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Mamie Ure Baker v. Richard Mills Baker : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

MAMIE URE BAKER,

Plaintiff,

VS.

RICHARD MILLS BAKER,

Defendant.

Respondent's Brief

FILED

APR 21 1900

Clerk, Supreme Court, Utah

DOBBS AND DOBBS,
Attorneys for Respondent

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In the Supreme Court of the State of Utah

MAMIE URE BAKER,

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RICHARD MILLS BAKER,

Defendant.

STATEMENT OF FACTS:

The Statement of Facts found in appellant's brief being merely an argumentative recital of a part of the matters here involved, requires further statement from us. We shall not include here discussion of evidentiary matters which must necessarily be gone into in subsequent argument and should be referred to there to avoid repetition. To understand exactly what took place here, elaboration of the issues made and the action of the Court is requisite:

Appellant signed January 22nd, 1949 an affidavit in which she recited the provisions of the original decree as to support money, and averred (Tr. 040-1) that \$300.00 thereon then was due and not paid to her. Order to show cause on this issued February 3rd, 1949 (Tr.

038) and Respondent on February 28th, 1949 made his return (Tr. 034 to 037)—it appears out of order in the transcript), to which appellant filed a responsive pleading, denominated a “reply” on April 4th. Issues were made by the return of respondent and the “reply” of appellant, the respondent admitting everything contained in the initial affidavit, except that \$300.00 was due from him, and making a confession and avoidance plea as to that. We will refer, so far as the pleadings go, only to matters necessary for understanding of facts in dispute, since the court’s findings and judgment cover the unquestioned matters.

Respondent pleaded in exoneration of the claim for past due support moneys that appellant had taken the children, about November 24th, 1948, to Oregon, with intent to make it her permanent abode, that he had on prior occasions sought and been refused the privilege of taking his children to see his mother, on her birthday, and during her last illness, and had been refused; and pleaded that appellant thereby was in contempt of the court, and that he believed she was without right to demand payment of the past due support money. He charged her acts to have been done for the purpose of preventing him from seeing the children.

To these allegations, appellant admitted the removal to Oregon, said she had done so because she had sold her Utah property and acquired a home at Nyssa, contended she never refused him permission to visit the children at any time, but that he had wanted to take them away from the house which she would not permit; alleged a controversy over how long the children might be kept away in the late November occasion when he

requested that they might visit his mother with him, his statement at that time that he would pay no more support money, that she took the children out the next morning "to avoid trouble"; that when he came that morning he had cursed and threatened her mother.

Mrs. Baker said that defendant was subject to fits of rage and anger, made "unusual and unjust" demands in his treatment of the children; that his visits upset them and made them ill. She then denied that her motive in taking them to Oregon was to deprive him of the right of visitation, and said:

"That under the conditions that now exist, it is absolutely necessary that plaintiff retain her residence in the State of Oregon; that her closest friends live there and that her children by a former marriage have established their homes there; that she is in a better position at her present residence to support herself than she would be in Ogden or Weber County, and that the children of the parties are better off at their present residence, and it is for their best interests that they remain where they are."

Issue also was made in a minor key as to what effect the destruction by fire of Salt Lake property respondent had retained under the decree had upon his ability to pay:

On the contested matters between the parties, the Court found generally for respondent, in substance finding:

That the appellant had not afforded Mr. Baker a reasonable and proper opportunity to visit with his children at any time since the divorce, either she or

some adult member of her family always being present on such visits, and making them awkward and uncomfortable; that she had made preparations to leave some time prior to the incidents of late November, having sold her local property and bought the Nyssa home before those incidents arose and that by her actions including the change of residence, she had wilfully deprived respondent of opportunity to see his children;

Further that she intended to stay permanently at Nyssa with the children, had visited Ogden three times since leaving without bringing any of them along; that the children had not suffered by reason of the non-payment of the support moneys but that appellant had been forced to provide for them from her own means; that respondent's employment was such that it would cost him at least \$100.00 in time lost from work and expenses to visit the children at Nyssa.

Findings go into the matters respecting disputes over taking the children to see the dying grandmother at length; the court finding a conversation to have been had as to appellant's right to receive support moneys while denying respondent his requests as to visitation. The court found respondent's financial condition to be materially worse than at the time of the decree.

The decree of the Court provided (a) that appellant was in contempt of the Court for her action in wilfully depriving respondent of his right of visitation given in the original decree, and as a penalty, deprived her "of the right to enforce payment by defendant of the sums accruing upon support moneys, under the terms of such

decree, from November 25th, 1948 to the end of February, 1949, amounting to \$350.00''; (b) modified the decree by reducing the total monthly payments of support money to \$60.00, directing respondent to pay all past due at that rate from March 1st, and (c) made specific directions as to the character and nature of visitation rights to be given respondent, both at Ogden and Nyssa, prescribing length of time, numbers permitted, and particularly requiring that on such occasions neither plaintiff nor any of her relatives should be present.

Some inaccuracies occur in appellant's statement of facts as to figures, and misstatements of the evidence, not worth going into here.

STATEMENT OF POINTS:

The argument in this case will follow the points below given, which seem to respondent more adapted to develop the issues in this case than the outline used in appellant's brief. Due reference to appellant's points will be made.

Point No. 1. The Court properly rejected the proposed findings, conclusions and decree submitted by appellant.

