Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (pre-1965)

1948

Faye Walker Osmus v. Harry Osmus : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

Part of the Law Commons

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.
Benjamin Spence; Attorney for Plaintiff and Respondent;

Recommended Citation
Brief of Respondent, *Osmus v. Osmus*, No. 7152 (Utah Supreme Court, 1948).
https://digitalcommons.law.byu.edu/uofu_sc1/821

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

7152

In the Supreme Court
of the State of Utah

FAY WALKER OSMUS,
Plaintiff and Respondent,

vs.

HARRY OSMUS,
Defendant and Appellant.

CASE NO. 7152

FILED
APR 30 1949
CLERK, SUPREME COURT,

Brief of Respondent

BENJAMIN SPENCE,
Attorney for Plaintiff and Respondent.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

INDEX

Statement of Facts 1

Argument 6

CASES CITED

Hillyard vs. Hillyard, 68 U 220, 249 Pac. 806.................... 6

Salph vs. Salph, 231 Pac. 921 8

Chaffee vs. Chaffee, 630 261, 225 Pac. 76.................... 10

Carson vs. Carson, 87 U 1, 47 Pac. 2nd 894.................... 10

Sandall vs. Sandall, 57 U 150, 193 Pac. 1093 10

Tribe vs. Tribe, 59 U 112, 202 Pac. 213 10

Harzog vs. Bramel, 23 Pac. 2nd 345 at 347.................... 11

Parish vs. cConkie, 35 Pac. 2nd 1001 11

Harzog vs. Bramel, Supra 11

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library. Machine-generated OCR, may contain errors.

In the Supreme Court
of the State of Utah

FAY WALKER OSMUS, *Plaintiff and Respondent,* vs. HARRY OSMUS, *Defendant and Appellant.*	CASE NO. 7152

Brief of Respondent

STATEMENT OF FACTS

Plaintiff as respondent herein commenced the above entitled action in the District Court of the Third Judicial District, in and for Salt Lake County, State of Utah, against the defendant on the 14th day of March 1947 praying for separate maintenance; pursuant to stipulation entered by attorney for plaintiff and defendant the court made and entered its order herein requiring the defendant to pay to the plaintiff the sum of $25.00 per week as temporary support money commencing on the 15th day of July 1947 and to pay to her attorney the sum of $50.00 on or before the 1st day of August 1947, pending said action.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

On July 21, 1947, the defendant filed his answer and cross complaint in said action praying for a divorce and praying the court enter an amount for the support of his children and for general relief.

On August 24 ,1947 the plaintiff filed an amended complaint setting forth some additional facts, but still praying for a decree of separate maintenance and support money, attorneys fees, a general accounting of his earning and for general relief.

On October 7, 1947, the plaintiff then filed her second amended complaint, in said action praying for a decree of divorce, custody of the three minor children; for the sum of $250.00 per month for the support of said children and herself and for her court costs herein and for general relief.

On the same day the defendant filed in said action his written entry of appearance and waiver, consenting that the court may enter his default in said action provided the court would not grant a sum in excess of $250.00 per month for alimony and support money, and on the same day the court heard said matter and the default of the defendant was entered by the court and the decree of the court was then entered, wherein the plaintiff was granted an interlocutory decree of divorce, the custody of three minor children with right in the defendant to visit with said children at reasonable times. The decree further provided that the defendant was to pay to the plaintiff the sum of $100.00 per month as alimony, and the sum of $50.00 per month for each of the said minor children and that the first payment of $250.00 was to be paid within

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

ten days from the entry of said decree and that the court retain jurisdiction of said matter for all purposes.

Since the entry of the order of the court on the 15th day of July 1947, requiring the defendant to pay to the plaintiff the sum of $25.00 per week as temporary support money, and the entry of the decree of divorce on the 7th day of October 1947, requiring the defendant to pay to the plaintiff the sum of $250.00 per month as alimony and support money, the defendant has paid to her the sum of $50.00, (Tr. 7).

On the 18th day of December 1947, the court entered its order herein requiring the defendant to appear in court on the 22nd day of December 1947, at the hour of 10 o'clock A. M. on said day to show cause, if any he has, why the court should not make and enter its order herein punishing the defendant for contempt of court for his wilful failure to comply with the decree of the court, and why he should not pay to the plaintiff what is due and owing to her under the terms of said decree and for attorneys fees. That said order was issued pursuant to the affidavit of the plaintiff (R-39) stating that the defendant had paid her nothing but $50.00 since the 15th day of July 1947! that he was able-bodied and steadily employed and capable of complying with the decree of the court.

