

1948

## Oscar Perris v. Margaret Perris : Brief of the Defendant and Appellant

Utah Supreme Court

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Jensen & Jensen; Attorneys for Defendant and Appellant; Eldon A. Eliason; Attorney for Respondent.

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IN THE SUPREME COURT OF THE STATE OF UTAH

- - - - -

OSCAR FERRIS,

Plaintiff,

vs.

No. 7207

MARGARET FERRIS,

Defendant.

- - - - -

BRIEF OF THE DEFENDANT AND APPELLANT

- - - - -

APPEALED FROM THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR MILLARD COUNTY, STATE OF UTAH.

- - - - -

Will L. Hoyt, Judge

- - - - -

JENSEN & JENSEN, ATTORNEYS  
FOR APPELLANT--

ELDON A. ELIASON, ATTORNEY  
FOR RESPONDENT--

**FILED**

**AUG 26 1943**

CLERK, SUPREME COURT, UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH.

-----  
)  
OSCAR PERRIS,

(  
Plaintiff,

)  
vs.

(  
MARGARET PERRIS,

)  
Defendant.  
-----

DEFENDANT'S AND

APPELLANT'S BRIEF

No. 7207

This is an appeal from two orders of the Judge of the District Court of Millard County, Utah, made in the absence of counsel for the defendant and entered respectively on the 19th day of February, 1948, and the 23rd day of April, 1948, both of which orders direct the clerk of the above court to pay to Eldon A. Eliason the sum of \$300.00, which sum was deposited by the plaintiff with said clerk pursuant to the order of the above court to deposit the same as security for such costs and charges as may be awarded against the plaintiff by judgment or in the progress of

the action.

### STATEMENT OF FACTS

Eldon A. Eliason was not and is not a party to this action. He did not interplead, or intervene in this action. He was not before the court by any process, permission or order of the court. He was and is the attorney of record for the plaintiff during all of the proceedings.

At all times herein mentioned the plaintiff was and now is a non-resident of the State of Utah. On May 7, 1945, he brought this equitable proceedings in the District Court of Utah in and for Millard County, to obtain the care and custody of the two minor children of the parties hereto, Allen Parris and Linda Parris. The defendant counter-claimed for the following: (1) For custody of said children, (2) for an order of the court requiring said plaintiff to pay a reasonable amount to the defendant for the

support and maintenance of said children, (3) for a reasonable attorney's fee, (4) for costs of the action, and (5) for such other and further relief as to the court should seem just and equitable in the premises.

On the 18th day of June, 1945, the defendant filed her notice of motion and motion for an order of the court "requiring the plaintiff to make and deposit an undertaking in the amount of \$300.00 as security for such costs and charges as may be awarded against the plaintiff herein." Said motion was made pursuant to the provisions of Section 104-44-17 U.C.A. 1943. By order of said district court the plaintiff was permitted to deposit with the clerk of said district court the sum of \$300.00 cash in lieu of a surety bond.

The cause was tried to the court, and on or about the 11th day of June, 1946, among

other things the court found:

"2. That Allen Perris, a boy '8' years of age, and Linda Perris, a girl '5' years of age, are minor children of the parties hereto; and since July 1944 said children have resided with and been under the care and custody of the defendant here in Millard County, Utah."

"8. That ever since July 1944 the plaintiff herein, Oscar Perris, has failed and refused to send any money to the defendant, for the care or support of said minor children, Allen Perris, and Linda Perris; and that their necessities during the period of July 1944 to April 1946 have been provided by said Margaret Perris, her relatives and her present husband, Wilker Webb."

"11. That it is for the best welfare and interest of said minor children, Allen Perris and Linda Perris, that their custody and control be awarded to Margaret Perris Webb."

"13. That the plaintiff, Oscar Perris has little religious or social background; that he is an able bodied man, a mechanic by trade, and earning and capable of earning \$250.00 per month."

"14. \*\*\*; that in September 1945 the said Oscar Perris, by force and violence, secretly seized said Allen Perris and Linda Perris at Deseret, Millard County, Utah, and attempted to take them outside the jurisdiction of the State of Utah, but he failed in said attempt."



