

1949

Smith v. Smith : Brief of Appellant

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.

Shields and Shields; Attorneys for Defendant and Appellant;

Recommended Citation

Brief of Appellant, *Smith v. Smith*, No. 7411 (Utah Supreme Court, 1949).
https://digitalcommons.law.byu.edu/uofu_sc1/1213

This Brief of Appellant 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.

In the Supreme Court of the State of Utah

ZOLA M. SMITH,

Plaintiff and Respondent,

vs.

ELMER W. SMITH,

Defendant and Appellant.

Case No. 7411

FILED

C 1942

CLERK, SUPREME COURT, UTAH

BRIEF OF APPELLANT

SHIELDS and SHIELDS,

*Attorneys for Defendant and
Appellant.*

INDEX OF POINTS

1. The order of February 9, 1949, should be construed to satisfy the judgment of plaintiff for all alimony and support money, due or to become due, from the defendant.....10
2. An order made after notice and hearing may not be set aside ex parte, and an attempt by the court so to do is void, of no effect, and subject to attack at any time.....12
3. Notice to a withdrawn attorney or record is not notice to that attorney's former client.....16
4. Where an order, or combination of orders, is so ambiguous that it cannot reasonably be determined therefrom what is required to be done, such order, or combination, should not be the foundation of a contempt proceeding.....18
5. Where a new order is entered, directing a party to do something he was not theretofore bound to do, or clarifying an order that was theretofore ambiguous, the party against whom the order is directed is entitled to notice of the new order before he can be found in contempt of court for failure to obey it.....20
6. Notice or knowledge by the defendant of what is required of him must appear either in the proofs taken at the hearing or in the affidavit supporting the citation and order to show cause.....22
7. In order to support the conclusion that the defendant is in contempt of court, the court must find that the defendant knew of the order to pay money, that he refused, and that he had ability to pay during the period of time in which he possessed the knowledge of his duty.....24
8. Civil contempt proceedings are for the purpose of enforcing an order of the court, not for imposing a penalty for past disobedience.27

INDEX

	Page
STATEMENT OF FACTS	3
ASSIGNMENTS OF ERROR	8
POINTS	8
ARGUMENT:	
Errors I and II	10
Error III	24
Error IV	27

CASES CITED

Cox. v. Dixie Power Co., 81 Utah 94, 16 P. 2d 916	12
Ensch v. Enschede, 157 Kan. 107, 138 P. 2d 491	19
Hambrecht v. Hambrecht, 128 Ore. 305, 274 Pac. 507	22
Hewson v. Hewson, 129 Ore. 612, 277 Pac. 1012, 63 A. L. R. 1216	22
Hoover, In re, 44 Utah 476, 141 Pac. 101	21
McCaleb v. McCaleb, 177 Cal. 147, 169 Pac. 1023	19
Moran v. Superior Court, 35 Cal. App. 2d. 629, 96 P. 2d 193	14
Phillips v. Superior Court, 137 P. 2d 838	21

Sandall v. Sandall, 57 Utah 150, 193 Pac. 1093, 15 A. L. R. 620	17
Smith v. Los Angeles and P. R. Co., 34 Pac. 242, 4 Cal. Unrep. Cs. 237	15
Trullinger v. Howe, 58 Ore. 73, 113 Pac. 4	22

STATUTES CITED

California Code of Civil Procedure, § 473	14
Utah Code Annotated 1943, 104-42-6	13
Ibid., 104-14-4	13

AUTHORITIES CITED

American Jurisprudence, Vol. 30, Judgments, § 4	11
Corpus Juris, Vol. 23, Evidence, § 1919	24
Corpus Juris Secundum, Vol. 17, Contempts, § 12	19
Ibid., § 18	21
Ibid., § 124(e)	28
Vol. 60, Motions and Orders, § 62(5), p. 75	14
24 L.R.A.(N.S.) 404	24
Restatement, Conflict of Laws, § 464(a)	11
Words and Phrases, Vol. 23, p. 166	11

In the Supreme Court of the State of Utah

ZOLA M. SMITH,

Plaintiff and Respondent,

vs.

ELMER W. SMITH,

Defendant and Appellant.

Case No. 7411

BRIEF OF APPELLANT

This is an appeal from a decree entered September 14, 1949, by Honorable Roald A. Hogenson of the Third Judicial District Court in and for Salt Lake County, adjudging the defendant in contempt of court and sentencing him to 30 days in the Salt Lake County jail (R. 133).