Point No. 2. The Court had power to punish such conduct as contempt, and deprivation of appellant of the right to enforce her judgment for past due installments was a proper penalty, within the discretionary power of the Court.

Point No. 3. Reduction of future installments of support moneys was within the discretionary power

of the Court under the changed circumstances occasioned by removal of the children from Utah.

Point No. 4 Monetary loss to Appellant resulting from the court's orders is not objectionable as a withholding of moneys of the children.

Point No. 5. The Court was not required to deny respondent relief because of default in payments due from him.

Point No. 6. The Court rightly denied appellant's request for modification of the decree to permit continued residence in Oregon, and was not required to afford her an opportunity to purge herself of contempt.

Point No. 7. The Court properly rejected testimony on matters previously litigated and determined.

Argument upon such matters follows.

Point 1. THE COURT PROPERLY REJECTED THE PROPOSED FINDINGS, CONCLUSIONS AND DECREE SUBMITTED BY APPELLANT.

Since appellant has not seen fit to assign in detail the matters which she claims were erroneously found by the Court, and those in which the Court should have found as she proposed, and did not make a finding, we are left to her argument to determine in what particulars her objections apply. Analysis of the differences between the two sets of findings and of the supporting evidence seems not necessary in other particulars. The

arguments which appellant makes emphasize that principally she objects to the failure of the Court to agree with her claim that her motive in taking the children to Nyssa from Ogden was as she claimed in her pleading responsive to the return made by Mr. Baker, in which she said:

“She did not take said children with the desire of preventing the defendant from visiting them, but because she had disposed of all her property in Utah and acquired a residence in Nyssa, so that it was necessary for her to change her residence”,

And the claims which she makes, at various parts of the brief, running to the same point, of which we instance:

“There is no claim that the welfare of the children is not promoted through the change of residence to Oregon”, (Br. 3).

“When it appears that the move was for the best interests of the children”. (Br. 4.)

“The removal of the children—was a reasonable exercise of the right of control by the appellant. She acted as the best good of the children required.” (Br. 12)

And because the Court made no order requiring appellant to return to Utah with the children, it is assumed that the Court must have determined that the welfare of the children so required. (Br. 9, 13, 14, 23, 26.)

The issues on this disputed matter having been found for the respondent by the Court, we will examine the record of appellant's admissions by pleading, and

in testimony, as well as any undisputed pleading and evidence from respondent to see how far the record supported the Court's determination. It is admitted, as we have noted in our Statement of Facts, that Mrs. Baker left with the children, about November 25th, 1948, shortly after an occasion when respondent had requested permission to take the children to see his dying mother on the following day: She was gone when he came there, she says he was not seen there again with the children. Prior to that time she had already sold her Utah property and bought the property in Nyssa. At Nyssa she had two daughters by a former marriage and other relatives and friends. The record of visitations between respondent and his children after the divorce has been noted. On these points:

Just what was said by Mrs. Baker as to the reasons for her secret, furtive departure from the state with the children? That she apprehended that it was contrary to rights existing under the divorce decree is evident from her statement: (B. of E. 20):

“If I had been given time, I would have got a court order to go there.”

An explanation of her meaning as to time is given in her direct testimony as follows:

“No, only he made it so miserable for us. We decided that when my daughter here she got a place, we just pulled out and left him, after he had kicked up such a fuss against us, threatened my mother, threatened to knock her block off, one thing and another.” (B. of E. 27).

Later on cross examination, she was asked what she meant as to getting a court order, but answered instead, repeating this excuse:

“Well I don’t really know what I had in mind. I just made up my mind I was going to get out of here as soon as I could. I couldn’t stand his abuse—when he started on my mother I made up my mind.” (B. of E. 30)

These threats, appellant’s only explanation of her bolting with the children, were made as she pleads (Trs. 043) after she had left the home with the children, so her evidence in pure hearsay. The mother was not called to testify. Respondent denied any threats, except (B. of E. 37) that he told Mrs. Baker’s mother that “he ought to call the cops and send them after them” when he found his children missing—hardly one warranting flight unless the fugitive intended to abscond from the state.

That such removal had its motive in a desire to separate the children from any contacts with their father seems clear. True she denied that she had attempted to estrange the children from their father (B. of E. 24) but she testified (B. of E. 22) that on the visits respondent always raised a disturbance, that whenever he came to visit, she or her mother remained in the room (B. of E. 31), that he had told her mother (B. of E. 30), when she interfered in an argument between the parents as to the children “to keep out of it”, that her own temper was quick and (B. of E. 31) she “got riled up”, so that his visits were ever the cause of a contention which the children heard, and didn’t like, respondent on such occasions losing his temper and using profane language.

Mr. Baker testified (B. of E. 35) as to this that Mrs. Baker’s mother “stayed in there like a cop” every time he visited, listened to what was said, and that he

resented it, but that he had not called names and (B. of E. 36) had been very careful of his conduct at all of his visits. He did not deny that the visits were the occasion for continual contention between himself and Mrs. Baker and the latter's mother.

As to the effect of all this on the children, Mrs. Baker testified:

“They would just stand and look at him. They don't seem to know what to do. He never gave them any love before, they cannot very well go to him now. He misses them, he naturally misses them, but they haven't any love there. I don't know how they could have.” (B. of E. 27)
“He made them nervous and irritable, because he started a row with me on account of taking them out.—He always wanted to take them out so as to be able to get a picture, he would have some silly thing like that.” (B. of E. 22).