**"15. That said minor children Allen Perris and Linda Perris, are without any Estate or income in their own right."**

**Thereupon, among other things the court concluded herein:-**

**"2. That the defendant, Margaret Perris Webb, is a fit and proper person to have the sole care and custody of said minor children, Allen Perris and Linda Perris; and that the care, custody and control of said minor children should be awarded to said Margaret Perris Webb, subject to the further order of the court."**

**The decree herein of the court is in part as follows:**

**"IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant, Margaret Perris Webb, be and she is hereby awarded the care, custody, and control of Allen Perris and Linda Perris, the minor children of the parties hereto, provided however, the plaintiff, Oscar Perris, may visit with said children at reasonable times and places.**

**"IT IS HEREBY FURTHER ORDERED that the plaintiff, Oscar Perris, shall pay to the defendant for the support and maintenance of said minor children of the parties hereto, Allen Perris and Linda Perris, the sum of Fifty Dollars (\$50.00) each and every month hereafter during the minority of said children; and that the first payment shall be made to the defendant herein, Margaret Perris Webb, on or before the 1st day of July A. D. 1946.**

Said findings of fact, conclusions of law, and decree of the court were made on the 11th day of June and entered on the 12th day of June, 1946. On the 18th day of June, 1946, notice of the entry of said findings of fact, conclusions of law and decree together with copies of each were served upon the plaintiff and his attorney, and each of them, by mailing them to Eldon A. Eliason, attorney for the plaintiff at Delta, Utah.

On the 10th day of March, 1947, the defendant made an affidavit therein alleging and petitioning the court: (1) to fix the amount due from the plaintiff to the defendant, (2) to adjudge the plaintiff guilty of contempt of the court for not obeying its order requiring the payment of \$50.00 per month for the support of said children and (3) for such other and further relief as to the court should seem just and equitable therein.

The court upon said affidavit issued its citation and order "that you, Oscar Perris be and appear before the above entitled court" on a day certain and show cause "if any you have \* \* \* why you should not be punished for contempt of this court in violating the terms of its decree in the above cause," and why judgment should not be rendered against the plaintiff in the amount due under the above decree. Service of said citation and order (with a copy of said affidavit) was made upon the defendant personally on the 24th day of March, 1947, at Roche Canyon, San Bernardino County, San Bernardino, California.

The plaintiff, Oscar Perris, did not appear pursuant to said order or at all. Neither did his attorney, Eldon A. Eliason. No cause was shown why Oscar Perris should not be punished for contempt of the court.

The defendant and her attorney appeared and testimony was adduced.

Thereupon on the 28th day of April, A.D. 1947, the court entered its order that the defendant have and recover of the plaintiff, Oscar Ferris, the sum of \$350.00 as unpaid support and maintenance money for the two minor children of the parties hereto. On said date and for some time thereafter said \$300.00 of the plaintiff was in the custody of the court. On the 12th day of August, A.D. 1947, a copy of said order was regularly served upon the plaintiff by both sending to him at his address in California a copy of said order and to his attorney Eldon A. Eliason at Delta, Utah, also a copy thereof. (R. 38) There is in the file a purported assignment from the plaintiff to Eldon A. Eliason bearing date of the 4th day of August, 1947, and stamped as filed November 10, 1947, (R. 40). We shall discuss its standing later. After August 12, 1947, no pleadings were filed by any party or person in the above entitled matter until the defendant filed its notice of motion and motion

The next record proceeding was on December 15, 1947, when the attorney for the plaintiff appeared in open court and in the presence of one of the attorneys for the defendant, the court upon some basis not shown in the record called the case of *Perris v. Perris*. The counsel of the plaintiff then related his views about the history of the case and referring to the proceedings before the court in June 1946 stated in part:

MR. ELIASON: - \* \* \*

"At the time of the hearing plaintiff in the action became indebted to counsel for services rendered to an amount of approximately the sum of the surety bond, and has transferred and assigned his interest in the said bond to his counsel for fees for services rendered."

"I would like to make a motion that the Honorable Court release that cost bond to counsel for the plaintiff."