STATEMENT OF FACTS

Zola M. Smith, the plaintiff, was divorced from the defendant by a decree entered in 1941, in which decree the defendant was ordered to pay the sum of \$50.00 per month

"as alimony and for support" of the four minor children of the parties (R. 12). Plaintiff remarried in 1943 and left the State of Utah with the four children, eventually establishing her residence in San Bernardino, California. During the years between 1941 and the date of the contempt proceedings in 1949, plaintiff attempted to realize upon the provisions of the decree as to alimony and support money, and the record shows a number of Orders to Show Cause, Garnishments and Commitments, most of which are not material to the consideration of this appeal.

On February 3, 1949, plaintiff, through her counsel in Salt Lake City, filed an order for the defendant to show cause why he should not be punished for contempt (R. 99), hearing being set for February 9th. Plaintiff appeared by her counsel and defendant appeared in person and by counsel. During this hearing the parties entered into a stipulation that if the defendant and a third person would give a bill of sale to the fixtures and equipment in a certain restaurant, transfer the lease, and warrant and defend the title to the fixtures and equipment, plaintiff would give to defendant a satisfaction of judgment. On this same day the following order was entered by Hon. Clarence E. Baker:

"The plaintiff's order to show cause comes now on for hearing before the Court, the plaintiff appearing by and through her counsel, LaMar Duncan, the defendant being present and being represented by his counsel, E. LeRoy Shields and Jed Shields. Whereupon Elmer W. Smith is sworn and testifies in his own behalf. Comes now the defendant and Lilly Parry Smith, a third party, and executes and delivers to the plaintiff a bill of sale for the fixtures and equipment and the

lease at 421 South Main Street, Salt Lake City, Utah, *in full satisfaction of the judgment for alimony and support money in favor of the plaintiff, and against the defendant.* Comes now the plaintiff and moves the Court to dismiss the plaintiff's order to show cause and the Court being fully advised in the premises, orders the plaintiff's order to show cause dismissed." (R.102) (Italics added.)

Immediately thereafter, defendant paid-off his attorneys, withdrew some funds he had in an assumed name in a local bank, and left the State of Utah.

On February 19th, LaMar S. Duncan, attorney for plaintiff, served upon defendant's counsel a notice of intention to move to have the stipulation and order set aside (R. 106). Mr. Duncan appeared before Hon. Joseph G. Jeppson on February 25th, and moved that the hearing on this motion be continued until March 1st; in response to this second motion, the court ordered:

"Upon motion of counsel for the plaintiff and good cause appearing therefor, it is hereby ordered plaintiff's motion to set aside be, and the same is continued to March 1, 1949 at ten o'clock A.M. *on the condition that plaintiff serves notice upon the defendant* not later than February 26, 1949." (Italics added.)

In the meantime (February 24th) Shields and Shields had served upon plaintiff's counsel a notice (R. 109) that they had withdrawn as attorneys for defendant. Notwithstanding this notice, plaintiff's counsel served upon Shields and Shields a notice that the continued hearing would be held on March 1. This notice was served on February 25th, the day after notice of withdrawal had been served upon Mr. Duncan (R. 110).

The motion to set aside was heard *ex parte* and Hon. Clarence E. Baker granted an order as requested (R. 112). A decree setting aside the stipulation and reinstating the judgment "except as actually satisfied" was signed by Judge Baker on March 7th.

During this time the defendant had been in the State of Nevada and did not know of the proceedings. He returned to Utah in August (T. 156) and on September 9th was served with an order to show cause why he should not be committed for contempt of court for failure to pay alimony and support money (R. 124, 125). On defendant's failure to appear, a bench warrant was issued and defendant brought into court on September 12 (R. 126). Hearing on the order to show cause was held on September 13, defendant appearing in person and by counsel, and plaintiff appearing by counsel (R. 128).

The hearing was held before the Hon. Roald A. Hogenson, the defendant being the only witness sworn. He, on direct examination by plaintiff's counsel, testified that he had withdrawn approximately \$1700 from the Walker Bank & Trust Company shortly after the Stipulation and Order of February 9th (R. 151). Then the following exchange took place:

"Q. Would it be February of 1949?

A. Yes, sir.

Q. It was a few days after you were in court?

MR. SHIELDS: May I make this observation, and make this objection: when we were in Court that day, Mr. Duncan, a settlement was made of this matter completely, for all back and future support money and alimony.

THE COURT: For future alimony?

MR. DUNCAN: It wasn't future.

THE COURT: I wouldn't pay any attention to future alimony.

MR. SHIELDS: Everything was settled up that day in court, and a stipulation signed by the parties.