It seems not to have occurred to this custodian that espionage upon her ex-husband's visits to his children would result in just what he saw. Children do not show their affection to the parent who had left the home while under the watchful eye of the parent who has control over their lives. Of course, they didn't “know what to do” and “would just stand” there. Appellant saw, in the attempts of respondent to get his children out door, where they might talk without restraint, and his wanting to “get a picture” just some “silly thing”. Her true attitude towards his visits, her belief that they were useless as well as bothersome, her callous attitude towards the father's yearnings for his children are illustrated by this, as well as by her testimony that on her last visit to Ogden, as well as on her previous

two, she had not brought the children (B. of E. 29) because when she asked if they wanted to come, they had said they did not; and also by her statement (B. of E. 25) that she would be willing to have him call and visit them, "in the presence of some one else."

Not only does this attitude throw light upon the reasons for her taking the children from the state, it tends to negative her excuse that the welfare of her children is the reason for her taking, and keeping the children in Oregon.

Her only direct testimony, on this point (B. of E. 23) is,

"Well they are close to the school's activity and they are happy. They weren't happy with him. They don't even know that he exists."

She then gave an affirmative response to a question if the children were happier in Nyssa than in Ogden.

There is no evidence that the schools in Nyssa are more accessible, nor better equipped as to staff or facilities than those left behind in Ogden. No considerations of healthier climate are urged. No special facilities for the education, the moral upbringing or any other phase of life which would make Nyssa better for the children appears. The only change in the atmosphere surrounding them of any note is the inability of respondent to see them often. True, when Mrs. Baker sold her property in Utah and bought the Nyssa home, it became very much to her interest to change her residence,—but the motive for her sale and purchase still is rooted in the desire to get the children away from the vicinity of the respondent.

Where weighty considerations of the welfare of children exist, they take precedence over convenience of visiting by parents who have not custody, but the right of visitation is a very important right, it sounds not only in the natural affections of parents, but in the fact that parenthood is not a matter for one sex only, and that children can learn much from both of their progenitors. Such a right yields only to "the most compelling and exceptional circumstances", (Williams v. Williams, 148 So. 358), giving reasons why the welfare of the children must be first considered. And its violations, as we shall see, is one which may give rise to loss of custody, a well as punishment for contempt.

We think the record supports the Court's findings as the matters essential to the disposition of this dispute.

The foregoing cover the general objection (Br. 27) to the findings as a whole.

The remaining objections made under appellant's Point VII are easily disposed of.

She complains that Finding No. 5 is not material—this relates at detail changes in his financial condition to entry of the decree. It was on matter of facts, put at issue by the pleadings. ((Tr. 036-043). The Court was entitled to find on it.

She charges that Finding No. 4 is not supported by the testimony. More examination of the evidence (B. of E. 2, 9, 12, 13 and 14) shows that not true, and conditions surrounding employment of a railroad brakeman are sufficiently a matter of general knowledge so that we submit that any reasonable person would know the finding to speak the truth.

The Conclusions of Law are all attacked: We admit that the first conclusion, based on the first finding and ruling in accordance therewith, that respondent was not in contempt because appellant had not charged him with it in her pleading, is not fortunately worded, but appellant admits in her proposed finding (Tr. 049) that, when that finding was submitted, these sums had been paid. And, as we shall see, his default in payments is not a material factor in this case. The other conclusions are supported by the findings, and are within the discretion of the trial judge.

Appellant does not point out in what respect the decree is not supported by the evidence, save as she has raised the point in prior argument, and we do not seem called upon to analyze that matter further. We submit that this point is not well taken.

POINT No. 2: THE COURT HAD POWER TO PUNISH SUCH CONDUCT AS CONTEMPT, AND DEPRIVATION OF APPELLANT OF THE RIGHT TO ENFORCE HER JUDGMENT FOR PAST DUE INSTALLMENTS WAS A PROPER PENALTY, WITHIN THE DISCRETIONARY POWER OF THE COURT.

Appellant under her Point II argues that the decree, providing for visitation "at reasonable times and places" was not breached by her acts, because that decree did not affirmatively forbid taking the children from the state and was too indefinite and uncertain on that point for its breach to be punished as contemptuous.

We concede that if the meaning of a decree is doubtful under a fair construction, a court may well hesitate to impose a penalty for a claimed breach, particularly where the consequences of adjudging contempt to have occurred might be serious. Just such a case was *In Re Vaughan*, (87 So. 792), which appellant cites, quoting at length (A. Br. 9) in her brief. The language quoted taken in its context, makes it obvious that the Court considered that the mother might well have thought, having remarried, her new husband a resident of another state, that the right of visitation might be "within her proper control" if given at her new home, so that the decree, with that proviso, was not sufficiently definite to make her conduct a wilful breach of its terms—nor does the Court rest on that but expresses its doubt that, even if in contempt, she should be prohibited from defending an attempt to take the custody of the child from her.

We do not say that there is not found language in decisions which seems to require an express prohibition against removal from the state before that removal is contemptuous. The text books reflect some uncertainty in this field:

"While the cases are not in complete accord, it appears generally to be the rule that if a wife is guilty of violating the provisions of an agreement between her husband and herself as to the custody of the children, the husband is relieved from making further payments for the support of such children, whether such payments are provided for in the agreement between the parties, or have been adopted in a subsequent decree of divorce. As in the case of the violation of the provisions

of an agreement, the authorities are not in agreement as to the effect of a violation by the former wife of the provisions of a divorce decree in respect of the custody of children on her right to recover payments provided by the decree for the support of the children." 17 Am. Jur. 536; Sect. 705.