MR. JENSEN:- "The defendant Margaret Perris will resist the motion." (Tr. 3)

Counsel for the defendant then made the following motion:-

Comes now Margaret Perris Webb and

"IT IS HEREBY ORDERED that the Plaintiff, Oscar Perris, shall pay to the defendant for the support and maintenance of said minor children of the parties hereto, Allen Perris and Linda Perris, the sum of Fifty Dollars (\$50.00) each and every month hereafter during the minority of said children; and that the first payment shall be made to the defendant herein, Margaret Perris Webb, on or before the 1st day of July, A. D. 1946."

"NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED: that the defendant, Margaret Perris Webb have and re-

cover of the plaintiff, Oscar Perria, the sum of \$350.00 as unpaid support and maintenance money for the two minor children of the parties hereto."  
(Tr.3)

Thereafter upon the 17th day of February, 1948, in the absence of the defendant and her attorneys the district judge in the above matter signed an order and caused the same to be entered in the above matter on the 19th day of February, A.D. 1948, setting out what the judge called findings, conclusions, and an order all in one instrument, therein directing the clerk of the district court of Millard County, Utah, to "pay to said Eldon A. Eliason the amount of said deposit now held by the clerk, to-wit: three hundred dollars."

Thereafter on the 9th day of March, A.D. 1948, counsel for the defendant made and on the 15th day of March, 1948, filed their notice of motion and motion to the plaintiff, and to Eldon A. Eliason, his attorney, to recall and vacate the order of the court dated the 17th day of February, 1948. Pursuant to

notice said motion was heard on the 7th day of April, A.D. 1948; and on the 20th day of April, 1948, in the absence of the defendant and her attorneys the district judge made and on the 23rd day of April, 1948, filed his order denying said motion and further ordering the clerk of the above entitled court to pay to Eldon A. Eliason the three hundred dollars deposited with the clerk of said court in the above matter. (R. 51)

#### STATEMENT OF ERRORS

Comes now the defendant and appellant and hereby assigns as errors committed by the District Judge or court of Millard County, State of Utah, during the proceedings or progress of the above action the following:

1. The said judge or court erred in making on the 17th day of February, A. D. 1948, and thereafter entering its order directing the clerk of said district court to pay to Eldon A. Eliason, a person not a party to this



action, upon his personal oral request, the \$300.00 in the custody of the court herein.

2. That said judge or court erred in making on the 20th day of April, 1948, and thereafter entering its order directing the clerk of said district court to pay to Eldon A. Eliason, a person not a party to this action and who had made no record appearance herein, the \$300.00 in the custody of the court herein.

3. That said judge or court erred in making on the 17th day of February, A.D. 1948, and thereafter entering its order in the above action directing the clerk of said district court to pay to the purported assignee of the plaintiff the \$300.00 in custody of the court herein, when neither the assignor nor the assignee had any right or equity to the same or any part thereof.

4. The said judge erred in making on the 20th day of April, A.D. 1948, and thereafter entering its order in the above action directing the clerk of said district court to pay

to the purported assignee of the plaintiff the \$300.00 in the custody of the court herein, when neither the assignor nor the assignee had any right or equity to the same, or any part thereof.

5. That said district court of Millard County, Utah, erred in not acting upon, and by implication denying, the motion of the defendant by her counsel, made to the said court on the 15th day of December, A.D. 1947, in the presence of the attorney for the plaintiff herein, to enter its order directing the clerk of said district court to deliver to the defendant said \$300.00 held by said clerk to apply upon the prior judgment and order of the above court that plaintiff support his two minor children and pay to defendant for them \$350.00.

6. That it was error for the said district court in equity not to enforce its own order to provide the support money for

**Allen Perris and Linda Perris, two minor**

children under its jurisdiction from funds of the debtor in the custody of said court.

7. That the district judge or court on the 20th day of April, 1948, erred in denying the defendant's motion to recall and vacate its order of February 17, 1948.

8. That the court erred in including within its order settling the bill of exceptions the purported assignment from the plaintiff to Eldon A. Eliason.

#### ARGUMENT

On Statement of Errors Numbered "1" and "2"

In November 1947 a copy of a defective purported notice signed by Eldon A. Eliason, attorney for plaintiff, was served upon counsel for defendant. In December 1947 another copy of a defective purported notice signed by Eldon A. Eliason, attorney for plaintiff, was served upon counsel for defendant (R. 66).

