th, the last time I saw him, he avowed his affections every time. There was never any break in it.

“Mr. Nation wanted a divorce because his family objected very strongly to our marriage; he never told me they had ceased objecting; their objections is what stood between us, absolutely, and that is why we did not reunite, the main reason. When we talked about our future plans, it all hinged upon removal of his family’s objections.

“During my marriage to Mr. Nation I had intercourse with him, and also after this last engagement. I did not go to his home, because his daughter occupied it. I never lived with him in a home of mine or of his own after our marriage, nor after our divorce. The main reason was the objec-

tions of his family.” (R. p. 1-38; Ab. 20-40).

V.

It affirmatively appears by plaintiff's own testimony that while she was yet the lawful wife of defendant, she connived and colluded with him to obtain a divorce by mutual consent, contrary to law within less than 60 days after their marriage on the pretended ground of non-support, while still continuing without interruption their sexual relations, both before and after their divorce, and without any actual grievance against him, merely because of objections to their marriage by his family; and that thus was accomplished their legal separation and inability to re-marry because of family objections, about which she complains. (R. p. 1, 30-38; Ab. 25-27).

VI.

It affirmatively appears by plaintiff's testimony that their practice of sexual intercourse (complained of in her complaint as her debauchment by defendant occurring after a promise of marriage on April 15, 1939), in fact began about a year prior thereto, and was continued without material interruption from then on down to, during, and after their marriage in July, 1938, divorce in September, 1938 and to as late as July, 1939, when after visiting her nearly every night, he failed to keep a “date” to meet her at the State Capitol grounds on the night of July 19, 1939, did meet her next day on Main street and excused his remissness, bid her a pleasant adieu, and

went at once to keep a "date" to get married to another woman. And that:

"I had made plans for living with Mr. Nation, and now my prospects were all blighted, and I am a widow, and have to work for a living." (R. p. 20, and see R. p. 1 to 35; Ab. 19).

VII.

The plaintiff's evidence affirmatively shows that and long prior to the time she alleges plaintiff proposed marriage to her on April 15, 1939, and down to that time, she had been living in a state of concubinage with the defendant, and was in not any manner deceived or misled by his imputed promise of marriage on that date. (R. p. 1-35; Ab. 20-22).

VIII.

The District Court erred in overruling and denying defendant's motion for a non-suit (R. p. 32-35), and his renewed motion for non-suit and also his motion for a directed verdict at the close of all the evidence. (R. p. 43, 61-62; Ab. 24-27).

IX.

The court erred in overruling and denying defendant's motion for a new trial. (R. p. 27, 34; Ab. 15, 32).

WHEREFORE, defendant asks that the judgment of the District Court may be vacated and set aside, and a new trial ordered with directions to that court to dismiss plaintiff's complaint.

O. H. MATTHEWS,
Attorney for Defendant
and Appellant.