THE COURT: The parties didn't agree to settle the support money, not the future support money for minor children." (T. 151).

It appeared that the defendant had used the money so withdrawn to live on, and to pay off some checks which were outstanding (T. 153-155), and that during the time he was in Nevada he earned only \$50.00 (T. 149).

There was no testimony by or for the plaintiff, all of her evidence coming from the affidavit in support of the order to show cause (R. 119). There was nothing in the affidavit to show that after March 1, 1949, the defendant had any money, or that he had received a notice of the order to pay alimony, or that any demand had been made upon him for alimony and support money payments.

Following the conclusion of defendant's testimony, the court made the following statement:

"I don't believe the testimony. He said he has only made \$50.00 since February, 1949. I simply don't believe it. I believe he has made more, and substantially more. In any event, he had in his possession on the 16th day of February, 1949, \$1700.00 out of which he paid \$208.43 for existing obligations which, of course, he had to pay. The balance of approximately \$1500.00—a few dollars less than \$1500.00, he testified he used to live on. He testified he has paid nothing

on the decree of this court, in pursuance of the decree of this Court since that time for the support of the minor children, as ordered in the case. * * *"
(T. 170).

The next paragraph of the court's statement (T. 170) shows that the court looked at the entire record to fix the sentence for contempt, and that the court fixed the penalty at the maximum allowed by law.

On September 14, 1949, Findings of Fact and Conclusions of Law were filed (R. 131, 132), which will be reprinted hereinafter. Additional facts will appear in the argument.

ASSIGNMENTS OF ERROR

1. The court erred in refusing to hear any evidence as to the effect of the Order of February 9, 1949, on future alimony and support money payments.

2. The court erred in finding that the defendant willfully refused to pay the money ordered by the court.

3. From the findings of fact made, the court erred in concluding that the defendant was in contempt of court.

4. The court erred in looking at the entire record to determine the amount of punishment to impose upon the defendant.

POINTS

1. The order of February 9, 1949, should be construed to satisfy the judgment of plaintiff for all alimony and support money, due or to become due, from the defendant.

2. An order made after notice and hearing may not be set aside ex parte, and an attempt by the court so to do is void, of no effect, and subject to attack at any time.

3. Notice to a withdrawn attorney of record is not notice to that attorney's former client.

4. Where an order, or combination of orders, is so ambiguous that it cannot reasonably be determined therefrom what is required to be done, such order, or combination, should not be the foundation of a contempt proceeding.

5. Where a new order is entered, directing a party to do something he was not theretofore bound to do, or clarifying an order that was theretofore ambiguous, the party against whom the order is directed is entitled to notice of the new order before he can be found in contempt of court for failure to obey it.

6. Notice or knowledge by the defendant of what is required of him must appear either in the proofs taken at the hearing or in the affidavit supporting the citation and order to show cause.

7. In order to support the conclusion that the defendant is in contempt of court, the court must find that the defendant knew of the order to pay money, that he refused, and that he had ability to pay during the period of time in which he possessed the knowledge of his duty.

8. Civil contempt proceedings are for the purpose of enforcing an order of the court, not for imposing a penalty for past disobedience.

ARGUMENT

I

THE COURT ERRED IN REFUSING TO HEAR ANY EVIDENCE AS TO THE EFFECT OF THE ORDER OF FEBRUARY 9, 1949, ON FUTURE ALIMONY AND SUPPORT MONEY.

II

THE COURT ERRED IN FINDING THAT THE DEFENDANT WILLFULLY REFUSED TO PAY THE MONEY ORDERED BY THE COURT.

1. The order of February 9, 1949, should be construed to satisfy the judgment of plaintiff for all alimony and support money, due or to become due, from the defendant.

As appears in the Statement of Facts, the order entered by Hon. Clarence E. Baker on February 9th incorporated the stipulation that in consideration of the transfer of certain restaurant property to the plaintiff there was a "full satisfaction of the judgment for alimony and support money in favor of the plaintiff, and against the defendant" (R. 102).

When the parties entered into this stipulation, it was the agreement that the entire claim of the plaintiff would be satisfied and that the proceedings would be terminated. The stipulation was the result of an attempt by the parties to close the long file involved in the case. And although the stipulation does not appear in the record, its intent and meaning is re-

flected in the proceedings and in the order of the court entered on the basis of the stipulation.

