

1940

Gladys Wilsted v. Hugh Nation : Brief of Appellant

Utah Supreme Court

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

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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.

BRIEF OF APPELLANT

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

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In
The Supreme Court
of the
State of Utah

GLADYS WILSTED,

Plaintiff and Respondent

vs.

HUGH NATION,

Defendant and Appellant

Appeal From the District Court of Salt Lake
County, Utah.

Honorable P. C. Evans, Judge

BRIEF OF APPELLANT

STATEMENT

Mrs. Gladys Wilsted sued Hugh Nation for breach of promise of marriage with debauchment and recovered judgment on a jury verdict for \$1250.00. He appeals and assigns error that the evidence was insufficient; that the contract and promise alleged was not proved; that the only contract or promise was another and different one, in fact performed by their marriage and later divorce;

that if any other promise was made it was in consideration of sexual relations long already being carried on, and was conditional upon removal of family objections which never occurred; that the sexual relations in question had begun before their marriage and carried on without interruption during their brief marriage and after the divorce on down to the time when Mr. Nation was married to another woman, with the full, free and voluntary co-operation of the plaintiff (her time against his), without fraud, deceit, imposition or deceptive and broken promise to induce it; that the trial court erred in denying defendant's motions for non-suit, directed verdict, and new trial which presented the above matters, and that the verdict was the result of passion and prejudice, unsupported by the evidence and contrary to law. Also that while she was the actual, lawful wife of defendant, she, by her own confession, voluntarily threw away that status and her rights and privileges under it, by joining with Mr. Nation in a collusive agreement to divorce him in order to please his family, — an act which the law abominates as a fraud upon the law and the court. Thereby she threw away her status, rights and privileges as his wife which she now complains that the defendant wrongfully prevented her from acquiring. And when Mr. Nation offered to and would have set aside the divorce during the six months before its finality, and requested her attorney to act in the matter, and requested her to have her attorney act, they failed to respond to his request and allowed the divorce to become absolute.

The evidence will be better understood if we first introduce the chief actors in this drama and understand their circumstances and status in life at the time our story opens. Then we will trace the beginning and growth of those meretricious relations between them which the plaintiff is pleased to

term their love affair, and out of which she seeks to construct the rudiments of a cause of action of the familiar pattern of lovely and unsuspecting maiden led astray and seduced by a designing man who had secured her love and trust under promise of marriage, then betrayed and abandoned her after accomplishing her ruin.

THE PLAINTIFF

Gladys Wilsted at the time of the trial of this action in December, 1939, and at the time of her alleged contract to marry Mr. Nation, was a widow 42 years of age, with a family of children, (number not shown). And since it is not a matter of controlling importance, we may add that according to current report she was also a grandmother, an incident which her age would easily make possible. Her husband died in January, 1936, and must have left no substantial means of support for herself and children, since the record shows that in order to win her way she accepted work as a domestic in various families from time to time. It was in that capacity that she first met and came to know Mr. Nation and his family in January, 1938. Mr. Nation's former wife was then living but confined to bed in what proved to be her last illness, terminating with her death some four months later in May, 1938. In short, Mrs. Wilsted's financial circumstances and economic status, if not critical, were such as would naturally incline her to welcome help from any source that would lift a share of her burdens and ward off the social stigma of being a maid or domestic in another's home, — unpalatable to any woman who has once presided over a home of her own. Just how far she, or any woman so situated, will go in order to obtain the help she so sorely needs, will depend upon her moral fiber, her resolution, the stress of the moment and the great-

ness of the temptation. If, as this record indicates, she "stooped to conquer," she is not the only Scarlet O'Hara of modern times, nor either better or worse than many another man and woman who have succumbed to error in the present day struggle for existence. We are not here as an accuser but to study and weigh the facts in this record and their irresistible implications.

THE DEFENDANT

Hugh Nation is a man of mature, perhaps, advanced, years. His exact age is not shown, but the fact of his marriage on February 1st, 1899, (R. p. 44*), nearly forty years before his wife's death in May, 1938, denotes an attained age on the latter date of more than sixty years. The record shows that he has four children by their marriage, indicates that at least two of them are married, and the others may well be, since they would be the fruit of the earlier years of the marriage. He owned and was living in his home at and prior to his wife's death. Whether any of his children were living with him in his home at that time is not shown by the record, but it does show that a married daughter, Mrs. Willis, and her husband moved into and resided in the home with her father after the wife and mother died. If neither of the children were actually living in the home with their father and mother before the latter died, some of them were undoubtedly there daily, or almost daily, to inquire into their mother's condition and welfare. Besides owning his home Mr. Nation has a life job as letter carrier for the Salt Lake City post office at a good

*The page citations herein are to the reporter's typewritten paging of his transcript, not the Clerk's renumbering thereof at the bottom of the pages.

salary, secure as to tenure by civil service regulations. He would be a "good catch" for any woman situated as plaintiff was at the time our story opens.