For some reason the originals of said notices were never filed in, nor were they made a part

of this record. The failure to file said original notices, or either of them, was unknown to counsel for the defendant until after the entry of the first order appealed from.

Counsel's failure to file said notices appears to have been because of the inconsistency of the positions taken by Eldon A. Eliason as attorney for plaintiff, and Eldon A. Eliason personally. Up to as late as December 9, 1947, he was in writing asserting he was acting as attorney for the plaintiff herein in serving said copies purporting to give notice he would at some time request or move the court to release the \$300.00 in question. Yet on the 10th day of November, 1947, he had handed the clerk of the above court a purported assignment from the terms of which it appears that after the 4th day of August, 1947, the plaintiff no longer had any interest in said fund. And on the contrary therefrom it appeared Eldon A. Eliason was the owner of the claim to said fund.

Eldon A. Eliason's inconsistency is further shown by his brief to the trial court as to what he himself had been doing. We quote from his trial brief:

" \* \* \*; and in the case at bar, the writer of this brief, in June of 1947 became the owner of, and entitled to the deposit, by reason of the assignment hereinabove mentioned.

"Let us consider the nature of the deposit. The \$300.00 in cash was deposited by the plaintiff, it is true, by order of this court, but was deposited in lieu of an undertaking" \* \* "

It occurs to us a bit unusual to have the plaintiff's attorney the owner of the \$300.00 in June 1947, to take a purported assignment of the same in August 1947; and in the first part of November 1947 and again on December 9, 1947, when copies of purported notices were served upon the counsel for the defendant, that Eldon A. Eliason failed to disclose his claim of ownership of said fund. For those notices definitely were not made by "Eldon A. Eliason," but were made by "Eldon A. Eliason, Attorney for Plaintiff." Even more strange than this

is the assignment which purports from its face to not be dated in June 1947, but to be dated on August 4, 1947. And even in view of that assignment the above two purported notices were made upon the basis that attorney for the plaintiff was still appearing in the case. Whether or not said assignment was before the district court for consideration, and whether it is any part of the record upon appeal will be later discussed.

On the 15th day of December, 1947, the matter was, upon a basis not disclosed by the record, called up by the court; and then upon our inquiry of Mr. Eliason it was shown he was claiming in his own right, and not as attorney for plaintiff. (Tr. 3) Such a disclosure entitled defendant to rely upon the provision that to stand as a party to a proceeding a person must intervene as provided by section 104-3-24 U.C.A. '43 or invoke the jurisdiction of the court by a written application, and not a mere oral statement. We contend the

District Court should not have proceeded upon Mr. Elinson's claim to the fund.

"In invoking the jurisdiction of the district court on matters where-in it has original jurisdiction, it requires a complaint, petition, or application. One cannot invoke the jurisdiction by simply stating orally one's complaint." *Stato v. Telford*, 93 U. 228 at p. 231, 72 P2d 626.

If the words "I would like to make a motion" are given their ordinary construction or meaning, they were a request for permission to make a motion in view of the fact thereafter stated by Elton A. Elinson that he was claiming the fund personally. Our reaction is: if he wanted to make a motion and was entitled to make one, why didn't he make it? But let us see. Can such a statement be considered as a motion? And if so, who made it?

Such a question at first may seem to be unimportant. But the plaintiff was in contempt of the judgment of the court in failing to provide for his two infant children,

having the ability to so do, as is set out in the decree herein; and further in failing to be and appear before the court as above ordered by it after having been personally served with an order so to do.

Our statute defines a contempt as :-

"Disobedience of any lawful judgment, order or process of the court."

"Disobedience of the lawful order or process of a judicial officer is also a contempt of the authority of such officer."

U.C.A. 104-45-1 (5), (12)

Disobedience of a valid, lawful order in this type of case is a contempt.  
Foreman vs. Foreman, 176 P2d 144. - U. -.

Under such circumstances it is not uncommon that a court will decline to proceed with any matters in an action or proceeding on behalf of a plaintiff who is guilty of a contempt, until such a contempt is purged.

"A plaintiff in contempt is not entitled to proceed with the trial in his case as a matter of right."