There was a judgment and decree for alimony and support money entered against the defendant in 1941. In 1948 the past-due portion had reduced to a new judgment. Defendant came in on February 9, 1949, on an order to show cause why he should not be committed for contempt for failure to pay alimony and support money to the plaintiff. The order subsequently issued by the court, by its terms, satisfies the *judgment* for all alimony and support money. And "judgment" is a broad term in the code states. It includes decrees in equity and divorce proceedings as well as judgments at law. As is said in 30 Am. Jur., Judgments, §4:

"In the states which have adopted the Code procedure, however, * * * relief in all actions, whether of a legal or equitable character, is obtained by a judgment in a civil action of the code."

And see Restatement, Conflict of Laws, §464(a) to the same effect. Also, 23 Words and Phrases 166, et seq. The code definition of "judgment" is a very real factor to consider in arriving at the intent of the parties in making the stipulation, and the intent of the court in incorporating it into its order.

To hold that this stipulation and order satisfied only that portion of the judgment that was past due, or "reduced to judgment" is to disregard its plain words.

It should also be noted that counsel for plaintiff was quick to procure the court to set aside this order and stipulation and order before taking steps to have the defendant placed in contempt of court.

2. *An order made after notice and hearing may not be set aside ex parte, and an attempt by the court so to do is void, of no effect, and subject to attack at any time.*

While it is true that a stipulation may be, in the proper case, set aside by the court ex parte and without notice, and that the same may be done with certain orders of the court, there are types of orders which may be set aside only after notice to the adverse party. This statement of principle was recognized and asserted by this Court in *Cox v. Dixie Power Company*, 81 Utah 94, 16 P. 2d 916, at 921:

“Where a court has jurisdiction of a cause and of the parties, there are undoubtedly various orders which the court can make without notice to the adverse party and be of binding effect, in the absence of a motion or notice to vacate or modify the order. But such doctrine applies only to such orders as the court has *power* to make without notice. It does not apply to a purported ex parte order whose effect is to deprive a party of property without due process of law or which constitutes a final order affecting substantial rights from which an appeal lies. * * * A motion is ordinarily confined to incidental matters in the progress of the case.” (Italics added.)

In the present case the Order of March 1st, setting aside the stipulation and order of February 9th, was such an order as would require notice under the language of the quoted opinion. By setting aside the order and stipulation, the Court deprived the defendant of valuable property (and eventually liberty) without notice. This appears more conclusive when it is observed that the March 1st order set aside the stipulation, yet allowed the plaintiff to retain the property she had acquired

by virtue of the stipulation—from the defendant and a third party against whom the original decree did not run. If the court was to set aside the stipulation, it was imperative that it set the entire transaction aside. It was unjust and error to allow the plaintiff to retain the benefits of the stipulation while suffering no detriment in return.

Two sections of the Utah statutes require notice of motions and orders. Section 104-42-6 Utah Code Annotated 1943 reads:

“An order made out of court without notice to the adverse party may be vacated and modified without notice by the judge who made it, or may be vacated and modified on notice.”

This section is precise as to what may be done without notice. Negative implication requires the construction that in other cases notice must be given.

Together with the above, we must read 104-14-4, which governs, generally, the setting aside of orders:

“ * * * The Court may likewise, in its discretion, after notice to the adverse party, allow upon such terms as may be just an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer, reply or motion for new trial to be made and filed after the time limited by this code; and may also, upon such terms as be just, relieve a party or his legal representatives from a judgment, order or other proceeding taken against him through his mistake, inadvertance, surprise or excusable neglect.”

This provision requires notice as a prerequisite to setting aside an order which was entered with notice and hearing. Such a construction is a logical one. It has been followed by

the California Court of Appeal. California Code of Civil Procedure § 473 is substantially the same as our 104-14-4. This section 473 came before the California court in *Moran v. Superior Court in and for Sacramento County*, 35 Cal. App. 2d 629, 96 P. 2d 193.

The *Moran* case was one in which the defendant after notice and hearing had procured the court to make an order setting aside an interlocutory decree of divorce. The trial court later decided that it had erred in setting aside the decree and on its own motion and without notice set the prior order aside and reinstated the decree. The Court of Appeal agreed that the trial court had erred in setting aside the decree in the first instance; but it went on to hold that the second order—reinstating the decree—was void because it had been made without notice to the defendant. Said the court:

“In determining the question as to whether an order of this character is valid or void, the same test should be applied as where a judgment is subjected to the inquiry. 42 C.J. 557, § 272. * * *

The order made pursuant to the notice of motion was therefore not void on its face, and the trial court *exceeded its jurisdiction* in vacating such order on its own motion.” (Italics added.)