THE STORY AND ROMANCE

As stated, Mrs. Wilsted was employed and entered Mr. Nation's home as a domestic in January, 1938, and she continued there in that capacity until about three weeks after Mrs. Nation died, or about June 1, 1938. At what time during this interval their embryonic romance began to stir and organize itself, or of what its initial manifestations consisted, this record does not reveal. But it does appear that by Decoration Day (May 30) 1938 it had taken root, budded and blossomed into a love affair of some sort, quality, hue or degree, and, according to her, a proposition of marriage by Mr. Nation. Manifestly, however, their romance did not have its birth and maturity all on one day, nor burst forth full-orbed, like a blinding flash, to her amazement in a single instant. Such things always have an antecedent. They grow from small beginnings into full proportions with the progress of mutual understanding, and are usually nourished by the contributions of both parties to the affair. They may start with sly but significant looks or glances, covert gestures, a smile or nod of approval, a hand touch or pressure that speak a welcome not couched in words, — but which foster understanding, encourage advances, and kindle expectations that no adult person of either sex can fail to understand.

If Mr. Nation "fell for it" and thought, like Shakespeare's actor, that he could "spy entertainment," he also was neither better nor worse than many another man or woman. The long illness of his wife, with his resulting abstinence for many a moon, we may surmise, heightened somewhat his

susceptibility and opened his eyes to Opportunity. Of course, the proprieties had to be observed. Nothing could go on in the immediate presence of the sick wife, or while any of their children were present. The latter were not ignoramuses nor entirely blind to anything irregular that they might notice in their goings and comings. But when all is said, there must have been many intervals of time when no one was present in the house save Mr. Nation, Mrs. Wilsted and, prior to her death, the sick woman, in bed in one room of the house. After her death, only Mr. Nation perhaps, and Mrs. Wilsted, for about three weeks that she remained in the house; or at least during some parts of every day or evening. That is, there were some opportunities for privacy and growth of an understanding which budded into a marriage offer by May 30, 1938, according to Mrs. Wilsted. She said they must now tell his family, and this was done. Something like an explosion resulted; she called it a "ruckus." Vehement objections were raised, and Mrs. Wilsted went out of that house instanter and returned to her own home. Hence, she says, she and Mr. Nation didn't "bother about" fixing a date for their marriage. They chose to let the matter rest until the storm quieted down.

The attitude of Mr. Nation's grown children can easily be understood. Their objections were not grounded wholly upon Mrs. Wilsted being a "young woman and having a young family," as the latter suggests. They felt exasperated by the acts of a woman they regarded as a servant and a menial coming into the family home and stealing their father's attentions right over the sick and dying form of their mother, and then wanting to marry him away from them before their mother was hardly cold in her grave. They felt grieved and humiliated and can never forgive her for it.

THE TRIAL STRATEGY

We interrupt our narrative here to call the court's attention to the strategy of plaintiff and her counsel at the trial. As carried out, their strategy was to place plaintiff on the witness stand and sketch very lightly the beginning of their acquaintance and marriage proposal, to which we have now come, and then take a long detour around all the happenings of the balance of that eventful year, and resume again a year later in the spring of 1939, as if nothing of importance had happened in the meantime to mar the continuity of their courtship. Whereas, during 1938 the two had actually gotten married, obtained a divorce, and through it all they had carried on an uninterrupted sexual intimacy clear down to and past the time when she vouchsafed to tell, on direct examination, about the closing chapter in their courtship and the alleged promise to marry, in April, 1939, on which she bases her complaint. This sexual intimacy was still going on at the time she retouches the picture for a final rise of the curtain, and later "debauchment," as if she had not already been "debauched" (?) many, many times in the interim. But her omissions, on direct examination, quite blurred the picture of the consummate whole. On cross-examination she was asked to supply the omitted chapter, — marriage, divorce and all. This was stoutly objected to and resisted by her counsel as immaterial and not proper cross-examination. But the objection was overruled by the court and she had to answer. When she had thus given up most of the omitted chapter on cross-examination, her own counsel took her over on re-direct examination and started in to mend his broken fences and dress up her case as best he might, with this introductory remark:

"Now, Mrs. Wilsted, I intended to ask you

about your first marriage to Mr. Nation. I think you mentioned that on cross-examination?

A. Yes."

And then he went on. We have re-arranged her further testimony on re-direct examination, combining it with that given on cross-examination, so as to give it all in its proper chronological order as we proceed from now on. We remark here, that our abstract of the record is a page-to-page affair, prepared and printed in a hurry to get it filed in time. Hence it presents the same pollyglot checker-board appearance as does the reporter's transcript itself, — confusing to read and understand. We aim to correct this here by taking up where she left off and state in their proper order the facts around which she made her detour.

THE STORY AND ROMANCE RESUMED

Mrs. Wilsted left off, on direct examination, with the first "ruckus" when they told his family of their plan to marry, and she went to her own home. When she was finally pushed back to that point she said that for the next two weeks she did not see Mr. Nation or try to get in touch with him. By the way, the affidavits of Mrs. Nielson and Mrs. Willis (record proper, pp. 29-30), tell another story. But she denied this in an affidavit of her own, so we let that pass. She testified at the trial that:

In about two weeks (after she went home June 1st) Mr. Nation came down to my home, excused his neglect, and continued his visits, until his children found out about it and raised "another ruckus." That stopped him again for a little while. Then he came again about two weeks later with the same plea, excusing himself for his

neglect of me. It went on until he took his vacation that year (1938), around the first of July. (R. p. 27-28).

