

1948

Oscar Perris v. Margaret Perris : Brief of the Plaintiff and Respondent

Utah Supreme Court

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

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7207

IN THE SUPREME COURT OF THE STATE OF UTAH

OSCAR PERRIS,)

Plaintiff, (

vs.)

No. 7207

MARGARET PERRIS, (

Defendant.)

BRIEF OF THE PLAINTIFF AND RESPONDENT

APPEALED FROM THE DISTRICT COURT OF UTAH

IN AND FOR MILLARD COUNTY

Will L. Hoyt, Judge

JENSEN & JENSEN, Attorneys
for Defendant and Appellant

ELDON A. ELIASON, Attorney for
Plaintiff and Respondent

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SUPREME COURT, UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH.

OSCAR PEREIRA,

)

Plaintiff,

(

PLAINTIFF'S AND
RESPONDENT'S BRIEF

vs.

)

MARJORIE PEREIRA,

(

No. 7207

Defendant.

)

STATEMENT OF FACTS

In this action the Plaintiff, Respondent herein, filed his complaint on the 7th day of May, 1945, requesting that the Fifth District Court of Utah in and for Millard County, enforce a judgment of divorce issued out of the Superior Court of the State of California in and for the County of San Bernardino, (K1). The said foreign judgment dated the 9th day of March, 1945, had by its provisions awarded the Plaintiff, Respondent herein, the sole care, custody and control of Allen Perrie and Linda Perrie, minor children of the Parties hereto, (K2). Before the matter had been set at issue the Appellant herein made a timely demand upon the Respondent herein for

Section 27-41-17, Utah Code Annotated, 1943.
Said Section 17 is entitled NON-RESIDENCE AND
JURORS COMPULSION TO GIVE SECURITY FOR COSTS
OF SUIT, and reads as follows:

"When the plaintiff in an action resides out of the state, or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff may be required by the defendant. When required, all proceedings in the action must be stayed until an undertaking executed by two or more persons, is filed with the Clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment or in the progress of the action, not exceeding the sum of \$100.00. A new or additional undertaking may be ordered by the Court or Judge upon proof that the original undertaking is insufficient security, and proceedings in the action may be stayed until such new or additional undertaking is executed and filed. No instrumentality or agency of the United States shall be required to give security for costs and charges herein provided."

The Respondent, not being a resident of Utah, had difficulty in securing such an undertaking, as contemplated by the Section of the Utah Code above set forth. Thereafter, by order of the District Court in and for Millard County, the Respondent was permitted to deposit with the

Clerk of the above entitled Court, the sum of \$100.00 each, in lieu of an undertaking as provided in Section 104-14-17 Utah Code Annotated herewith set forth, and the Appellant was ordered to answer or otherwise plead to the Respondent's Complaint. Thereafter, issue was joined and the matter finally came on for trial and was decided by the District Court on its merits. No costs were taxed against the Respondent and no judgment was rendered by the Court in the said matter in favor of the Appellant or at all against the Respondent, for costs incurred in the said action (R31). The Court, by its decree, awarded a temporary custody of the children to the Appellant and did award certain sums of money to be paid monthly to the Appellant for the support and maintenance of the minor children of the Respondent and the Appellant (R31).

The Respondent became indebted to his attorney, Eldon A. Nilsson, by reason of the services rendered in the said action and on the 4th day of August, 1947, the Plaintiff, Respondent herein assigned to said Eldon A. Nilsson

his professional services, the \$300 be paid with the Clerk of the Court. Said assignment (hereinafter discussed) was duly and regularly executed and filed with the Clerk of the Court on November 10, 1947 (1940) at which time demand was made upon the Clerk of the Court to turn over to the assignee the money so held in lieu of security for costs. The Clerk requested that an order of the Court be obtained and accordingly demand was made upon the Court by the assignee in November of 1947 by an oral motion and request that the Clerk be directed to turn over to said assignee the money so deposited with the Clerk. The Judge in open Court in November, 1947, requested that before such order were made that counsel for Appellant herein be given notice of such proceeding. Accordingly on the 10th day of November, 1947, notice was sent to Othell E. Jensen, counsel for Defendant and Appellant herein stating as follows:

In the District Court of the Fifth Judicial District, and for Millard County, State of Utah. Oscar Parrie, Plaintiff, vs.

Edward Parrie, Defendant. Othell E. Jensen, Attorney for

Defendant above named, you will please take notice that on Thursday, the 13th day of November, at 2:00 P. M. or as soon thereafter as counsel can be heard a motion will be presented to the above Court at the court room in Fillmore, Utah, requesting that the non-resident cast bond presented in said case be released, the demands of the Statute having been met and the judgment accordingly entered. Signed, Eldon A. Eliason.