Close examination of other cases cited by appellant upon this point detracts from their weight as authority. Much reliance is placed upon the Vaughan case (*supra*) and upon

Barnes v. Lee (Ore.) 275 Pac. 661, (Appl. Br. 10-11)

Campbell v. Campbell, 37 Wis. 206, (Appl. Br. 11-12)

yet the first, on close analysis, is very weak authority, and the second seems to support respondent and not appellant.

Lee, in the Oregon case, having won custody of a child in an Oklahoma divorce, with rights of custody reserved in the mother, came to Oregon with it. The mother, upon that ground, procured modification by the Oklahoma decree, giving her custody; and brought habeas corpus in Oregon. The court determines: (a) That the Oklahoma decree was "not entitled to full faith and credit so far as the question of custody is concerned;" (b) that "on the real question in the case, as to what would be best for the interests of the child" the trial court rightly determined that it should remain in the father's custody, and with "the real question" disposed of (c) said: "There was no disobedience of the order of the Oklahoma court in bringing the child with

him, so long as there was no provision in the order that she was not to be taken from the state.” Citing *Stetson v. Stetson*, (Me.) 15 A. 60, 61.

This last statement for which appellant cites it, is only dictum—since the case had previously been ruled on the first two grounds given—but the citation on which the Court relied shows that no real consideration had been given the question, and that the statement is uninformed dictum. For the *Stetson* case merely decides that, under a Maine statute, a trial court may place custody of the child of divorced parents in a non-resident custodian if its best interests demand, and the language relied on has reference to the Maine statute only.

The *Campbell* case says that the decree, not expressly prohibiting the custodian mother from removing the child from the state, she was not “in strict contempt” in so doing. Just what is “strict contempt” does not appear there, nor can we find a definition of it. It would seem the court must have meant some contempt for which no excuse might be received, for it goes on then to consider her conduct, says that the terms of the decree “fairly implied” that the father had been adjudged the right to make visits on his child at Milwaukee, the common domicile, chides the mother for “vindictively” telling him that he could see the child in Chicago; then points out that the child was sickly, that by removing it to Chicago, where she could give it better care, she had been able to nurse it back to health and doubtless had saved the child’s life, and adds:

“We must say that the necessities which pressed upon her and which she now pathetically pleads

for her conduct go very far to redeem her removal of the child from the implication of wanton disregard of her duty to the Court and the appellant.”

Without laboring the point too much, this seems good authority for the view that such a removal of the child from the jurisdiction, where the decree fairly implied that visits should be had, would have been wanton disregard of duty to the court—not a bad definition of contemptuous conduct—had it not been for the overbalancing excuse that it saved the child’s health and perhaps its life.

Examination of other cases cited by appellant under either Point II or IV, does not aid her contention. Those cases generally establish some point not here in dispute: For example:

In *Kane v. Kane*, (Mich.) 216 N.W. 438, the precise question raised in *Stetson v. Stetson* appeared. The father, under arrest in Windsor, Ontario, for non-support, jumped his bail, fled to Detroit, and four years later sued for divorce there. The mother crossed the river, defended, won custody and support money. The father appealed—his claim that a Michigan court lacked jurisdiction to order payment of support money to the non-resident custodian of a non-resident minor. The decision accurately states the law as to non-resident custody:

“Where proofs are convincing the welfare of the child demands the course taken, its custody may and should be awarded the non-resident parent notwithstanding the effect may be to defeat visitation by the resident parent.”

We submit the proofs in the instant case were neither convincing nor did they show a state of affairs which “demanded” defeat of the respondent’s right of visitation.

Other cases cited to this point were *Bedolfe v. Bedolfe*, (127 P. 594), a Washington case, and *Waldref, v. Waldref*, (159 N.W. 1068) a Minnesota case. The *Waldref* case held that a father who had deserted his family, been divorced without rights of visitation reserved, could not insist on a modification giving him rights of visitation where the evidence indicated that such visits would be detrimental to the health of one of the children. The court in the *Bedolfe* case, where the decree provided for visitation at “reasonable times during reasonable hours of the day”, said that the language was susceptible to interpretation as requiring that the child should be kept in the jurisdiction of the court of divorce; notes without passing on the matter that the lower court did not so interpret the decree, and determines that the welfare of the child would not be subserved by returning it to its Washington residence, with the maternal grandmother, but warns the father’s parents, where it was staying in Oregon, that they must treat the mother, when visiting the child, with civility under pain of loss of custody, or of contempt proceedings against the father.

Before presenting cases supporting our position, let us point out again the fundamental error appellant makes in her argument as to the penalty imposed upon her. The Court in this case did not in any wise modify the decree to eliminate past due installments of support moneys or alimony—the gist of appellant’s Point III.

The Court's action is correctly stated in these terms: As a penalty for her continuing contempt, it withheld from her the right she had asked, to use the enforcement powers of the Court to obtain that money from respondent. In effect it said: While you are in contempt, you may not come into this Court and seek to enforce rights, otherwise yours to enforce, under such decree. Our cases generally are based on the rule stated next below.