(NOTE: Mrs. Wilsted has her time table somewhat twisted and awry. She mentions two absences of about two weeks each, interspersed with nightly visits to her house between his lay-offs caused by objections at his home, all occurring between June 1st and July 1st, 1938. There were only 30 days in June, so that his nightly visits and his two periods of rest at home must all be compressed within the thirty days, as well as allow for time to fan the flames of love between them to a point which prepares us for what followed immediately upon his return from his vacation. He must have done more than merely calling and cease calling twice, in view of the rapidity with which their romance matured after his return). She said:

Mr. Nation left the city July 1st. He wanted to marry me before he went on his vacation, but we decided against it. He was gone eleven days and wrote me every day by air mail while away. He returned June 12th and came straight to my home and spent the night at my home. His family didn't know he was in town. He made arrangements to go down in town with me next day, July 13th. The next morning he went to his home. That day we went down in town. One of his youngest boys walked down in town with us and created a fuss all the way. On our way home we went by the City and County Building and got married. Then we went home and told my mother and he told his family. Mr. Nation spent that night with me. The next day, July 14th, he went back to his home. I was

never with Mr. Nation again as his wife.
I was wife in name only, not anything else.
(R. p. 28-29).

Notice here that Mrs. Wilsted speaks of two nights Mr. Nation spent with her at her home, one the night before, the other the night after their marriage. Was this the beginning of their sexual intimacy, or was it begun some time before? Mr. Nation knew how he stood with her well enough to come right to her house on arrival in town, and stay all night. He could have slept in a separate room and bed from hers, of course, on either night. But did he? She has told us very little of his goings and comings, his nightly visits to her during that month of June, or of his evening automobile journeys with her and him as sole occupants — so much in evidence in her later testimony. Nor as to how close their intimacy had become before she left Mr. Nation's home. Nor what had happened to mature their friendship to the point of a marriage proposal while she was still in his home. A ball seen at the moment of its impact against a wall does not tell the whole story unless reason is allowed to supply its previous journey from its point of origin. So likewise do these two nights lodging with her in her home speak of an antecedent intimacy of some sort.

And why such submissiveness on the part of them both, their recoil from the wrath of his children by his failure to return to her after their first night of marriage, if everything was regular and in order? For she later testified that they never disagreed between themselves, nor ceased their sexual relations with each other during their marriage, nor after their divorce. She must have been perfectly aware of the weakness and assailability of her relations with Mr. Nation. Else, why did she not stand her ground, insist upon her rights, and

resent the objections and interference of Mr. Nation's children? And if they had no ethical scruples against indulging in sexual intercourse after they were no longer man and wife, but divorced, as later appears, would their scruples be any greater before the marriage began?

Likewise, Mr. Nation was so ashamed and abashed, when his children voiced their fierce resentment, that he submitted like a whipped child to their scolding and left her at her own home, returning to his own, instead of standing his ground and removing her either into his own home or another.

Again, Mrs. Wilsted was mistaken in saying that after their first night of marriage together, and he had returned to his own home, she was never with him again as his wife; that she was wife in name only, nothing else. She testified later that their sexual relations continued throughout their short marriage, and after their divorce, and there was never any break in their relations. (R. p. 22, 32, 37). That is something more than being wife in name only. True it is that, as she says, she never lived with him in a home of her own, or in his home (R. p. 37). But that was due to their failure to make provision for a home, and to live in it. She was content to wait and trust to the future for a home, meanwhile continuing those practices which constituted her hold upon him.

Returning now to their separation the day after their marriage. She says they each went to their separate homes. And that about two weeks later, Mr. Matthews, her husband's attorney, came to see her and asked her to sign a waiver releasing Mr. Nation from their marriage. She refused to sign until she could see Mr. Nation. When she did see him he argued for the divorce because of his

family's objections, and that if they were divorced he could talk his family into being sensible about it, etc. She at length consented and sued him for divorce on ground of non-support, and they were divorced September 8, 1938 (R. p. 30), — less than two months after their marriage.

Collusion bars a divorce even though plaintiff has sufficient legal grounds for a divorce.

19 Corp. Jur., p. 91-92, notes 45-47 and cases cited.

Thompson v. Thompson, 70 Mich. 62, 65; 37 N. W. 710.

Such an agreement is a fraud on the courts and the law, against public policy and void.

Id., and 17 Am. Juris., p. 243-4, Sec. 186, Notes 3-7 and cases.

Usually such questions arise while the divorce case is still *in fieri*, or before finality of the decree. But the courts and the law look with no more favor or approval upon a consummated fraud than they do at a stage when they can more easily circumvent it.

But while she obtained the divorce, at his request, without any actual grievance against him, they never terminated their sexual practices, as we have seen, nor had they any real misunderstanding with each other. Their love affair kept on, clandestine though it was and concealed from public view and from their children.

A suit for divorce must be brought in good faith . . . and for the sole purpose of redressing matrimonial wrongs.

19 Corp. Jur., p. 93, Sec. 218, N. 74, 76 and cases.

Thompson v. Thompson, *supra*.

17 Am. Jur., p. 243-4, Sec. 186, N. 3-7 and cases.

It further appears that Mrs. Wilsted and her attorney were remiss in failing to have the decree set aside during the six months after its date. She testified that during the six months period Mr. Nation spoke to her *every night* they met about setting it aside, and wanted her to come down and see her attorney (Mr. Duncan) and have it set aside (R. p. 31). And Mr. Duncan himself went upon the witness stand at the trial and testified that Mr. Nation himself came to see him (Duncan) personally, *several times* during the six months before finality, and begged and urged him to get the decree set aside, saying that they had composed their differences and were reconciled.* And that he promised to do so when he could see her or have her come in. And that

In February or about New Years when the time was getting close, he inquired and found that Mrs. Wilsted was sick and couldn't come, and I suppose I wasn't very diligent about it, anyway, so I didn't. (R. p. 40).