The general rule, as laid down in 60 C.J.S., *Motions and Orders*, § 62(5), p. 75, is as follows:

“A party who may be interested in resisting the motion may be entitled to notice of motion to amend, modify, or vacate an order, and especially so when the order sought to be amended, modified, or vacated is an order that was itself settled, made and entered on notice.”

If the order setting aside the stipulation and order of February 9th was void, defendant could properly disregard it and attack the validity of the second order at any time. As the California Supreme Court said in *Smith v. Los Angeles and P. R. Co.*, 34 Pac. 242, 4 Cal. Unrep. Cs. 237:

"This is not a direct attack upon the order appointing the receiver, but the order being void, it may be disregarded. If the order is absolutely void, it is a nullity, and can be attacked in any proceeding."

On the final hearing of the order to show cause, which led directly to the sentencing of defendant for contempt, and hence to this appeal, counsel for defendant objected to interrogation of the defendant as to his earnings on the ground that the judgment of the plaintiff had been satisfied and that there was nothing before the court. If satisfaction were established, there would be nothing of which defendant could be in contempt. But the trial court refused to consider the question of satisfaction and proceeded with the hearing. To preserve the record, defendant was not obligated to make an offer of proof on the point for two reasons: (1) the burden was on the plaintiff to establish that there was a subsisting order of which the defendant was in contempt, and (2) the court's point-blank refusal to hear anything concerning the effect of the stipulation on future alimony and support money would have obviated the necessity of an offer of proof, even if the satisfaction had been an element of defense—for defendant would not have been obligated to make a futile offer merely for the sake of form when the court had indicated what its ruling would be. Hereinafter we will point out how this refusal of the court to inquire into the terms of the satisfaction was

prejudicial error even if the stipulation and order was not subsisting.

3. Notice to a withdrawn attorney of record is not notice to that attorney's former client.

We have attempted to point out the law as to requirements of notice of motions and orders. If it be argued that there was notice to the defendant, through his counsel, it need only be shown that the defendant's counsel had been released by the defendant prior to the service of the notice, and were no longer authorized to act for him nor to appear for him.

Shields and Shields had been released as counsel for the defendant on February 9th, or a few days thereafter. On February 19th, plaintiff's attorney, LaMar S. Duncan, served on them a notice that he would move, on February 25th, to have the order and stipulation set aside. Later plaintiff obtained a continuance to March 1st, the order granting the continuance being "on condition" that the defendant be notified not later than February 26th.

Prior to plaintiff's service of a notice of continuance, Shields and Shields served upon plaintiff's counsel, and filed with the court, a notice that they had withdrawn, and that they no longer represented the defendant. The day after receiving this notice of withdrawal, viz., on February 25th, plaintiff's counsel served upon Shields and Shields a notice of the continued hearing.

The notice thus served complied neither with the general law as to notices of motion, nor to the express order of the court below. The court, in acting on the motion to set aside

the stipulation and order, was obligated to ascertain whether proper notice had been given. And the record before it showed that it had not.

Whether service on a discharged attorney is service on a party has been decided by this Court. In *Sandall v. Sandall*, 57 Utah 150, 193 Pac. 1093, 15 A.L.R. 620, the plaintiff sought to modify a decree nine years after it had been entered. Notice of motion to modify was served on the attorneys who were then attorneys of record, having represented the defendant in the original action. Apparently no withdrawal as attorney was ever entered. But the court held that the service of the notice was not sufficient to bind the defendant, and said:

"The authorities support the proposition that an attorney's relation to his client ceases upon the rendition of judgment and satisfaction thereof, unless there are disturbing events or a special arrangement continuing the relation. The following excerpt from 6 C. J., p. 672, Sec. 184, illustrates the trend of authority:

'In the absence of disturbing events the employment of an attorney continues as long as the suit or business upon which he is engaged is pending, and ordinarily comes to an end with the completion of the special task for which the attorney was employed. Where the evidence of continuance of the relation is conflicting, it is a question for the jury.

'It is always a presumption that an attorney is employed to conduct the litigation to judgment, and no farther; the relation of attorney and client and the general powers of attorney cease upon the rendition and entering of the judgment. There is a distinction between those cases where the attorney is retained to represent the plaintiff, and those in which he represents the defendant; in the latter case, the entry of final judgment

always terminates the relation and the attorney's authority; in the former case it is generally the rule that the attorney's authority lasts until satisfaction of the judgment, and that he may take the ordinary and usual steps to secure such satisfaction.' "

In the present case, in addition to the circumstance that the litigation for which the attorneys for defendant were employed had ended, there was the factor that notice of this fact had been given to plaintiff, and that the withdrawal of attorneys was made a matter of record. This being so, plaintiff's counsel could not give notice to the withdrawn attorneys and have it suffice to constitute notice to the defendant.