“A parent who has been denied the right to visit a child, as provided in a decree of divorce, may apply to the Court of first instance for a modification of the decree, or for a rule to show cause why he or she should not be punished for contempt. A divorced wife who refuses to permit a child to visit its father as provided by decree is not entitled to the aid of the court in collecting alimony until she has complied with the decree, or offered to do so in good faith.” 17 Am. Jur. 516.

In *Eberhart v. Eberhart*, (189 N.W. 592) the Minnesota decree provided only for reasonable rights of visitation. After the mother with custody had taken the children from the state, proceedings of the same character had here arose. The court held, the Supreme Court affirming, that the mother might not have the aid of the court to enforce her claims for past due payments of support money and relieved the father from the payment of installments thereof subsequently accruing during the absence of the children from the state.

In *Combs v. Combs*, (162 Pac. 273) upon a finding of removal of the child, by the mother with custody, from the county of residence, and that she had obstructed

and prevented the father from having the opportunity to visit the child "at reasonable times and places" the Kansas Court affirmed a modification of the decree which placed custody in the father, and to a suggestion as to absence of evidence to show the mother to be an unfit person to have custody continued in her, said:

"There was evidence to support another ground of the motion—that the plaintiff had 'obstructed and prevented the defendant from seeing said child or having an opportunity to visit with him at reasonable times and places'. Disobedience of the original decree naturally worked a modification thereof."

A result substantially similar to that which appellant thinks happened here is found in *Weinbaum v. Weinbaum* (153 Atl. 303.) where the Rhode Island decree granted the father the right, so long as he was resident in that state, to visit the child "at reasonable times and places." The mother took the child to Florida, the father withheld some of the payments of support moneys due from him, and the mother returning to the jurisdiction cited him in for non-payment. It was held that, having placed it out of her power to perform that part of the decree affecting her, she was entitled to no moneys during the period she kept the child out of the state.

Distance, as well as questions of jurisdiction come into such cases, and it is obvious that here, had Mrs. Baker taken the children to some Nevada town at the other end of Mr. Baker's run, his complaint as to the hindrance upon his rights she imposed by changing her residence would have little weight. In the case of *In Re Hipple* (256 Pac. 1015), the Kansas court found a

move from Hutchinson to Wichita—about as far as from Ogden to Provo,—improper. It evidently considers the cause of the removal to be the greater facility afforded the mother in resisting visitation by her husband.

Where the divorce decree contained no provision for visitation by the father, in *Meyers v. Meyers*, (126 N. W. 841) it appeared that the parties had stipulated as to custody, reserving a right of visitation in the father, that provision having been omitted by her counsel in preparing the decree. The father discontinued payment of support moneys when the wife took the children from the state. Upon like proceedings to those here, he pleaded deprivation of visitation, the omission of the provision from the decree, and asked modification to show his right, and relief against payment during deprivation of that right. The Court refused to enforce payment of past due installments, modified the decree to strike out all provisions for subsequent payments, and provided that upon the mother returning the children to the state, she might ask for modification restoring the support moneys.

In *Williams v. Williams*, (148 So. 358) where the husband had been required by the Mississippi divorce decree to pay off a mortgage on the wife's home, and attorney's fees, had paid \$120.00 on the mortgage and \$50.00 on the fees, he requested with his last remittance the child be permitted to visit with him at his home—the decree giving that right to him “at reasonable times and intervals”. The request not being complied with, he renewed it. Upon further non-compliance, believing that if the other amounts due from

him were paid, any subsequent request for a visit from the child would be ignored, he deposited installments falling due from him in a bank, until substantially all due was so deposited, the bank then failing and the moneys being lost. Upon a petition that he be required to pay the sums accrued, or be adjudged in contempt, it was held,

“One party may not successfully call upon the other to perform the duties and obligations imposed upon the latter, unless the petitioning party shows that, on his or her part, he or she has done those things which the contract or decree requires of him or her, or else presents and substantiates such a complete and well founded excuse that the petitioner’s default may for the time be postponed or substituted; and the case, when an excuse will be received and the other party nevertheless required to perform, will be rare and under the most compelling and exceptional circumstances.—We are of the opinion that she is not entitled to invoke the aid of the Court, and the decree will be reversed and her petition dismissed, without prejudice to a renewal when the required conditions have been complied with, or there has been a real offer in good faith to do so.”

In *Harris v. Harris*, (189 N.Y.S. 215) when the wife, who under a decree of separation had custody of the child, went with the child to Nevada to obtain a divorce, the Court held that she was not entitled to invoke the power of the court in contempt proceedings to enforce payments of moneys which had accrued under the separation decree, so long as she remained without the state in defiance of the terms of that decree.

In another New York case, *Schweig v. Schweig*, (107 N.Y.S. 905), the mother who lived in Pittsburg at the commencement of the action had obtained an order for support moneys pendente lite, the order requiring her to have the child in New York City twice a week for a visit with its father. She did not comply, neither did he. The Appellate Court reversed an order permitting him to withhold payment so long as she failed to afford the rights of visitation, but on the purely procedural ground that she had not been adjudged by the lower court to be in contempt for defeating, impairing or prejudicing a right or remedy of a party in the litigation—and certainly the court would have been well justified in so adjudging under her admitted conduct.