And that in April (after finality) Mr. Nation came in and rather upbraided me for not doing it. He said, You let the time go by and you promised to have the divorce set aside so we could live together as husband and wife. (R. p. 40).

So that, it appears that Mr. Nation had repented of his wrong doing in seeking or allowing

*Mrs. Wilsted testified that they never had any differences to be reconciled, as later shown.

the collusive divorce, and wanted to undo it and return to the marital status with plaintiff, but that either she or her attorney, or both, were negligent and indifferent about it and allowed the decree to become final, and their marital rights were cut off on March 8, 1939. But not their sexual relations. These continued almost up to the date of Mr. Nation's marriage to his present wife, which occurred in July, 1939, as we will see. She testified:

Later, on September 8, 1938, we were divorced but he continued to see me. We had sexual relations after the divorce which became final on March 8, 1939. (R. p. 22). Mr. Nation signed a waiver, as I understand it, and the divorce was granted to me. (R. p. 33).

During the time of our marriage and afterwards I had intercourse with him, and after this last engagement. (R. p. 37).

I worked for Mrs. Duke (or Jukes) from the middle of November to the latter part of January when I became ill and on February 20th I entered the hospital and was there for about six weeks except one week that I returned to my family. Mr. Nation brought me home from the hospital and on April 2nd took me back to the hospital. He brought me no flowers but just talked, kissed and loved me and talked of our future relations. (R. p. 30-31). There was never any break in our relations, so far as our affections were concerned; none whatever. (R. p. 32).

We have now reached the station in their affairs to which Mrs. Wilsted skipped over, in her detour from about Decoration Day of 1938, when

she testified that Mr. Nation first mentioned marriage to her while she was still living in his home right after his wife died. She now proceeded to tell of their courtship as if nothing had happened in the meantime. She testified:

I continued to keep company with him. He came down in the evenings and we went for rides, visiting friends, went to dances, or spend an evening at home with my family. That continued every night (i. e. from a time in April, 1939) until he went east on May 14, 1939. While he was away he wrote letters to me every day.

The letters were put in evidence as exhibits and, except affectionate salutation in opening and closing, have no bearing. They contain no promise of marriage. They merely describe events and places encountered on his tour with the Orpheus Club of which he was a member. (R. p. 5 to 8).

After Mr. Nation's return from this trip east on or about May 28, 1939, she testified that he visited her almost nightly, and that they usually went out riding together in his automobile, spending many hours together in strict privacy and intimacy, during which they loved, kissed and embraced. Thus:

May 28th, ride to Bingham and spent the evening.

May 29th, drove to Ogden and return. After that practically every night for a week.

June 5th-10th, visited me at my home probably every night. When he came he spent the evenings with me. I was alone with him.

June 8th or 9th, to Ogden to attend a dance.

June 11th, a ride around town.

Q. Did you have any relations with him?

A. We loved and kissed each other and he stayed two or three hours. There was no night he came when we did not love and kiss.

June 17th, I believe, just can't remember dates, to a dance or a show.

June 17th-24th, In each other's company every night and went for rides. He came to my house every night. Then two or three nights he didn't come.

July 3rd, to Lagoon, drove alone together.

July 4th, came to my home and stayed an hour; kissed me and everything was pleasant.

Then two or three nights straight he came to see me.

July 15th, he took me for a ride up Mill Creek canyon. He kissed and loved me.

July 17th, we went for a ride about the city. Made arrangements to take me up to the Capitol building on the night of the 19th. That night he loved and kissed me. July 19th, he didn't show up. I saw him next morning on Main Street between 1st and 2nd South; I chided him for not coming; he said he had had a dinner engagement and forgot about his date with me. We talked a while and he left me saying "I'll be seeing you." He was pleasant as usual, never a cross word. That is the

last I ever saw or spoke to him. A few days later a newspaper clipping was handed me containing notice of his marriage to another woman. (R. p. 9 to 17).

The above contains a sufficient behind the curtain description of how the two generally spent their time together not only during the period covered by the dates given, but also without doubt during the entire period of their romance, beginning a year before when he first began to keep steady company with her; and quite possibly before she says he first popped the question to her on May 30, 1938 while she was still living and working in his home.

But it was not consistent with the blue-prints of the case of marriage promise, debauchment, and broken promise they proposed to follow, for her to pull back the curtain upon their meetings and doings prior to April 15, 1939. For that was the date they fixed on as the date of defendant's promise to marry her (only a few weeks after finality of their divorce on March 8, 1939), and it would do no good to carry the disclosure back of the date of the alleged promise to marry. The alleged date of April 15th, so selected, was merely a random date decided upon perhaps because it fell safely without the six-months period. But she confesses her inability to recall dates (R. p. 12). There was no separate chapter in their long continued relations which detaches itself from the rest, and centers around the date of April 15, 1939, as a distinct part of their intrigue. If she were to try to cut their romance in two parts she would never know where to draw the line, since there was no interruption in their relations as she stated several times. Hence we turn from that branch of their case to inquire

what the record discloses on the subject of the promise to marry.

