

1948

# The State of Utah v. Ivella Hutchison : Brief of Appellant

Utah Supreme Court

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W. Lee Skenchy; Attorney for Appellant;

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In The  
SUPREME COURT  
Of the State of Utah

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THE STATE OF UTAH,

Plaintiff and Respondent

vs.

IVELLA HUTCHISON,

Defendant and Appellant.

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APPELLANT'S BRIEF

W. Lee Skanchy

Attorney for Appellant.

FILED

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U. S. SUPREME COURT, UTAH

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**In The  
SUPREME COURT  
of the State of Utah**

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THE STATE OF UTAH,	)	
Plaintiff and Respondent	)	
vs.	)	NO.
	)	
IVELL HUTCHISON,	)	
Defendant and Appellant.	)	

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**APPELLANT'S BRIEF**

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**STATEMENT OF FACTS**

This cause was the result of an order to show cause proceeding. Howard Byington having been divorced by his wife was cited into court for failing to pay alimony as decreed by the court. Respondent's Exhibit C. Mr. Byington's former wife took the stand and testified as to the default in

alimony payments. Rec. 44-52. At the conclusion of her testimony, Mr. Byington was asked by the court if he wanted to cross examine his former wife. He declined to cross examine. The court asked him if he wanted to take the stand and he declined. The court then requested Mr. Byington to take the stand as he, the court, wanted to ask him some questions. He was examined as to his earnings since the divorce. Mr. Byington was then asked if he were married and he answered "yes". Rec. 52-55. Mr. Byington was then asked by the court to produce his wife. The court then sent Mr. Byington and the sheriff to bring her into court, giving him five minutes to do so. The appellant, his alleged wife, was placed on the stand by the court in the order to show cause proceedings, and asked whether she was married to Mr. Byington, and she answered in the affirmative. Rec.

56-63. The appellant was asked where she was married and where her marriage certificate was and etc. The court then found Mr. Byington in contempt of court for failure to pay alimony and then in open court said,

"You will be remanded into custody of the sheriff of Cache County in execution of this judgment, and the District and the County Attorney are here, and I'm submitting this case to them for an investigation with respect to violation of any of the criminal laws of the State of Utah." Rec. 65. (Reference to the record above refers to the record in the appeal of State vs Byington)

On the 13th day of December, 1947, a charge of first degree perjury upon Sheriff's complaint was filed against the appellant and Howard Byington. The complaint and information were based on the testimony of the appellant and Byington in which they stated they were married. The trials resulted in convictions of second degree perjury of both the appellant and Byington on the 13th and 14th day of January respectfully. The appellant was

fined \$250.00 and sentenced to 90 days in the County jail. The sentence to be suspended upon the payment of the fine.

From this sentence the appellant appeals.

Said appeal is based on irregularities and illegalities in the proceeding which resulted in the filing of charges and the ultimate conviction of the appellant.

The appellant contends that the conviction should be nullified and set aside for the following reasons.

I. That the proceedings from the beginning were irregular and illegal.

A. The charge of perjury was based on immaterial testimony irregularly received.

B. Testimony on which charge was based was on incriminating questions and answers of the appellant.



C. The appellant was illegally compelled to testify.

D. Appellant was entitled to change of Judge because of bias and prejudice of the trial Judge.

-A-

THE CHARGE OF PERJURY WAS BASED ON  
IMMATERIAL TESTIMONY IRREGULARLY RECEIVED.

The question as to the marriage of Mr. Byington was wholly immaterial as far as the order to show cause proceedings were concerned. Whether he was married or not was collateral and incidental as far as the issue in the proceedings was involved. He was in default in his alimony payments and was in contempt for such failure. This was true whether he had remarried or not. Mr. Byington made no defense as to the failure to pay alimony. He did not raise the question of remarriage as a defense for defaulting in the payment

of alimony.

From the court's instruction at the trial, it is admitted that the appellant's testimony as to marriage was immaterial.

Instruction Number Five.

"If you do find beyond a reasonable doubt that the defendant did commit perjury, then the Court instructs you as a matter of law that the matters concerning which the defendant testified were not material matters and your verdict must be guilty of perjury in the second degree.

THE COURT: The record may show that the Court gives you Instruction Number Five with respect to second degree perjury because the financial status of Mr. Byington was the primary purpose of the inquiry, and his marital status was only collateral. That statement of the Court may also be transcribed by the Reporter and taken to the jury room if counsel desires." Rec. 115.

The only reason that can be given for requiring the appellant to testify was either to have her perjure herself or incriminate herself. The question of marriage was wholly irrelevant and remote to the issues involved in the order to show cause proceedings. It would appear that

the only possible reason for compelling the appellant to testify was one of entrapment.