The Florida Supreme Court held in *Van Loon v. Van Loon* (182 So. 205) a case cited by appellant under her point III, that strong equitable reasons, rising out of radically changed circumstances, might authorize a court to refuse to enforce its decree by contempt or ne exeat proceedings, even though all power to change or modify it had been lost by reason of the installments having accrued and the right thereto become vested.

In square opposition to *Lee v. Barnes*, (*supra*) we call attention to *St. Ex rel Nipp v. District Court*, 128 P. 590, a Montana case, where, after a divorce in Omaha, with each parent given a child, subject to the right of the other to visit, the parents being enjoined against “interposing any obstacle or hindrance in the way of the other”, the father took both of the minor children to Montana and established a residence. It would seem the child given to the mother’s custody was returned

without use of process. The mother, on such facts, obtained from the Nebraska Court a modification awarding her custody of both children; came with it to Montana, filed habeas corpus, and was met with the objection that she was not a fit person to have custody, being addicted to the use of drugs. The Montana trial court struck out this pleading, and awarded the child to the mother.

In an original proceeding to vacate the order, the appellant court disregarded the father's contention that "since the award in the original decree did not in terms prohibit him from removing the son to Montana, he was at liberty to establish his own domicile in Montana, and thus that of the son, and having done so, it was incumbent upon the district court to determine the question of custody without reference to the amendment made to the decree by the Nebraska court". It held that the Omaha decree was entitled to the protection of the "full faith and credit clause", and that the provisions of the original decree were "tantamount to a direction to him to keep the son within the jurisdiction of the court whose ward he was"; citing the Campbell case as authority.

Even where no divorce was involved, in *Allison v. Bryan*, (109 P. 935) a Kansas case, the father of an illegitimate child, who had taken it into his home and legitimated it, was adjudged in contempt for failure to obey the order of the Court granting the mother rights of visitation, even though she had taken possession of the child and gone with it to Oklahoma, losing custody there upon a habeas corpus brought by the father. In *Cole v. Sp. Ct.* (151 P. 169) a mother who refused to comply with the father's request, for a visit from his child

as provided in a decree giving the mother custody was held to be in contempt of the California Court and in *Cole v. Addison* (58 P. 2d, 1013) an Oregon decision, where the wife obtained custody in a divorce action which gave the husband the right to visit the child at all reasonable times, and where provisions for support were contractual, the Court held that the mother breached the contract by taking the child to live with her in New York and not sending it back for visits with the father as agreed upon, and lost any right of recovery under the contract for support moneys.

Last under her Point No. II, appellant complains that her fine is greater than that permitted under Title 45 of the Civil Code. That is shortly answered for, in the first place, we do not have here any fine, that being a penalty payable to the State, and not a mere deprivation of the right of process, and to the claim that such a penalty is all that may be imposed on a party in contempt to enforce compliance, we may point to the wide use of such means of coercion in case after case we have cited, going even to deprivation of custody. The defendant in *MacPherson v. MacPherson*, (89 P. 2d 382) had been fined the limit, ordered jailed for the maximum amount permitted by the California statutes on civil contempt, and ordered to pay very large sums for the use of his former wife in her future attempts to recover from his custody of the children to which she was entitled, and with whom he had fled from the state to Mexico. When, on his appeal from the order requiring him to supply the means of litigation to his adversary, he was met with a motion to strike his appeal, because he then was in continuing contempt, he likewise

pleaded that, having been penalized all the statute on contempt permitted, no additional penalty could be imposed on him. The Court said:

“There is no language in Section 1218 which in any way places a limitation upon the power of the Courts to refuse a hearing to contumacious litigants. (Quoting the statute fixing fine and time of imprisonment.) This statute will not be construed to infringe upon the court’s inherent power to ignore the demands of litigants who persist in defying the legal orders and processes of the state.”

The matter is not worth further labor.

Holding in mind the rule heretofore quoted from 17 Am. Jur. 516, and supported by the cases we have cited, as well as inferentially by some of appellant’s cases, that the court has power to coerce, as for contempt, the parent with custody who denies to the other parent reasonable rights of visitation, which coercion may be by withholding enforcements of rights otherwise enforceable by the custodian and arising under the same decree, or by punishment for contempt, we must turn to another point, since the questions are much intermingled:

Point No. 3. REDUCTION OF FUTURE INSTALLMENTS OF SUPPORT MONEYS WAS WITHIN THE DISCRETIONARY POWER OF THE COURT UNDER THE CHANGED CIRCUMSTANCES OCCASIONED BY REMOVAL OF THE CHILDREN FROM UTAH.

Much of what we have said and many of the citations made under our last point are applicable here. For if

the Court may withhold payment of support moneys while the custodian, entitled to them, is in contempt of another part of the order, the right to modify the amounts payable, to conform to the circumstances arising from taking the child from the state, is equally clear, and is in fact a milder aspect of the use of the power of coercion. There simply is nothing contrary to this in the citations made from the Utah cases and other authorities referred to on pages 5 and 6 of appellant's brief.

The rule of course is that modification may be had only under a change in circumstances. What more change of circumstances is required than the showing made here. As the Michigan court said in *Myers v. Myers*, (106 N.W. 403), where exactly this same question was raised:

“If any change of circumstances, or new facts arising since the decree were necessary to be shown, they may be found in the prolonged absence of the daughter from the state of Michigan, and the inability to visit guaranteed to defendant by the contract, with no assurance that the daughter will ever return to the state.”