THE MARRIAGE PROMISE

Her first testimony on this subject was that of his first proposal to marry her made on Decoration Day, or May 30, 1938. That, of course, was cancelled out by their actual marriage on July 13, 1938. During the continuance of that marriage and until their divorce, there could be no promise to marry, since they were already married and she had all the rights that any marriage could give her. That takes us to at least the date of their divorce on September 8, 1938, or perhaps the date of its finality on March 8, 1939, since they needed no new promise or new marriage during that period. They had only to agree together to set aside their divorce and ask the court for an order to that effect, and it would be granted. Besides, she lays no claim to a promise of marriage made during that period, or prior to March 8, 1939, and her complaint alleges none. She does allege April 15, 1939 as the one and only promise of marriage made and broken by defendant, and to that her proof must be confined. Probata must follow allegata, and either without the other will not suffice. With this in mind, let us see what her testimony shows:

Two weeks after the divorce Mr. Matthews came down and asked me to sign a waiver for his divorce. When I saw Mr. Nation he pleaded that if we were divorced he could talk his family into being sensible about the matter. Finally in August I listened to his pleading and sued for divorce on ground of non-support, which was granted September 8, 1938. After it was granted we talked of having it set aside and liv-

ing together as man and wife, and he promised to help me take care of my family. And it went on.

During the six months period Mr. Nation spoke to me every day about setting it aside. He wanted me to come down and see my attorney about it. (R. p. 30-31). I spoke to Mr. Duncan about it, yes, but it was not settled. It became final. (R. p. 23).

Mrs. Wilsted's attorney, Mr. Duncan, corroborates this on the witness stand, and says that Mr. Nation came to him at his office several times, at least half a dozen times, and urged him to get the divorce set aside so that he and plaintiff could return to each other and live together. (R. p. 40).

Mr. Duncan further testified that in the latter part of April, 1939, Mr. Nation came in to see him again and rather upbraided him for not doing it, and charged him with breaking his promise to set it aside. And that Mr. Nation thereupon added that:

"Well, it don't make any difference anyway. We are going to be married again."

DUNCAN: "How about the objections of your family?"

NATION: "Well I am not going to let that or anything else stand in the way of my happiness." (R. p. 40).

Our comment on this testimony is that it does not constitute a promise of Mr. Nation to Mrs. Wilsted to marry her again. Mr. Duncan was not her agent or attorney authorized to receive promises of marriage, nor to communicate such promises to

his client. His employment was to get her a divorce from Mr. Nation, which he had done, and perhaps, to move to set it aside when so requested by her. There is no evidence that he did ever in fact repeat to Mrs. Wilsted what he says Mr. Nation said to him on that subject, or that she ever knew of it, or assented to it, or agreed to marry on the strength of it. Hence there is no mutuality, and no binding promise to marry contained in his interview with Mr. Duncan. It was at most a statement of Mr. Nation's intention, or state of mind at the time, and of his opinion that Mrs. Wilsted would be willing to marry him again. What else have we? We go back to her direct examination, the early part of it, when, after the first proposal on Decoration Day, 1938, she skipped a year, and then resumed as follows:

On April 15, 1939 we were both unmarried. He said he loved me and wanted to marry me. I hesitated, knowing I had a family, and his was raised. I thought it a kind of imposition for him to take my family and raise it as well as having raised his own. He said it was all right, he would help me care for them; but there were objections and no definite date was set for our marriage. So we just drifted along without any definite date set at all. I returned his love and was willing to wait until things could be fixed so that we could be married. I promised to marry him but no definite date was set.

I continued to keep company with him. He came in the evenings; we went for rides, visited friends, out to dances, and an evening at home, every night until he went east

on May 14, 1939. While he was away he wrote me letters every day. (Letters put in evidence). He returned May 28, 1939 and came to see me that night and we went on a ride to Bingham that night. (R. p. 5 to 9).

(From May 28, 1939 to July 17, 1939, for their schedule of rides and jaunts, see resume ante pages 15-16 of this brief).

CROSS - EXAMINATION:

Mr. Nation took a trip east. There was no animosity between us; we were friendly.

Q. He seemed to have your interest at heart, as a friend?

A. And as an intended husband, because he always said he would marry me, but no definite date was set.

Q. But he did mention it on several occasions?

A. Yes.

Q. Did you ever try to exact of him when he would re-marry you?

A. We talked about it but never came to any conclusion at all.

Q. Did he make any reply?

A. He would say "Well, we will have to wait a while."

Q. Can you remember the month, or the day of the month, when he asked you to marry him the second time?

A. I can't recall exactly, no. It was around April, the middle of April, I believe.

Q. About a month after the decree became final?

A. Yes. (R. p. 23-24). We had sexual relations after the divorce, yes. (R. p. 22). There was never any break in our relations after we were married so far as our affections were concerned, none whatever. There was never any ill-will toward each other.

Q. I notice in one of these letters to you he speaks of "our troubles may soon be over." Do you know what he referred to by that?

A. He was referring to the troubles with his family, their objections to our marriage. (R. p. 32).

RE-CROSS EXAMINATION:

Q. Why did Mr. Nation want a divorce?

A. Because his family objected very strongly to our marriage.

Q. Did he tell you his family had ceased objecting?

A. Not exactly. He *always said things would straighten out for us.*

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

A. Yes, absolutely.

Q. And that objection was never removed?

A. No.

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

A. Yes, that is the main reason.

Q. Isn't it a fact that when you and Mr. Nation talked about your future plans, it

all hinged on whether the objections of Mr. Nation's family were removed; is that correct?