The question arises then whether appellant had to take the stand as a witness and whether she could rightfully by the court be asked a question that would be self incriminating if answered. The appellant had been living with Mr. Howard Hyington as man and wife. A baby was born out of this relationship. To have answered the question as to whether she had married in the negative would be admitting that she, the appellant, had lived in unlawful cohabitation with Mr. Hyington. A baby was born within the six months period following the divorce of Mr. Hyington and the relationship with Mr. Hyington occurred while Mr. Hyington was married. Rec. 99.

-B-

TESTIMONY OF MISS ORANGE ANN BAKER

AS TO INCARCERATING A FEMALE WHO REFUSES

OF THE APPELLANT.

Art. 1 Sec. 12 of the State Constitution and Sec. 105-1-10, Utah Code Annotated 1912, provide that "The accused shall not be compelled to give evidence against self." "The privilege of refusing to answer extends to all proceedings sanctioned by law." 70 Corpus Juris 7-1.

If appellant is compelled to testify, are his constitutional rights as to self incrimination waived. Immaterial questions by the court in this case as to remarriage were if answered correctly incriminating. At this instance she, the appellant, should have been advised as to her rights.

This court has said, "If counsel, knowing witness should not be compelled to answer, ask questions implying immorality, supreme court may reverse case with censure on counsel, whether or not witness claimed privilege." State vs. Thompson 91 Ut. 351-64 P. 2nd, 229.

Where appellant has no counsel and the court is asking questions the appellant should have his rights preserved with greater care than ever.

As to waiver of rights, it is difficult to say a person can waive his rights if he doesn't know he has any.

As a 13 in Callan vs. Com. 8, 24 Gratt, 66 Va. 674- "There can be no waiver of privilege unless the witness has been warned of his right to the privilege."

"However, fair and impartial Judges frequently in proper cases notify witnesses of their right in this regard. And in some instances it is not too much to say this should be done. Of course, if a witness is silent, or officially the accused he must be advised of his privilege." 28 R. C. 1, 437.

The policy of the law and courts is to have witnesses testify voluntarily without compulsion and without subjecting themselves to criminal prosecution.

In 70 C. J. 147-21 it quotes the law as "Unless evidence has been voluntarily given the policy of the law relative to the privilege against self incrimination is to protect all persons from criminal proceedings of any character based on evidence obtained from the persons themselves."

"A witness may claim privilege against self in a cross examination as well as direct unless waived by direct examination." 70 C. J. 7, 5.

Appellant by immaterial questions was placed in an incriminating position. This was a clear case of a violation of her constitutional rights.

-C-

THE APPELLANT WAS ILLEGALLY COMPELLED TO TESTIFY.

In the proceedings of the order to show cause herein, the appellant was taken from her home and compelled to testify by order of the court. The appellant without subpoena or order of any kind was taken to court by the sheriff and Mr. Byington.

The proceedings so far as material here are set out as follows:

Mr. Byington on the stand.

"THE COURT: Where is your wife?  
DEFENDANT: Home.

THE COURT: Hasn't she been able to tell you where you got married?

DEFENDANT: Well, I guess she could.

THE COURT: Then I'm going to give you just about five minutes to get down there, Mr. Byington, and bring her back

here. We'll take a recess for about ten minutes so far as this case is concerned, and you may go with the sheriff and bring her back.

(Court recessed, as far as this case was concerned, for approximately twenty minutes.)" Rec. 56 of Brynston Appeal.

"To require a witness to attend court he must be subpoenaed." 104-49-6. Utah Code Annotated 1943. "He must be allowed reasonable time for preparation and travel." 104-49-8. Utah Code Annotated 1943.

Ivella Hutchison, the appellant, was called to the stand by the court and the proceedings are here set out:

"(Ivella Hutchison, a witness called by the court to testify for and in behalf of the defendant, having heretofore been duly sworn, testified as follows upon

EXAMINATION BY THE COURT:

Q What's your name?

A Ivella Hutchison.

Q Will you say that again?

A Ivella Hutchison.

Q How do you spell it? I-v-e-l-l-a?

A Yes.

Q Hutchison?

A Yes.

Q Don't you go by the name of Brynston?

A Yes.

Q How long have you been going by that name?

A Well, I've been going by it, too, for the last month.

Q Well, how long--

A But we weren't married until the first of December.

Q How long did you go by it indefinitely?

A Since last October.

Q When were you married?

A First of this month.

Q Where?

A Montana.

Q What?

A Montana.

Q Where at in Montana?

A Can't tell you.

Q Have you got a marriage license?

A Did have, yes.

Q Where is it?

A It's either in my personal belongings at my mother's home or somewhere between Buel, Idaho, and Blackfoot and here.