In answer thereto the defendant filed a petition for modification of decree, (R-42) stating among other things that he was not able to pay the sum of $250.00 or anything in excess of $25.00 per week at a later date.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

On the 22nd day of December 1947 a hearing was had on the issues involved, and the court made and entered its findings of fact and conclusions of law and order in said action, finding the defendant in contempt of court for his wilful failure to comply with the decree of the court and pronounced judgment upon him that he be confined in the County Jail for a period of 25 days (R-46 to 49), from which order the defendant appeals to the Supreme Court.

ARGUMENT

The only argument the defendant contends for is that he was not able to comply with the order of the court in the payment of $250.00 per month to the plaintiff and he has, in his brief, set forth several cases that hold in substance that:

> "Under the authorities cited and the uniform holdings of the courts, it is prerequisite in contempt proceedings of the nature here under review to an order committing to jail that the one charged should be found able to comply with the court's order, *or that he had intentionally deprived himself of the ability to comply with such order."*

Hillyard vs. District Court, 68 Utah, 220. 249 Pac. 806.

With the foregoing doctrine the plaintiff agrees, but it is the contention of the plaintiff that the defendant "had intentionally deprived himself of the ability to comply with such order."

The defendant testified that up to the 15th day of February 1947 he was working for D. F. Anderson making as high as

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

$800.00 per month (Tr. 4) when he lost his job. Since that time he states he has not worked except for a Mrs. Carlson at 6373 So. State St., and that he was working for her since May 1947, for his board and room. He was living at Mrs. Carlson's in Sandy, Utah (Tr. 2) (Tr. 4 & 5). Defendant further testified that he had been keeping company with Mrs. Carlson before and after his divorce (Tr. 7). Upon redirect examination the defendant was asked: (Tr. 21) "Isn't it a fact you are more interested in Mrs. Carlson here than you are in her business or your future welfare?" Answer: "Yes, sir." He further testified that he is capable of making $8.00 a day as a Fry Cook but that he would work for Mrs. Carlson for his board and room because she promised him an interest in her business (Tr. 10) (Tr. 6). They had not been making any money in this business and in fact running behind (Tr. 6) and yet he was satisfied to go along with Mrs. Carlson and let her keep him by furnishing him board and room rather than get out and work for himself or for his family. He was able-bodied and capable of working, except he states that he was temporarily disabled because of his shoulder (Tr. 11). He was content to let his wife and three children, one of whom is an invalid (Tr. 26) live on relief and let the County Welfare Department take care of them (Tr. 22) and to further work for his board and room so that he could be around the woman he cares for, rather than do anything for his wife and three children. Defendant further testified that he had made no effort to find work in Salt Lake because he had outstanding bills against him and he was afraid his creditors would be after him (Tr. 5). He was not interested in his former wife, the plaintiff, or

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

his children. He made no effort to even see them although he was given the privilege of visiting with the children at reasonable times and had not seen them since July 1947 (Tr. 20).

The plaintiff and defendant had a substantial interest in a fine home which the plaintiff was compeled to sell in order to save the equity they had in it (Tr. 23). She recovered $5,000.00 on it. She spent some $3,000.00 between the time she sold it and the time she purchased an equity in another home on which she paid $2,000.00, all the money she had left. The defendant contends she had sufficient money to live on and that apparently was an excuse for him not to pay her anything. She testified she was under heavy expense and had to spend some $3,000.00 for the support of herself and children which the defendant contends is unwise and extravagant. She explained what she did with this money (Tr. 24). She had to have a home for her children and she did the best she could with what she had. The defendant rendered no help to her or his children or to provide a home or support for the children and now he complains of her extravagance. Let him try to keep three minor children, some of whom were sickly and invalid, living at a hotel and paying medical care for them and see if he could do better with the money she had. We think this is no excuse for his failure to offer some supervision for his children and their welfare. He merely told her she could live on that (Tr. 26) and made no further effort to help her.