A. Yes. (R. p. 33-34).

Defendant's counsel thereupon moved and argued for a non-suit on the ground that by plaintiff's own testimony the promise to marry, if any, was conditioned upon the removal of family objections, which never happened. Argument follows at the end of which the court indicated that it was disposed to grant the non-suit. Thereupon plaintiff's attorney asked to be allowed to re-open his case and put in further evidence. He was allowed to withdraw his "rest" and court adjourned until the following morning. (R. p. 34). When court opened next morning, plaintiff was returned to the witness stand by her attorney who interrogated her as follows:

Q. In answering Mr. Matthews last night on the stand, did you mean to say or intimate that Mr. Nation's promise of marriage you spoke about was dependent upon the objections of his family being removed?

A. No, I didn't understand it that way.

Q. What did you say?

A. As I understood Mr. Nation's proposal, the objections of his family were not to stand in the way at all.

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

A. I didn't understand Mr. Matthews' questions thoroughly last night.

Q. Well was it understood, in your engagement, that the marriage would not

take place at all unless the objections of his family were removed?

A. No, that was not understood. 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 he resumed relations, was it because of this promise that he was going to marry you?

A. It was. (R. p. 36-37).

With respect to the foregoing we point out the following:

1.

The very indefinite information given as to any conversation between plaintiff and defendant, or the defendant's own words or language on which to build, deduce or construct a specific promise to marry the plaintiff. She speaks of his "wanting to marry" her, without quoting the words he used to express his wants, and whether it was conditional or unconditional. She says that he said, in the event of marriage, he would help her care for her family. But she admits that there were family objections and hence no definite date was set at all.

2.

The all-pervasive reference to *the time* at which or during which defendant's promise or promises to marry were being made. No attempt to confine the date or time of the promise to the

alleged date of April 15, 1939 laid in her complaint. Thus on cross-examination she said they were friendly, no animosity, and he *seemed* to have her interests at heart as a friend and intended husband, because he *always* said he would marry me but no definite date was set. Now what seemed to her as thus and so, may have seemed to the court as something quite different had she disclosed her grounds for so thinking, in some words or promise of his. And the words "he always said he would marry me" can as well apply to a year before, or at any time during or after the marriage or divorce, as to any other time. And why not tell just what Mr. Nation did say, instead of such generality? He could not have been "always" saying he "would marry her," unless he was a maniac forever repeating set phrases. So when was it, and what did he say? If the word "always" means anything in this connection, it must mean the whole period of their intimacy, which extends back to Decoration Day (May 30) 1938. And that would correspond with her repeated testimony that there was never any break in the relations or feelings toward each other, their affections and practices, kisses and caresses, embraces, and what not. And that is our contention also based upon the evidence. Hence not restricted to and after April 15, 1939 as laid in the complaint.

3.

She stated on cross-examination, what she had not stated on direct examination, that the promise to marry, whatever the words used (but not disclosed) was emphatically and absolutely a conditional promise to become effective only upon the removal of his family's objections. This accorded exactly with the very purpose of Mr. Nation's inducing her to obtain the divorce against him, i. e.,

in order that he might talk them into being sensible about it, and cease objecting. He would not do that and then at once make a new promise to marry against their objections. But whatever the argument based on reason of the thing plaintiff left no doubt about it on cross-examination. She said that was the reason they never re-united; and that their future plans in this respect hinged on the removal of his family's objections. And the court was about to nonsuit plaintiff because this condition was never met. But the defense was asked and allowed to re-open her case, after a night's "heads together" between plaintiff and her counsel. Then she returned next morning to contradict every single thing she had said the day before, and now she asserted that the promise to marry was unconditional and did not turn on the removal of family objections. In this process she was led as by a halter by her counsel, who virtually fed his client with a spoon. In all this, she never once told what defendant said to her, in words, but she retailed what "she understood" as to their going to be married whether his family objected or not. And what she "did not understand" as to attorney Matthews questions when she was telling him exactly the contrary on the day before.

A better exegesis of what Mr. Nation may have said to her about his intentions with respect to marriage, may perhaps be gleaned from some excerpts from his letters to plaintiff during his absence on his vacation in the latter part of May, 1939, and from her own testimony as to their conversations during their nightly rides in his automobile on country roads and mountain canyons after his return from the east and before July 17, 1939, when their relations ended. We quote:

Exhibit A-1, letter of May 19, 1939, in closing:

— “for I know that everything will turn out all right. There is happiness ahead for both of us..”

Exhibit E-1, letter of May 21, 1939: “Keep the home fires burning, as they say; also keep the corners turned up. Everything is bound to turn out all right for us yet.”

Exhibit C-1, letter of May 23, 1939: “Let us both keep up our faith and, as you say, everything is bound to turn out all right.”

Exhibit F-1, letter of May 25, 1939: “—and a prayer that all our troubles may soon be swept aside, I close,”

(Each letter signed “Dad.”)

These letters each express a hope or prayer that some obstruction will be removed to their happiness. Being asked on the witness stand what was meant by the expression in above letter about: “our troubles may soon be swept aside,” she answered: “He was referring to the troubles with his family, their objections to our marriage.” These expressions betray no consciousness of those obstacles having been already removed, or of a resolve to disregard them and marry regardless of family objections. In the letter of May 23rd, he reflects the same thought in what plaintiff had written him, viz: “as you say, everything is bound to turn out all right,” i. e., the existing obstacles *would be* removed, in her firm faith, not that they had been removed.

Likewise the same state of Mr. Nation’s mind as facing obstacles to their marriage yet to be removed, is revealed in their nightly automobile

rides after his return from his trip east, and right on the heels of the above letters written in his absence, viz:

May 28, 1939, on night ride to Bingham and return, he said he sure would be glad when I was his wife. (R. p. 9).