The said date of November 13, 1947, at 2:00 P. M. had been set by the District Court to hear the matter. Eldon A. Eliason appeared on November 13, at 2:00 P. M. but the District Judge was unable to appear because of a Court hearing he was required to conduct at Provo, Utah. The Judge was requested by Eldon A. Eliason to set another day for such hearing and the 29th day of December, 1947, was set as the day for such hearing. Edell E. Jensen, attorney for Appellant, was sent formal notice of such hearing to be held on the 29th day of December, the same coming on a regular day of Court, and in response to said notice said Edell E. Jensen appeared on said day and resisted the request and notice of Eldon A. Eliason, assignee, to have the Court direct the Court to turn over to the said assignee

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26, 1963, and again on June 7, 1963. At each of these hearings Counsel for Appellant was present and the argument of both parties was heard by the Court. And on the 30th day of April the Court by further order re-affirmed its ruling of February 17, 1963, and ordered the \$300 deposited with the Clerk as security for costs turned over to the assignee of the Plaintiff, Alden J. Eliason.

The above facts have been set out in their particular to correct a statement or an inference in Appellant's Brief on Page 1 and Page 11 thereof stating that the appeal is taken from two Orders of the Judge of the District Court of Millard County and made in absence of Counsel for Defendant. It would appear from this and other statements in Appellant's Brief that he had not had opportunity to be heard, the reverse of which is shown by the facts from the record.

APPENDIX

Various and sundry matters of small and insignificant nature have been referred to in

the Brief of the Appellant. Little, if any, of such material in the brief is directed toward the pertinent issues of the case herein. An attempt will be made here to answer each of the claims or contentions made by Appellant unimportant though the same may be. It is submitted that counsel for Appellant has not considered, or if he has considered, does not appreciate the nature of the Security for Costs which the defendant is entitled to under Section 19b-16-17, Utah Code Annotated, 1943.

Reference is made to 18 Corpus Juris Page 770, Section 23, under the general title "Deposits in Court." In that chapter is discussed deposits under two general heads, namely: (1) "Deposits made on application of a party in possession of the fund, who desires to be relieved of the burden of caring for it;" and (2) "Deposits ordered to avert danger of loss or depletion of the fund." It does not purport to address itself to the question of Security for Costs or deposits made into Court in lieu of Security for Costs under

Appellant has presented his case as though the deposit made in lieu of security for costs by the Plaintiff was the subject of a doubtful claim or a fund, the ownership of which was in dispute requiring the Court to determine as between litigants the proper disposition of the fund. Such is not the case here. The statute provides the purpose of such security and the use to which it may be put. The money advanced in lieu of security for costs is not a fund or of which disputed litigants can contest except as to what constitutes costs and charges. And costs and charges are defined in American Jurisprudence Vol. 14 Sec. 2 as follows:

"Costs" are statutory allowances to a party to an action for his expenses incurred in the action. They have reference only to the parties and the amounts paid by them; or, as otherwise defined, they are the sums prescribed by law as charges for the services enumerated in the fee bill. Again, costs are said to be in the nature of incidental damages allowed to the successful party to indemnify him against the expense of asserting his rights in court, when the necessity for so doing was caused by the other's breach of a legal duty. When used in a judgment or decree of a Federal court without qualification, the word "costs"

leave the amounts taxable as such under acts of Congress, rules promulgated by its authority, and practice established consistent with governing enactments.

The terms "Fees" and "Costs" are sometimes used interchangeably, but accurately speaking the term "Fees" is applicable to the items chargeable by law between the officer or witness and the party whom he serves, while "Costs" has reference to the expenses of litigation as between the parties. The latter term strictly includes only those expenditures which are by statute taxable and to be included in the judgment."

Now is the fund advanced in lieu of security of costs, one where outside parties through interpleader or intervention can make of the fund a doubtful claim.

Bancroft's Code Practice and Remedies, Volume III, at Page 2612, is also cited, supporting the proposition that "property in custodia legis is not subject to seizure or execution." Counsel for defendant seems to have overlooked the fact that that citation has reference to money or property deposited by order of the court to abide the final determination as to its ownership, and is not helpful in determining

whether or not a defendant, as in the present case, can by order of the court subject a deposit made in lieu of an undertaking for security for costs to the payment of support and maintenance money that may have accrued thereafter in favor of the defendant, where in the first instance no costs were taxed against the plaintiff and in favor of the defendant, and no judgment for costs in favor of the defendant or against the plaintiff rendered or entered in said action.