THE COURT: I think somebody's being taken for a ride.

MR. BULLEN: These are all new facts to me. I didn't know anything about it." Rec. 63-64 of Byington's appeal.

The court will see that she was not asked if she wanted the advise of counsel. She was not asked if she was the defendant's wife. She was not advised of her rights as to self incrimination.

In fact, the court advised the jury in the perjury trial that there was no reason to ask the witness if she wanted an attorney.

"Ivella Hutchison.

Q Would you state what happened on that date, if you recall?

A Howard was served his papers to come into court, and I started my washing. I was just about half way through when the sheriff came in with Howard and informed me I had





"If there is an issue of fact as to the validity of the marriage, the alleged spouse may not testify until the marriage has been proved void, and prima facie proof of marriage renders the witness incompetent." 70 C. J. 124 Dixon vs People 10 Mich 84 State vs Harris 22 S. W. 480 283 Mo. 99.

"Even in a collateral proceeding one spouse cannot give testimony tending to show that the other has committed a crime." 70 C. J. 148.

The question of marriage was not even an issue of fact in this case.

This procedure is called to the attention of the court to show the flagrant irregularity of the whole proceedings.

As stated, "A Judge may cross examine the witness or ask him leading questions, but it is not proper that he conduct an extended examination of any witness or usurp the place of counsel." 33 D.C.L. 388.

It must be remembered that the opposing counsel did not request the witness to testify.

How far does the right of a court go if he can call on his own witnesses who are not properly brought under the court's

**jurisdiction?**

The issue of marriage was wholly immaterial by the court's own admission.

(supra)

"A witness is not bound to answer a question collateral, irrelevant or immaterial if the matter is to degrade the witness, under guise of effecting credibility." 70 C. J. 741.

That the question of marriage was not only incriminating but was degrading cannot be denied. The witness and the defendant were living in unlawful cohabitation. A child was born out of wedlock. The child was conceived when the defendant was married. Rec. 99.

-D-

APPELLANT WAS ENTITLED TO A CHANGE OF JUDGE BECAUSE OF BIAS AND PREJUDICE OF THE TRIAL JUDGE.

A petition was filed January 7, 1948 for a change of Judge. Rec. 15.

The petition was based on bias and prejudice of the Judge. In this case the Judge not only heard the alleged perjured testimony, but he initiated the investigation. He requested the County Attorney and District Attorney to investigate. Petition for change of Judge was denied. Rec. 40.

In his sentencing of Mr. Byington for contempt the Judge in open court said,

"You will be remanded into custody of the sheriff of Cache County in execution of this judgment, and the District and the County Attorney are here, and I'm submitting this case to them for an investigation with respect to violation of any of the criminal laws of the State of Utah." Rec. 65 (Reference to the record above refers to the record in the appeal of State vs Byington)

This court has repeatedly held that where bias and prejudice are shown to exist against the defendant by the court, he is disqualified to try the case. Haslam vs. Morrison.

Where a Judge is the complainant.

Where he was presiding when the alleged

crime was committed; he certainly cannot be free from bias and prejudice.

"But he, (the court) is disqualified when he makes a statement in advance of trial amounting to a prejudgment of the case in favor of one of the parties, and when under circumstances he unreasonably denies a change of venue or a change of Judge, judgment will be reversed on appeal although no showing of prejudice at the trial." 30 Am. Juris. 786.

"Where prejudice is ground for disqualification, prejudice which is sufficient to disqualify a person to sit as a juror equally disqualifies him as Judge." 30 Am. Juris 785.

That the Judge had formed an opinion as to the guilt of defendant is evidenced by his remarks at the conclusion of the order to show cause proceedings. (supra) It is submitted that the Judge would not have been a competent juror to sit in the cause.

"A person who might be called as a witness is not necessarily incompetent as a juror, but if he knows about the controverted facts in the particular case, he is deemed to know material, controverted facts that of necessity must bias and influence his judgment as a juror." 16 R.C.

That the court knew the facts is quite plain.

The fact that there are so few authorities in such cases as this can be explained by the fact that there are few cases where a person's constitutional rights have been so grossly ignored.

It is the appellant's contention that the proceedings from the beginning were irregular and illegal for the following reasons:

1. The charge of perjury was based on immaterial testimony irregularly received.
2. The testimony on which charge was based was on incriminating questions and answers of appellant.
3. Appellant was illegally compelled to testify.
4. Appellant was entitled to a change of judge because of bias and prejudice of trial judge.

For these reasons the appellant respectfully submits that the conviction should be set aside and the complaint and information should be dismissed, and the fine of \$250.00 be ordered returned to appellant.

Respectfully submitted,

W. Lee Skanchy

Attorney for Appellant.