From the foregoing arguments it appears that there was no notice of motion given to the defendant, and that the court exceeded its jurisdiction in going ahead *ex parte* in deciding a matter of such consequence. And inasmuch as the stipulation and order invalidly set aside settled all judgments in favor of the plaintiff and against the defendant, there was nothing before the court for which the defendant could be committed for contempt.

4. Where an order, or combination of orders, is so ambiguous that it cannot be reasonably determined therefrom what is required to be done, such order, or combination, should not be the foundation of a contempt proceeding.

Assuming, but not conceding, that the order and stipulation of February 9th can be construed to satisfy the judgment only as to past due alimony and support money, it must at least be held that the stipulation is capable of the construction we have given it. The language is broad enough to be ambiguous.

In *McCaleb v. McCaleb*, 177 Cal. 147, 169 Pac. 1023, the Supreme Court of California said:

"One who is ordered to pay money to another, on pain of imprisonment if he fails, is entitled to a formal expression by the court of such order, stated clearly enough to enable a person of ordinary intelligence to know what he is to do. He should not be obliged to resort to inferences or implication to ascertain a duty or obligation of that character."

The Supreme Court of Kansas added its views on the subject in *Ensch v. Enschede*, 157 Kan. 107, 138 P. 2d 491. That court, in ruling on a contempt commitment on an ambiguous order, first quoted 17 C. J. S., Contempt, § 12, to the following effect:

"A decree or order will not be expanded by implication in contempt proceedings, beyond the meaning of its terms when read in the light of the purpose for which the suit was brought, and the facts found must constitute a plain violation of the decree or order so read. To justify adjudging one guilty of contempt for the alleged violation of an order, the order must be so clearly expressed that when applied to the act complained of, it will appear with reasonable certainty that it has been violated. * * * Nor should a party be punished for disobedience of an order which is capable of a construction consistent with his innocence",

and then went on to set aside the judgment of contempt on the ground that the original order was ambiguous.

In the instant case, the original decree entered in 1941 was clear enough, and we do not question that defendant knew what was required of him thereunder. But a new order, or stipulation (the term is not important) was entered in 1949;

and at this time it became necessary to read the decree and the subsequent order as one. In so reading them there was, at the very least, some doubt as to what was required of the defendant. He did not—and could not—know for certain whether he was still under an obligation to pay money to the plaintiff, nor whether—if so obligated—plaintiff intended to enforce the decree after the action of February 9th.

5. Where a new order is entered, directing defendant to do something he was not theretofore bound to do, or clarifying an order that was theretofore ambiguous, the party against whom the order is directed is entitled to notice of the new order before he can be found in contempt of court for failure to obey it.

Consider the situation of the defendant on February 9, 1949. On that day the court entered an order, and the parties had entered into a stipulation, that the judgment in favor of the plaintiff was satisfied. At that moment, either (1) the judgment was fully satisfied, both as to past due and future payments, or (2) it was satisfied as to past due payments and there was some doubt as to satisfaction of future payments. If there had been no order setting aside the stipulation and order, defendant could not have been found in contempt at that point.

What was the effect of the order of March 7th? Either it reinstated the decree calling for alimony and support money payments, or it clarified the situation of February 9th, i.e., it modified the decree and order to such an extent that defendant would thereafter know that he was required to make monthly payments to the plaintiff.

But whichever was the case, something more had to be done before defendant could be found in contempt. It was a condition precedent to contempt that defendant have notice or knowledge of his duty. There is not even a pretense that defendant knew of the order of March 7th, or that any notice of it was served on him or his former counsel. Even if we ascribe to him notice that the hearing was to be held, he was still entitled to notice of the action taken at the hearing—or after it—if he was not present when the order was made, or if he had no actual knowledge of it. He had neither notice nor knowledge.

It is well established that a party is entitled to notice of the entry of an original decree. See 17 C. J. S., Contempt, § 18, and cases cited therein. Also, *Phillips v. Superior Court of Kern County (California)*, 137 P. 2d 838. The doctrine has also been enunciated by this Court—in *In re Hoover*, 44 Utah 476, 141 Pac. 101:

“It must appear that such order, judgment or decree has been personally served on the one charged, or that he had notice of the making of such order, or the rendition of such judgment or decree.”