12 Am. Jur. p. 438, sec. 71.



In this proceeding neither the plaintiff, nor Eldon A. Eliason personally, offered any evidence, oral or documentary. The plaintiff still was a non-resident (Pr. 4); and no showing was made as to why he had failed to appear pursuant to the order of the court. Yet the court ordered the \$300.00 paid to Eldon A. Eliason.

"It matters not what court acts. Every court must acquire jurisdiction from its record which every court must have and keep and which binds the court; and there is no principle better established than what is not juridically presented can not be juridically decided. Just as elemental is it that pleadings are the juridical means of investing a court with jurisdiction of the subject-matter to adjudicate it and that a judgment or decree beyond or not within them is a nullity, for the court is bound by its record."

Cooke v. Cooke et al., 67 Utah 371  
at page 428, 243 P. 53.

The proper way is pointed out for Eldon A. Eliason, if he wanted to be heard in this case.

"Persons who hold assignments of the interest of parties in a fund in court or liens upon it have been permitted in equity to appear as claimants."

24 Jan. 1917. 371 sec. 10.

"That filing and serving a motion on the adverse party is the proper method of making the application, if made to the court in which the judgment is rendered, or out of which the execution is issued, whether the application be a party to the action or by one affected as aforesaid, is also well settled \* \* \*."

State Ex. Rel. v. Third Dist. Court,  
37 U. 418, 108 Pac. 1121.

Accordingly we submit that Elison A. Eliason in his individual capacity never was before the court by any pleading, by any motion, by any notice, or by any appearance, and the orders of the court to turn the money over to him was without pleadings or evidence to support his claim to his right to the money, and was and is of no force and effect.

On Statements numbered "2" to "7" inclusive.

It appears to us to be elemental that a purported assigment with notice, which is Mr. Eliason's position in this particular matter, is in no better position than his attempted assignor.

"The policy of the law is clearly opposed to contracts between client and attorney in relation to property in litigation. The doctrine is founded in public policy. It is demanded for the welfare of society."

2. R.C.L. p. 967-8 sec. 43.

Taking Mr. Eliason's statement at its face, what did it amount to? The statement was not made as a witness, nor was it made under oath; nor was there any showing of the amount of unpaid attorneys' fees owing Eldon A. Eliason; nor for what services he claimed to be unpaid. When the attorneys' fee he then claimed were earned does not appear, nor does the reasonableness thereof.

In this proceeding all persons have agreed and proceeded upon the basis the moneys in question were in the custody of the law. "Court: In my opinion it was in the custody of the law when it was in the hands of the clerk." (R.64) Accordingly we submit no brief upon that point.

The reading of section 104-44-17 U. C. A.  
<sup>143</sup>  
~~117~~ discloses that the legislature used the

terms that the non-resident bond was to be "for the costs and charges which may be awarded against such plaintiff" and the same was to be conditioned that the plaintiff "will pay such costs and charges as may be awarded against the plaintiff by judgment or in the progress of the action, not exceeding \$300.00."

In this action defendant submitted to the court the question of the duty of the father to provide for the support and maintenance of the two minor children of the parties hereto. Thereupon the court made and entered its decree on the 11th day of June, 1946, that the plaintiff pay \$50.00 per month to support said children. Each month that amount became due, and remained unpaid. The money still remained in the hands of the court. On the 28th day of April, 1947, the court determined the plaintiff had not paid \$350.00 under said decree and made the judgment certain for that amount. Was not that "charges

awarded against the plaintiff by judgment \* \*  
and in the progress of the action?"

Some definitions of the word "charges" are:

"The expenses which have been incurred in relation either to a transaction or to a suit. It is a larger term than costs." Cyc Law Dictionary--Words and Phrases-- Def. Glossary Maxims (1912) p. 144

"It has been said that the word 'Charges' has, from familiar use, the precision of a technical term; and it has been defined as meaning expenses which have been incurred with relation either to a transaction or to a suit; also liability \* \* \* "

14 C.J.S. p. 404

One of the expenses to a non-resident father of bringing an action for custody of children is an ought to be the payment of the reasonable amount of their maintenance. Certain it is that in this action it was a liability incurred in this proceeding and in the progress of it that the court ordered the plaintiff to pay the \$50.00 per month.

Our Supreme Court has held that "costs and expenses" under section 104-45-11 U.C.A. 1943 is broad enough to cover items

of attorneys' fees and loss of property.