The defendant cites the case of Selph vs. Selph, 231 Pac. 921, Arizona in the following language:

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

> "The law does not require impossibilities, but it does exact good faith and an honest and conscientious effort to perform its orders and decrees.
> It has been held too that an inability to pay alimony brought about by the defendant's own act for the purpose of avoiding its payment may be punished for contempt."

and justifies himself by saying that it was impossible for him to comply with the decree of the court. We may agree that he could not pay the money to the plaintiff when he would not work, but we certainly do not agree that he was acting in good faith and an honest and conscientious effort to perform its orders and decrees and we further contend that his inability to pay the money to the plaintiff was brought about by his own acts for the purpose of avoiding its payment. Defendant's own testimony and demeanor before the court bears this fact out and it was, without doubt, the reason the court held the defendant in contempt of court.

In the defendant's assignment of error No. 2 he contends the court should have modified the decree by reducing the alimony and support money because of the defendant's inability to pay same and has cited a number of cases in support of this contention.

We agree that the law he cites is good law but not applicable to the instant case. The decree in this case was entered by the court upon the stipulation of the defendant that the court award not more than $250.00 per month; $100.00 as alimony and $50.00 per month for the support of each child.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

The court had a perfect right to assume the defendant was able to pay this on his own stipulation (R. 27) and the fact that he had been making $800.00 per month. The court had nothing further before it. If he was able to pay this out of his ability to earn such an income, $250.00 was not excessive for a wife and three children, who needed the constant care of their mother. The defendant now comes before the court and contends that he cannot make that and that he signed the stipulation and waiver upon the advice of his attorney. This appears to be a flimsy excuse at this time. That matter should have been raised before the court made its findings of fact and decree in the main case.

Our courts have repeatedly held that:

> "To entitle a party to modification of a decree there must be change of circumstances. Chaffee vs. Chaffee, 63 U. 261, 225 Pac. 76.

and the court has upheld this strictly in a number of cases, some of which are as follows:

> Carson vs. Carson, 87 U. 1. 47 Pac. 2nd 894.
> Cody vs. Cody, 47 U. 456. 154 Pac. 952.
> Sandall vs. Sandall, 57 U. 150, 193 P. 1093.
> Tribe vs. Tribe, 59 U. 112, 202 Pac. 213.

There was no change of circumstances in this case. If anything, the changed circumstances were on the part of the plaintiff wherein she was worse off than when the decree was entered. I do not think it is necessary to go into this matter further for the reasons mentioned herein and the law in such

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

cases. An action in equity may be the proper procedure in such a case to show that the decree was inequitable and impossible of performance, but to attack the matter by a petition to modify where no changed circumstances exists since the entry of the decree is unjustifiable and we think the ruling of the court in denying this modification was entirely justified. *Herzog vs. Bramel,* 23 Pac. 2nd 345 at 347.

We think the plaintiff in every essential has complied with the law in bringing this proceeding before the court by the facts that she sets up in her allegations contained in her affidavit (R. 39) and in the findings of fact and conclusions of law and decree of the court (R. 46 to 49) in accordance with the law in *Parish vs. McConkie* 35 Pac. 2nd 1001 and in accordance with the following:

Herzog vs. Bramel, 23 Pac. 2nd 345 at 347, wherein the court held:

> "Under the statutes and codes sililar to ours, we think it is generally recognized that the enforcement by citation or an order to show cause or by contempt proceedings, or orders or decrees with respect to the payment of monthly or other specific periods of alimony and counsel fees, for a failure and a wilful refusal to pay the same, is one of the inherent equity powers of the court.
>
> Had the plaintiff by her petition merely averred the existence of the decree, the allowance of alimony, counsel fees, and costs, the ability of the defendant to comply therewith, demands made of him to do so, and his failure and wilful refusal to comply therewith, without averring or referring to the alleged fradulent

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

> and void contract or settlement entered into subsequent to the decree, and by citation or order to show cause or by attachment of the person of the defendant sought the enforcement of the decree, the jurisdiction of the court to entertain the petition and proceed with the cause may not well be doubted."

all of which we think the plaintiff has complied with and the findings of the court that the defendant herein was able to comply with the court's order, or that he had intentionally deprived himself of the ability to comply with such order, was justified, and the order of the court finding the defendant in contempt of court and the imposition of sentence should stand.

Respectfully submitted,

BENJAMIN SPENCE,

Attorney for Plaintiff and Respondent.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.