May 29th, trip to Ogden and back, "He was wishing we could get married quickly, that things would work out so we could," but still we did not have any definite date set. (R. p. 10).

July 3, 1939, night ride to Lagoon and back, conversation "how much we loved each other and we would be glad when we were married." (R. p. 13).

All recognizing a contingency or impediment to be removed, otherwise they need not hope or long for something that was already at hand and that they could bring to pass any time they chose, by disregarding the objections. It is obvious that Mr. Nation had no intention of disregarding his children's objections, and Mrs. Wilsted knew it. Hence it was folly for her counsel to return her to the witness stand on the next morning after motion for nonsuit, to correct and change her testimony by saying that "it was her understanding" that Mr. Nation was to marry her unconditionally and regardless of his family's objections. Or that she "did not understand" opposing counsel's questions when she answered categorically and repeatedly, that their marriage was conditional and hinged upon removal of his family's objections and that the objections were never removed.

SUMMARY

It is evident that the jury disregarded this and much other competent and unimpeached testimony, most of it coming from plaintiff herself on the witness stand. If her own testimony is to be regarded, the alleged promise to marry was nothing more than a general topic of conversation to which some allusion may have been made from time to time while their sexual intimacy was going on. Whenever it was mentioned it was always in terms of "*wishing they were married,*" or that "*things would work out so they could,*" or that recognized obstacles and impediments to their marriage "*might be swept aside,*" consisting of the ever present objections and opposition by Mr. Nation's family, to which they had yielded, even to the extent of getting a divorce when they were married in the year before (1938). Also her explicit testimony on cross-examination that the question of their marriage at all times hinged on the removal of those family objections which never were in fact removed. It is furthermore quite evident that whatever their understandings and private discussions may have been on the subject of marriage, from time to time during the nearly eighteen months of their association and intimacy, it was largely influenced and brought about by her own ministrations to him in the matter of his sexual appetites. There is a subtle connection or relation between the physical exercise of the sexual parts, — the passions that are generated and developed thereby, — and the affections which men and women come to have for each other, some times termed "love," perhaps is love in a sense. If so it is the coarser and more uncultured form of love, may grow into that complaisance with each other which will permit their

association to endure, or may not. A union thus begun, however, is lust, and is just as apt, even more likely, to lead downward than upward, to end in discord than in harmony, in shipwreck rather than in permanence. The more orderly way, that sanctioned by the moral sense of mankind, is the process of mating which begins in mutual concepts of respect and esteem and grows into a union of minds and hearts, the true essence of love, and is tempered later with the alloy of sexuality. The reverse process may work sometime, but it is risky. In the case of those who have already attained advanced ages, as in the case of these parties, love at first sight with vague but unknown premonitions of the sexual climax, is not so likely to be the routine as in the case of younger couples. Neither can people who have already had their sexual powers developed and matured by years of experience expect always to go back a generation or so and repeat exactly their method of approach in the days of their youth. When a family has grown up, whose mouths must be fed, bodies clothed, minds educated, and no earnings, or inadequate to meet the bills, — then practical considerations all too often intrude and sway judgment in preference to lessons learned in the Sunday School. Above or through it all is the incessant demands of the sexual appetites which can not be, at least are not always, silenced and subjected to ethical considerations. Youth and beauty can afford to wait a while. An empty pantry and a bawling progeny are vociferous while faded beauty and an empty purse watch the procession of males go by. A widow thus caught in the jamb must all too often “catch as catch can,” nor be too choice as to her man, or the means of holding him. These considerations are general, of course. It is for the reader of this record to judge as to their applicability. The world is full of just such in-

stances. A case arising upon very comparable facts, was that of

McPhail v. Trovillo, reported in 65 Ill.
App. 660,

which the Court and counsel may read at their leisure, and concerning which the Court observed:

“We have no disposition to indulge in any harsh criticism of her conduct, as shown by this record, but we think that the less said about her high moral instincts the better. Her own testimony as to her association with plaintiff in error . . . does not indicate that she was a woman of extremely refined notions as to the proper distance to be maintained between virtuous people of opposite sexes.

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“We hardly think this conduct indicates that refined delicacy, or those high moral instincts, which it is insisted that defendant in error possessed and which, she claims, have been so grossly outraged by plaintiff in error. . . .

“It is true we have not the advantage of having seen the witnesses, and can only judge of them by what appears in the record, but that is true of every case which comes up for review. . . .

(NOTE: The Court here points out evidence as to the secrecy and clandestine character of most of the associations of the parties as indicating sexual promiscuity rather than orderly public courtship known to all).

“It must be remembered that she was a woman of mature age, — not a young un-

sophisticated girl. She had been a married woman and a mother. She knew what every advance or approach toward impropriety with the other sex meant, and would probably lead to if not repelled at the outset. And yet she allowed liberties and caresses from McPhail (the defendant) by sitting in his lap and permitting him to kiss and fondle her, which were liable to inflame the passions and lead to the results which followed. . . .

“It seems to us that her testimony, under all the circumstances is not more worthy of belief than that of McPhail and without discussing the subject further, we hold that the verdict is not supported by the evidence, and therefore the court erred in not granting a new trial. For the errors indicated the judgment will be reversed.”