Certainly there is no assurance here that the Baker children will ever return to Utah—most certainly they will not if the appellant can prevent it. The later case of *Meyers v. Meyers* (*supra*) approves the language quoted. Both were cases where a stipulation providing for rights of visitation by the father had not been followed in the decree, and the Court first modified the decree to include it, and then cut off support moneys due under it for breach of the agreement. Waive as to this the fact that the Court found impairment of respondent's financial standing to have occurred. If the

worst comes to the worst, he can let his ruined property stand idle, can fail in his tractor payments and lose it—can even lose his insurance through non-payment of the loan thereon. But these changed circumstances appeared. Before the Thanksgiving period in 1948, he had only to walk, or ride a bus, or take a few minutes ride in a taxicab to see his children. Now he must travel some 800 miles, must lose, as the Court found from strong supporting evidence, approximately \$100.00 in time and expense each time he pays a visit to his children. That is a well defined change in circumstances, and one created by the act of the appellant.

Not only do cases already referred to herein give instances of modification, with removal the factor principally or solely creating change in circumstances; but appellant under her point IV gives citation to other instances:

In *Feinberg v. Feinberg*, 66 Atl. 611) the New Jersey chancellor as quoted by appellant at page 19 of her brief, refused to relieve against support moneys already accrued, upon the ground that the father should have asked modification when new conditions arose. (Which Baker did.) But appellant should have called this Court's attention to what followed:

In this case it appears that the mother with custody, subject to rights of visitation, took the child to Pittsburgh, some 250 to 300 miles from most New Jersey points. Some suggestion had been made that she would be willing to set up a residential domicile for the child in Philadelphia, and readily accessible from all points in that state. The chancellor gave time to the parties to

file additional affidavits respecting the effect of such a residence, and reserved for decision, until any such new affidavits were available, the question:

“Whether an order should be made discontinuing the payments until the minor is returned to the jurisdiction, or whether the order should permit the minor to be maintained in Philadelphia, with the right of visitation specified in the decree fully protected.”

In *Zirkle v. Zirkle*, (172 N.E. 192), an Indiana case cited by appellant under Point IV of her brief, the minor at the time of the divorce was not within the jurisdiction of the Indiana court of divorce jurisdiction, and thereafter was taken from the state. The court denied the right of the father to withhold payments of support moneys after that removal,—it is not clear to what extent this was based upon the fact that the child was never in the jurisdiction of the divorce court—but, as quoted by appellant, pointed out that the father had the remedy of asking for modification of the decree so that it would require return of the child to the court’s jurisdiction or the state.

In *Altschuler v. Altschuler* (284 N.Y.S. 93) the court pointed out that the father, whose ex-wife had removed with their child to California and so violated the provisions of the decree, had the remedy of securing a modification of the decree as to payment of moneys to her thereunder.

Point No. 4. MONETARY LOSS TO APPELLANT IS
NOT OBJECTIONABLE AS WITH-
HOLDING MONEYS FROM CHILDREN.

While we do not quarrel with a rule broadly stated, that a divorce does not sever the parent's responsibilities towards his or her children, to argue, as does appellant, that reduction in support moneys payable to the mother with custody is equivalent to stealing the bread from the children's mouths somewhat overstates the case. The order fixing the amount which the divorced parent must contribute to the support of the children does not make the moneys paid the moneys of the children, nor is there an obligation on the part of the parent custodian to account for expenditure thereof, nor to show that all received was expended on the children alone. The converse is also true, the parent with custody may not hold the other parent for moneys spent for the upkeep of the children in excess of the amount ordered paid by the Court:

Adair v. Court (Ariz.) 33 P. 2d 995.

Under our laws, as well as those of California, the parents are jointly and severally liable for the expenses of the family and the education of the children. (Utah Code Ann. 1943, 40-2-9), and a wife who receives a property settlement, in lieu of alimony, is not thereby absolved from bearing such part of the burden of the upbringing of the children as the Court does not place on the father. To shift a part of that burden from the father to the mother, for such time as the mother persists in conduct calculated to estrange the children from their father, is a means of coercion of the spouse guilty of such conduct well within the powers and the discretion of the trial court.

“The mother is charged equally with the child's father to protect nurture and educate their infant

progeny. (Citing Civil Code). The award of Nancy's custody to appellant and the requirement that respondent pay money for her support did not absolve appellant from a parent's obligation.—After spurning the court's decree by removing Nancy from the state she was in no better position to demand a continuance of respondent's contribution to the child's support than she would have been had the father been removed from this mundane sphere.—She now argues for her own advantage while pretending an interest solely for the child. But protestations in behalf of the daughter are unavailing for the reason that, in the absence of a showing that the child is in need, she will not be considered a party to the proceeding.”
White v. White (Cal.) 163 P. 2d 89

To the same effect are substantially all of the citations and cases we have previously discussed herein, where the question involved conduct of the wife, involving impairment of rights of visitation, and a change of custody was not asked including 17 Am. Jur. 516 (R. Br. 19), Eberhart v. Eberhart (R. Br. 19), Weinbaum v. Weinbaum (R. Br. 20), Meyers v. Meyers (R. Br. 21), Harris v. Harris, (R. Br. 22), Schweig v. Schweig (R. Br. 23), Cole v. Addison (R. Br. 25), Myers v. Myers (R. Br. 27), Feinberg v. Feinberg (R. Br. 28), and Altschuler v. Altschuler (R. Br. 29), in each of which coercion of the custodian, to performance of her duty to the court and the other parent, by withholding of support moneys was either permitted, or so discussed as to show it to be considered a remedy open to the Court and the parent, whose rights to see his children had been defeated by the custodian's conduct.