This item is quite different from the 'costs and disbursements' referred to in Section 104-44-14 U.C.A. 1943."

Foreman vs. Foreman --U.--; 176 P2d 145 at p. 151.

Upon that matter we submit the terms of Utah statutes when applied in equitable proceedings is broad enough, and it was contemplated by the legislature that money deposited in this type of proceeding is subject to the terms of the order to provide and the judgment entered thereon, and to offset the judgment against the money in the court's hands.

The question of the right of a court in an equitable proceeding to enforce a decree and to compell the husband to support his child where he was able to so do, was considered important enough to the National Association of Legal Aid Organizations, 25 Exchange St., Rochester, N. Y. to print its brief in support of the equitable enforcement of non-

resident support orders upon the ground that

support his children, rather than have them become public charges.

We quote therefrom:-

"This Brief arises from a situation which is becoming increasingly acute with the increased mobility of our population. Frequently individuals--usually husbands or fathers, still married or divorced--who are under court orders for the support of dependents seek relief from their legal obligations by crossing state lines."

\* \* \*

"In *Fanchier v. Cammill* (1927), 148 Miss. 723, at page 727, the court said:

"It is our view that, on account of the character of a judgment for alimony, which rests to some extent upon public policy, in requiring a husband to support his wife and children due to the sacred human relationship, and that they may not become public charges and dolefuls, the decree for alimony with the extra-ordinary power of enforcement by attachment and contempt proceedings should be established and enforced by our equity court which has full and sole jurisdiction of all matters of divorce and alimony; because to hold that a foreign judgment for alimony can be enforced in this state only by execution, the same as judgments at law, would be to impair or to deprive a foreign judgment for alimony of its inherent power of enforcement by attachment and contempt proceedings. Thus, as we view it, to so hold would be to disregard the 'full faith and credit' clause of the federal law, which we interpret to mean that the judgment, with its peculiar right

of enforcement, as one for alimony, should be established and enforced by the equity courts of our state in the same manner, and to the same extent, as it could have been enforced by our court if originally obtained in our state."

\* \* \*

"Holten v. Holten (1922), 153 Minn. 346, where the court said: "It would be a reproach to our system of legal administration if one could escape from the operation of a judicial decree by going into another state."

\* \* \*

"It is submitted that the growing list of states, now including California, Connecticut, Florida, Illinois, Minnesota, Mississippi, Oklahoma, Oregon, South Carolina, Virginia and Washington, which for reasons of comity and public policy grant equitable enforcement are meeting a national problem with realistic vision. There are literally thousands of husbands and fathers shirking their moral and legal responsibilities for supporting their families by 'leaving the state.' If these men knew, before they 'left the state,' that no matter where they decided to take up residence, that state could and would punish them for failure to support their dependants to the same extent as the one from whence they came, many would remain where they were and abide by their support orders.

"The underlying assumption of this Brief has been that alimony and maintenance are debts, but that they are more than ordinary debts. They are debts in which the entire community has an interest. They grow out of



an especially sacred social relationship controlled by the community. Moreover, if these debts are not paid by the debtor, then they must usually be borne by the taxpayer in the form of relief to the debtor's needy dependents."

There was some argument by the counsel for the plaintiff and the court appeared to be of the view that the defendant was dilatory in not getting out an execution and levying upon the \$500.00. We consider the law to be that property in the custody of the law is not subject to an execution or levy by process.

"Property in custodia legis is not subject to seizure on execution. This rule is based upon public policy."

Bancroft P. & R. sec. 1981 p. 2612

Further that the same was entirely unnecessary as this was an equitable proceedings, that the money was in the possession of the court and the court should, upon application for equitable relief and motion to so do, direct its payment towards support of plaintiff's children.

**In the original counterclaim defendant**

asked the court to require the plaintiff to pay attorneys' fee to her, so she might have representation. The court did not grant said request. She asked for costs against plaintiff. This the court did not allow. She then asked for such equitable relief as to the court might seem proper. Apparently it was the view of the court it had no equitable power to enforce its order against the fund in its custody. The court found plaintiff had the ability for the past two years to support the children, but had failed to so do.

"Where an action is brought for the support of the minor children, the father has the duty to support and an allowance of an attorney's fee for that is proper."