The case of

Gilman v. Katz, 206 N. Y. Sup. 790,

is also somewhat in point and the Court's deductions therefrom are pertinent, though not all the facts are exactly parallel. There the alleged debauchment took place in an automobile at a secluded spot, attended with talk about marriage and a promise to marry. It appeared by the plaintiff's evidence that the act of intercourse was, in a measure, forced upon her by defendant against her will, in which case she did not yield thereto under promise of marriage, but to an act of force. But the Court further said:

“Even had it been otherwise, an act of sexual intercourse by itself would not constitute a sufficient consideration to sup-

port a promise of marriage. It is true that there is proof of a promise made by plaintiff after the 4th day of June. That proof cannot, however, save the verdict which plaintiff has recovered. In the first place, the promise proven is not the promise set up in the complaint. In the second place, the act of sexual intercourse took place before a binding promise of marriage had been made. It could not be used, therefore, to enhance the damages resulting from the breach of the promise.”

Judgment reversed and new trial ordered.

Substitute our date of April 15, 1939 for the date of June 4th in the above quotation from *Gilman v. Katz*, and the quotation has exact application to the facts of this case. In the case at bar the sexual intercourse of defendant with plaintiff, in her complaint termed her “debauchment,” had been going on between them willingly and voluntarily for a long time prior to the imputed date of the promise to marry (April 15, 1939) relied on, and could not be used to enhance damages as was done. And besides, her testimony was that he “had always promised to marry her.” And since her testimony shows that she, upon her part, had “always” been doing something to please and soothe him, and feed his sexual appetites, the promise to marry was illegal because based upon an illegal consideration. Likewise the promise to marry, if made, was unenforceable because it was expressly made conditional upon the cessation of his family’s objections to the marriage, which never took place. She so testified repeatedly and explicitly, notwithstanding her counsel’s attempt to have her withdraw it. Her

own testimony elsewhere contradicts her withdrawal, and nullifies it.

The record is plain. Grandma Wilsted very clearly wanted a husband or some one to share her burdens of raising and caring for her family of young children. Grandpa Nation, whom she met in her duties as a domestic in his house, appeared to her to be suitable timber for a husband or provider, if she could work him up to undertake the task. She found him to be rather susceptible. She taught him to like her by the utmost of benevolence on her part. Even a wild animal will yield to kindness, become subdued, may even be trained to domestic service. Grandpa Nation was no wild animal but he has certain wild passions that dwell in every man, and which may be domesticated by kindness and hospitality. Grandma Wilsted gave him the best meat she had in the pantry. He was fond of it, and his appetite grew with what it fed upon. She knew what she was doing, and she expected to profit by his capture and domestication, if successful. She all but succeeded. She did succeed, to the point of bringing him into the marriage relation. But it did not "jell." She had not figured upon such fierce and determined opposition from his family. It quite upset all calculations. Their hold upon him as his children proved stronger than her hold upon him as wife and hostess. She battled with them for possession of the prize, but when the test came, she found her claim upon him weaker than theirs. So she gave in, and they were divorced.

But his insistent appetite for more of that which his sexual nature longed for becoming dominant, as it did at times, he sought to cancel the divorce and rejoin her in marriage, despite his children. He asked her and her attorney to have

it set aside. Somehow it was not done, and it became absolute. Thereafter, the record denotes only continuation of the process of attempted domestication by which she had at first brought him into wedlock with her. On the subject of marriage there were only mutual wishes that "they could be married," "that they were married;" that "obstacles thereto could be swept aside;" and a willingness of both to "wait until things can be straightened out," that is until his family's objections could be removed or ceased. They were never removed, and plaintiff did not recover that which she had collusively given up by her divorce suit against him. Perhaps she should have held on to him, and refused to ask for a divorce. But by so doing, she would risk his displeasure and alienation of his affections. She preferred to retain her liaison with him and trust to the future for solution of the problem.

It was suggested at the trial that her motives were not mercenary, in that she consented to the deed by which Mr. Nation conveyed his home property to his children, and that in divorcing him she asked no alimony. This was explainable by the same motives which controlled her in seeking the divorce in the first instance. She wanted her man, and was willing to give up her prospective claim on the home in order to retain its owner as a present or prospective husband (of greater value to her). And a waiver of alimony, which she might never collect, was nothing as against her continuing plan and effort to hold him as her servitor and future husband, if possible. And so she never "riled" him once, nor resolutely opposed his wishes. Meantime she continued to give him the best she had, i. e., access to her person. In this process or practice there is nothing to show that

she was not just as active as he, that she did not freely give as well as receive, tit for tat, in those osculatory exercises, those practice maneuvers, with which both had become familiar in their prior marriages, and by which they solaced themselves as time passed by while awaiting for "things to straighten out" for them, and peevish children cease to object to their marriage.

As time passed, their romance may have sagged somewhat, or gone to seed. He may have experienced a degree of satiety. Or, his children may have maneuvered him into another match as a means of putting an end to their liaison once and for all. But as to that, plaintiff took the risks of the adventure along with the possible profits. It is not every rich cargo that comes safely into port. The chances of loss is a tax laid on by fate. Like the real estate broker or salesman who labors long and hard to make a sale, if he fails, he loses his time, his labor, his expenses of the effort. If he succeeds, he profits, sometimes very largely. If his efforts fail, he does not turn in vengeance upon the buyer who disappoints him, and seek to recuperate his losses by a "breach of promise" action at law. And so we say to the plaintiff, "Better luck next time."

Respectfully submitted,

O. H. MATTHEWS,
Attorney for Appellant.