Let us consider the nature of the deposit. The \$100.00 in cash was deposited by the plaintiff, it is true, by order of this court, but it was deposited in lieu of an undertaking executed by two or more persons to the effect that they would pay such costs and charges as may be awarded against the plaintiff by judgment or in the process of the action, not exceeding the sum of \$100.00, as per the provisions of the sections 106-16-17, Utah Code Annotated, 1943, and it is submitted that the defendant can have only such rights in the deposit as the provisions

the right is to Security for Costs, and not security for the payment, as in this case, of support and maintenance money, that might accrue under a decree awarding the custody of children to the defendant.

The statute clearly contemplates that a defendant in the State of Utah shall be entitled to demand of all non-resident plaintiffs Security for Costs in the form of an undertaking signed by two persons, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment or in the progress of the action, not exceeding the sum of \$300.00. The objects of such statute are:

- (1) To have within reach of the process of the Court some financially responsible person who is bound for the costs awarded against such non-resident plaintiff.

Beckman vs. Mackay
12 Fed. 576 and

- (2) To protect a party from being harassed with groundless suits.

Moore vs. Langer
29 N. C. 293;
Conley vs. Massachusetts a long Inst.
11 N. I. 147.

The conclusion seems inescapable that a plaintiff under the provisions of Section 104-41-17 can only be required to give security for costs and that the Plaintiff may offer to deposit with the Court cash in the maximum amount of \$300.00 in lieu of said undertaking; that deposit, however, must be made with the approval of the Court; and the fact that a cash deposit is made in lieu of said undertaking as security for costs, can in no wise enlarge the defendant's rights in said deposit. Certainly, the defendant cannot say, after the court has awarded a money judgment for the support and maintenance of the minor children in a matter involving the custody of said minor children, that the deposit may be, by order of the Court, applied to the satisfaction of said judgment.

In volume 29 of Corpus Juris Secundum, under the general subject of Costs, there is a chapter entitled "Security for Payment of Costs" and at Page 401 the topic "Deposit instead of

~~bond, undertaking or recognizance,~~" is discussed.

proposition that

"Ordinarily a deposit of money will be accepted as sufficient security for costs" although some cases hold that a deposit may be insufficient. However, in the present case, where the Court by its order permitted the Plaintiff to make a deposit in lieu of an undertaking for security for costs, it would seem that the Statute had been satisfied. *Id.* Page 116 of said Volume 20, Corpus Juris Secundum, the topic "Disposition of Deposit," is discussed, and the cases seem to uniformly hold that

"Unused deposits made as security for costs should be returned to the depositories, on termination of the litigation to which they are incident."

The term "costs" is synonymous with the term "expenses," costs being the allowance to a party for expenses incurred in prosecuting or defending a suit embracing counsel fees
Florida v. Georgia 1797 2nd 116.

In the present case the issues raised by

the pleadings were resolved, and the decree of this Court entered, and in said decree there was no award made for costs, and it is submitted that thereafter the plaintiff assigned the deposit to Eldon A. Eliason (H&O), who he had a right to do, since at the time the defendant, Appellant herein, could have no possible claim against said deposit, and the Court did honor that assignment by turning over to Eldon A. Eliason said deposit. Had the Appellant acquired some interest in the deposit prior to the date of the assignment by purchase, donation, or any other means, then we might have a different problem; but the fact of the matter is that as of the date of the assignment the defendant had acquired no interest in said deposit. The following facts have been held sufficient to discharge the surety:

(1) The dismissal of the action--

Hollingsworth vs. Hallgren
10 No. 106; 15 C. J. P. 221,
Note 35;

(2) A decree failing to award costs against the plaintiff--

Woolfolk vs. Woolfolk
167 Tenn. 362; 69 S. C.
92nd) 103).

Much contention has been made by Appellant in his brief as to whether Eldon A. Eliason in making his appearance before the Court in his motion and request for an order directing the Clerk to pay him the money as counsel for Plaintiff, or as assignee of the Plaintiff. We fail to see any real importance to the argument concerning such matter. The \$300.00 deposited by the Plaintiff in lieu of security for cost never was a doubtful claim. The money as such never was before the Court as the subject of the litigation and when there was no cost bill filed or demand for cost or award of costs made at the conclusion of the case and within the statutory time, the deposit belonged to the Plaintiff and then by reason of the assignment to the assignee. There was no reason for Eldon A. Eliason to interplead or intervene as a Party to the suit because the \$300.00 was not a part of the claim of the suit. He needed merely to request as any Claimant

or assignee would be required to do. If he appeared as the assignee of the Plaintiff in asking demand upon the Clerk and the Judge of the Court for the release of the money he is acting entirely within the scope of his prerogative. If he were required to appear at a hearing and contend as attorney for the Plaintiff that there was no statement of costs filed or demand for costs entered or award of costs made against the Plaintiff it would not be outside the scope of his duties as attorney to so appear. At the outset it is contended throughout the hearing that his demand for the money deposited was by reason of his claim as assignee of Plaintiff.