There is no difference in principle between an original decree and a modified or reinstated decree. And this principle concerns itself with substance rather than form. Whether the original decree was modified by an order, a supplemental decree, a stipulation, or whatever else; when it is reinstated the party against whom it is directed must have notice of the reinstatement or modification—particularly when the decree as modified requires the party to do something he was not

theretofore bound to do. The question is this: *Did the defendant know what was required of him?*

6. *Notice or knowledge by the defendant of what is required of him must appear either in the proofs taken at the hearing or in the affidavit supporting the order to show cause.*

As was pointed out in Point 5 of this Argument, notice or knowledge on the part of the defendant must be shown as a condition precedent to commitment for contempt. And this notice or knowledge must appear by some form of evidence: either in the affidavit, or in the testimony and proofs taken at the contempt hearing.

The Oregon Supreme Court followed this principle in *Hewson v. Hewson*, 129 Ore. 612, 277 Pac. 1012, 63 A.L.R. 1216, as follows:

"And the affidavit charging the contempt must aver that the order has thus been served and the demand made. See to the same effect *Trullinger v. Howe*, 58 Or. 73, 113 Pac. 4. In the recent case of *State ex rel. Hambrecht v. Hambrecht*, 128 Ore. 305, 274 Pac. 507, the contemnor's knowledge of the duty was not positively averred, but it was inferred from those recitals of the affidavit to the effect that he had at one time complied with the duty. In our present case neither the so-called affidavit, nor the petition, affords any basis for such an inference."

Plaintiff's affidavit in this case reads as follows:

"ZOLA SMITH FISHER, formerly ZOLA SMITH, having been first duly sworn, deposes and says: that on the 14th day of February, A. D. 1941, this Court made and entered a decree of divorce, which among other things granted to her custody of the four minor chil-

dren of said parties, and awarded to her and ordered the defendant to pay to her the sum of Fifty (\$50.00) Dollars each month for the support and maintenance of said minor children; that since the entry of said decree defendant has paid to plaintiff nothing except those sums received involuntarily from defendant and by the proceedings of this court *as indicated by the files herein; that he has paid nothing since the court proceedings in February, 1949.*

Affiant further states that recently defendant has come into an inheritance of a considerable amount of money from his father's estate and he nevertheless has refused and still refuses to pay anything at all to the support of said minor children; that defendant is now working, able bodied and capable of paying this award.

WHEREFORE, affiant prays that this Court issue citation ordering defendant to be and appear before this court * * * " .(R. 119) (Italics added.)

In the above affidavit there is no averment that defendant received any notice of the change in the court's order entered after the hearing of March. Nor is there any room for inference that defendant knew of the new order. The affidavit does state that defendant made some payments under the original decree—a statement which might be proper basis for an inference under the Hambrecht case, cited in the opinion, *supra*—but the efficacy of this statement as basis for inference is dispelled when we read the entire affidavit. For the court's attention was directed to "the files of the case" and to the "Court proceedings in February, 1949." The files of the case, including the proceedings of the court on February 9th, were then before it and the court erred if it raised an inference of notice from reading the entire affidavit. And if it did not raise such an

inference, there is nothing in the record on which the court could find that the defendant had notice. See 23 C. J., Evidence, § 1919, to the effect that the court will judicially notice the original record in ancillary proceedings, such as proceedings in contempt. And see 24 L.R.A. (N.S.) 404.

Thus we observe there was no evidence to support a finding that the defendant willfully refused to pay money to the plaintiff, because there is no evidence to show that he had knowledge of a duty to so pay: (1) no averment of notice, and (2) no facts from which an inference of notice can be drawn. Nothing brought out at the hearing showed notice or knowledge—either directly or by implication.

III

FROM THE FINDINGS OF FACT MADE, THE COURT ERRED IN CONCLUDING THAT THE DEFENDANT WAS IN CONTEMPT OF COURT.

7. In order to support the conclusion that the defendant is in contempt of court, the court must find that the defendant knew of the order to pay money, that he refused, and that he had ability to pay during the period of time in which he possessed the knowledge of his duty.

After the hearing in the contempt proceeding the trial court made the following findings of fact and conclusions of law:

“That heretofore this Court made and entered its decree of divorce awarding to plaintiff the custody of said minor children and ordering defendant to pay to plain-

tiff for the support of said minor children the sum of Fifty (\$50.00) Dollars each month.

2.

That heretofore, to wit, on the day of March, A. D. 1949, this Court made and entered its decree and judgment for arrears in said payments in the sum of \$2,635.00.

3.