Jenkins v. Jenkins, 107 U. 239 at p. 245;  
153 P2d 262

In defendant's application to the court for assistance in March 1947, she asked the court to find the defendant guilty of contempt; and for such other and further relief as should

seem equitable in the premises. But the court did nothing about finding the plaintiff guilty of contempt, or requiring that the money in the custody of the court be applied to the judgment of \$350.00 which it entered in defendant's favor, although the request was for that relief.

Yet, when a plaintiff who the court has found has the ability to support his children, who has failed to support his children for over three years, who has stayed out of the state and prevented the defendant from getting the plaintiff personally before the court on contempt proceedings, and who has had notice that the court has rendered a judgment against him for \$350.00 for non support of his children, thereafter makes an assignment to his attorney for his fee, the court without requiring any intervention, any pleadings, or any evidence, was in this case quick to turn the money over to the attorney for the plaintiff.

Certainly it appears to us the plaintiff had no right to give to his attorney a superior claim upon the fund to that fundamental duty that plaintiff's funds in possession of the court be applied to the support of his children.

The strength of the obligation of the father of minor children in Utah is shown in the language of our decisions and statutes:

"Any person who, without just excuse, \* \* \* willfully neglects or refuses to provide for the support and maintenance of his minor children, under the age of sixteen years, in destitute or necessitous circumstances is guilty of a felony."

U.S.A. 103-13-1

Rockwood vs. Rockwood 65 U. 261,  
250 P. 457

On Statement of Error Number "8."

Of what effect is the purported assignment of the funds in the hands of the court as shown in the record upon appeal (R. 40)? It purports to be acknowledged by the assignee, Eldon A. Eliason. Said acknowledgment can give it no force or effect.

"The decided weight of authority considers a person acquiring a beneficial interest under an instrument to be so far incompetent to take the acknowledgment of its execution as to render his act null and void."

1 Am. Jur. p. 334

Said instrument does not bear any title of the court or cause in which it might be claimed to be a pleading. It does not bear a verification as required by section 104-12-1 U.C.A. '43. It does not contain any allegations.

The effect of getting the clerk to put his stamp upon the back of the same and putting it in the file herein seems to have been regarded by both the claimant and the court as a sufficient means of setting up a claim by pleading and establishing the claim by evidence. Our search of the authorities has produced no authority which would regard the paper as a pleading in the record, nor as any act which would entitle the court to consider the same before it as evidence.

**We proposed a bill of exceptions and a**

record upon appeal without said purported assignment therein. No amendment to the proposed bill of exceptions was made within the time allowed or at all by the plaintiff. So again the court upon an oral statement of Eldon A. Eliason that he wanted the same a part of the record, the court in settling the bill of exceptions stated certain facts concerning the same; and allowed us an exception to such statement. We objected to the district court considering the same; and we object to the Supreme Court considering the same as any part of the record herein. Our contention is the same should have been disregarded by the district court and should be disregarded by the Supreme Court in view of the record. By definition of our statute, U. S. A. 1943 104-33-14 said purported assignment is not a part of the judgment roll; and by 104-33-4 it is not a part of the bill of exceptions.

Accordingly we submit said "assignment" is no part of the record herein.

Conclusion

In conclusion may we say that the plaintiff, Oscar A. Harris, couldn't himself or by his attorney have come in to court and have secured the payment of \$300.00. That was the announced view of the district judge. Then in law, fairness, and equity another with notice, his attorney, should not be able to have the district court do indirectly what it would not have done directly. To uphold the orders appealed from Herwin will be an aid in disobedience of orders of support of minor children by their father; will open the way for persons claiming funds merely upon a personal appearance in court without pleadings to obtain orders and awards in their favor. To reverse the order of the lower court will be to affirm the rule of procedure by pleadings and evidence, to discourage non-resident fathers from failing to support their children, and discharge a duty to the public that it not bear the burden of

supporting minor children in this state,  
where funds of the father are available to  
support them.

We affirm our belief in the justice of  
the cause of this appeal and that the supreme  
court will do equity to the cause of seeing that  
resident minor children are supported by their  
non-resident fathers where a court can easily  
so do.

Respectfully submitted,

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By   
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