(MSL-62) (Tr3)

Because of the lengthy argument of the Appellant regarding the legal and moral obligation of a father to support his minor children (Appellant Brief 25-27-28-29-31) it is felt that a brief reference to each matter is necessary. The obligation to so provide is conceded and approved.

It need be borne in mind, however, that the plaintiff, Respondent herein was at all times a non-resident of the State of Utah and was seeking to claim what had already been awarded him by the Superior Court of California (20), that is custody of his children. That the Defendant, Appellant herein was herself subject to contempt of Court in disobeying the California de res (21-2) and should not expect to be dealt with differently than she would have the Respondent dealt with. From such facts it is clear that Plaintiff was not willfully remaining out of the state as claimed by the Appellant's Brief (22) but on the contrary had sought the help of the Courts of this State for assistance in the return of the custody of said children which relief was granted him by restoring said custody to him in a separate action August 4, 1947. Appellant in his Brief (P. 8 and 10) makes reference to the assignment (23) as lacking in some of its aspects; first that the heading of the Court and

the title of the case does not appear upon it. It is herein contended that such omission does not affect its validity at all and that if it should it could be amended even now to show the title of the case. Also reference is made to the acknowledgment as being irregular. Such fact is noted, but it may be further stated that the instrument would have been just as valid had it not contained an acknowledgment.

It is contended by Respondent herein that the Appellant had no basis or claim for attempting to delete from the record in the Bill of Exceptions that part of it which contained the assignment from the Plaintiff to Eldon A. Eliason. That the law or the rules of procedure did not entitle him to thus take from the record those things adverse to his claim and incorporate at the same time those things favorable to his claim. Such proposed Bill of Exceptions without the assignment would not have represented the true facts of the case and was resisted by Eldon A. Eliason as the matter came to the

attention of the Court. There is nothing in the Statutes to prevent this from becoming part of the judgment rule. We contend that it is and should be an important part thereof.

The matter of attorney's fees for Appellant at the time the custody of the children was heard is not a part of the issues involved herein and proof or authorities on this matter would be outside the issues of this case. Likewise, it is outside the issues of this case to consider the suitability of Oscar Ferris or Margaret Ferris to have custody of the minor children as is contained in the finding of facts as reported on page four and five of Appellant's brief so also is the matter of whether Oscar Ferris was properly found in contempt for his failure to provide.

Edwin L. Williams by reason of his professional services to the Plaintiff was a creditor as early as June of 1944. Such debt and obligation was recognized by the Plaintiff as an outstanding and legal obligation.

The statement that the claim had been owing many months prior to the time the assignment was actually executed on the 4th day of August, 1947 (R40), need not be as confusing to Appellant as (his brief on page 17) he would appear to imply. Counsel for the Plaintiff did not accept the assignment to him of said cash deposit with the intent of bringing an action thereon. The assignment was made for the sole purpose of paying an honest obligation which was long past due, and that had been incurred before any monies became due or owing the Appellant under the terms of the said decree for support and maintenance.

CONCLUSION

In conclusion it should be stated that at no time during the entire proceedings or any time subsequent to the decree and order of the Court did the Defendant, Appellant herein, make any request for costs or expenses incurred by reason of the suit, nor did Appellant make any request

or action for any disposition to be made of the money which had been deposited in lieu of security for costs with the Clerk of the Court until long after Eldon A. Allaman, assignee of the Plaintiff, had presented a valid assignment from the Plaintiff to the Court and had made formal demand upon the Court for the release, then five months following such formal demand and more than / year following the entry of judgment in the case the Appellant seeks to resist the Claim of the assignee without quoting a single authority to show by what right he seeks the security fund transferred to him.

The statement of errors set out by the Appellant reciting that the Judge or Court erred in its orders is not substantiated by any of the evidence or by reference to any case or legal authority. The trial Court made the only disposition of the security fund that under the circumstances and the law the Court could reasonably make and is hereby respectfully submitted that the Plaintiff was entitled to have

returned to him said deposit, and the plaintiff
having made an assignment of the same to Eldon
A. Hansen the assignment should be recognized
and the order of the trial Court so recognizing
it should be upheld and affirmed.

Respectfully submitted,


Eldon A. Hansen
Counsel for Respondent