That during said time defendant has been able to pay for the support of said children and has received and has had at least \$1540.46, since the 9th day of February, A. D. 1949.

4.

That since said date defendant has willfully failed and refused to pay anything to plaintiff for the support of said minor children, although ordered to do so by this court.

As conclusions of law from the foregoing facts the Court finds:

CONCLUSIONS OF LAW

That defendant is guilty of contempt of Court and for this contempt defendant be ordered to serve a period of thirty (30) days in the County Jail of Salt Lake County. * * *

We respectfully urge the Court that a judgment of contempt, based upon such ambiguous, uncertain, and contradictory findings cannot stand—for there is something more here than a “minor irregularity.” In paragraph 3, the Court finds that “during said time” defendant has been able to pay; but in the preceding two paragraphs there is no date certain which “during said time” refers to. The Court also found that defendant had money since the 9th day of February — which means he had money during at least 21 days in which

he had no obligation to pay. For it will be conceded, we think, that under no theory was there an obligation to pay prior to the first day of March. Paragraph 4 states that "since said date" the defendant has willfully refused and failed to pay. But we have no way of knowing what date the Court is referring to.

The specific must control the general — and this is particularly true as a rule of construction where there is a conflict between the two. And although there is here a general finding that the defendant willfully refused to pay alimony and support money as ordered by the Court, this general finding is rendered nugatory by the subsequent findings as to defendant's ability to pay. Furthermore, there is no finding at all that the defendant had knowledge of the demands of the decree.

So we find a situation where there are insufficient facts to support the findings made; insufficient findings; and other findings which are so uncertain and ambiguous that they fail to support the conclusions of law.

We are aware that there is a line of authority indicating that a Citation and Order to Show Cause is sufficient to constitute notice of the demands of the decree, and of the demand of the plaintiff that the defendant perform as ordered. But a Citation issued in August is notice in August. And if the Court relies upon the Citation as evidence of notice to the defendant, there must be evidence—and a finding—that the defendant was able to pay as ordered *after the citation was issued*. There was no such finding—and there was no evidence to support such a finding.

IV

THE COURT ERRED IN LOOKING TO THE ENTIRE RECORD TO DETERMINE THE AMOUNT OF PUNISHMENT TO IMPOSE UPON THE DEFENDANT FOR CONTEMPT.

8. Civil contempt proceedings are for the purpose of enforcing an order of the Court, not for the purpose of imposing a penalty for past disobedience.

On page 170 of the transcript of proceedings at the hearing appears the following address by the Court:

“As to the amount of punishment the Court will inflict upon the defendant in the case, the Court now refers to the file, and the entire file; the Court finds that there has been a great amount of litigation over the failure of the defendant to comply with the Decree of the Court. The Court finds from the record that Judge B. P. Leverich committed the Defendant for wilful contempt, failure to comply with the terms of the decree on December 1, 1941; and again in January, 1949, defendant was committed to the County Jail by Judge Baker. * * *

Following this there are indications that the trial court sought to reinforce its ideas of social policy by making an example of the defendant. The court looked at the entire record—except those portions of the record which would excuse or mitigate the conduct of the defendant. That the court should not allow prior contempt proceedings to influence it in fixing

punishment in a given contempt case, and that to take judicial notice of such prior proceedings is an abuse of discretion and reversible error, is pointed out in 17 C.J.S., Contempt, § 124(e).

Civil contempt proceedings have been defined well and often as a type of proceeding for enforcing an order of the court—usually for the benefit of a party. The purpose of such a proceeding is coercive, not retributive. And the court should not allow past contempt proceedings to influence it in fixing punishment in a current one—unless such past proceedings convince the court that the more severe sentence will affect the readiness of the defendant to pay in the case before it.

CONCLUSIONS

The order of February 9th settled the entire judgment in favor of plaintiff and against defendant, and the March 1st order setting it aside was void because entered without notice to the defendant. This being so, the defendant could not be committed for contempt because there was no subsisting order to pay money to the plaintiff.

But even if the stipulation and order was properly set aside, that is, was not void, defendant was entitled to notice of the action taken by the court. It was necessary that he be apprised of his duties before he could willfully refuse to perform them. The findings of fact must show that he had such notice; and these findings of fact must be supported by evidence.

And, finally, the court abused its discretion and committed

reversible error in taking judicial notice of prior contempt proceedings.

Upon this argument, and for the reasons appearing therein, we submit that the judgment of the trial court should be reversed and the defendant ordered discharged.

Respectfully submitted,

SHIELDS and SHIELDS,

*Attorneys for Defendant and
Appellant.*