It seems significant that none of the cases cited by appellant squarely holds that a reduction or complete termination of payment of support money is not proper, where the children are taken far from the domicile of the divorce, where they are estranged from the father, and his chances of seeing them, holding or winning back their affection, have been thwarted by such removal. We have discussed everything cited by appellant, except *Hatch v. Hatch* (192 A. 241), *Thomas v. Thomas* (233 Ill. App. 488) and *Heimbold v. Heimbold* (217 N.Y.S. 379), the latter two cases referred to in the citation she gives on page 22 of her brief from 88 A.L.R. 200; and the citation on page 21 from 20 A.L.R. 838.

The *Hatch* case goes to the rule that vested payments of alimony may not be reduced by retrospective modification of the decree; the *Heimbold* case holds simply that, with the divorced wife a resident, the remedy of the father deprived of rights of visitation is an appeal to the court to enforce his right, and not withholding of payments due from him; In the *Thomas* case the Court says that the father is not relieved of all liability for the support of his children by his wife's interference with his rights of visitation—and the A.L.R. text gives a somewhat extreme statement as to the considerations surrounding the appointment of custodians of minors. None of these citations hit the bullseye at which appellant aims.

This resolves itself down to the question of whether the children are harmed by the action of the Court. Significantly again, there is no testimony from Mrs. Baker which even hints upon their lacking any of the

necessaries of life. She speaks, as we have noted under Point No. 1, of their being happy, better off at Nyssa than they had been in Ogden, and this in spite of the fact that only \$50.00 had been paid on support moneys between November 10th, 1948, and the time of trial eight months later. She owned a residence in West Ogden, (B. of E. 19) and had received in the divorce (Tr. 019) Ogden property, which had some indebtedness on it, both of which she had sold. She had \$50.00 a month coming in from sale of one of her properties (B. of E. 26), and it would seem paid \$25.00 a month on the balance on the Nyssa property (B. of E. 29) and \$26.67 on debts on the Utah property, but from her other property, sold for \$7,500.00, (B. of E. 30), she received \$100.00 a month. She had with her an unmarried daughter who paid her \$35.00 a month for room and board. In other words with the \$60.00 monthly payable by respondent, \$150.00 monthly from her Utah properties, less \$53.00 payable upon the Nyssa home and one of the properties sold, and \$35.00 from the unmarried daughter, Mrs. Baker has had since entry of the order herein about \$190.00 a month to use, and of course has had no rents to pay. She says she had reserves (B. of E. 26) for her use during the period when no support moneys came in. Obviously she had good reason for not contending that the children had been suffering for want of the support money, and for not protesting that the children would suffer if the decree was modified by reducing support moneys, as respondent had asked.

And equally obviously, the Court rightly held that she, and not the children, had suffered from the withholding of support.

We submit that, on this record, the Court had open to it, in its judicial discretion, the power to withhold means of collecting through the Court's process moneys due her, and of reducing the moneys payable to her during the period of her continuing contempt.

Point No. 5. THE COURT WAS NOT REQUIRED TO
DENY RESPONDENT RELIEF BE-
CAUSE OF DEFAULT IN PAYMENTS
DUE FROM HIM.

This is the converse of Appellant's Point III. The only authority cited by appellant under that point which sustains her proposition is the last sentence from 27 C. J. S. 1239, there quoted (Br. 17) to the effect that "defendant's application to set aside order for maintenance of children, or reduction of award will not be considered until he pays all arrears due under the original decree." As sole authority that text cites in a footnote *Cooper v. Cooper*, (N. J.) 143 A. 559.

The *Cooper* case concerned a chronic evader of responsibilities to his children, imposed by a divorce decree, whose reasons for asking reduction of amounts payable the Court seemed to care little for. The decision is contrary to the *Feinberg* ruling-- and is not good law in New Jersey or elsewhere.

The correct rule on such matters is as follows:

"Where a husband seeks a reduction of alimony, the fact that he resists the payment of what has accrued does not compel the court to refuse a reduction but is a circumstance justifying the refusal of a reduction." 19 C. J. 277.

"If the existence of accrued and unpaid alimony should be held to absolutely prevent the court

from altering, reducing, or altogether abrogating future installments of alimony, then it would result that, in cases of pecuniary inability of the defendant to pay and discharge all arrearages of alimony, the court would be powerless to grant relief as to future and further alimony, no matter what the changed conditions of the parties in the property, or how loudly the facts and circumstances might call for the equitable intervention of the Court. The hands of a court of equity are not thus bound". *Craig v. Craig*, (Ill.), 45 N. E. 153-cit. p. 154.

The *Craig* case next above is one cited by appellant under Point III of her brief. She there cites also

Wassung v. Wassung (Nebr.) 286 N. W. 349

Kell v. Kell (Ia.) 161 N. W. 636

Delbridge v. Sears (Ia.) 160 N. W. 218

Van Loon v. Van Loon (Fla.) 182 So. 203

in each of which the court either granted modification as to future payments of alimony at a time when the petitioner was in default on payments already accrued, or, in one instance, referred the matter to a referee to determine what modification was justified.

The Utah case of *Myers v. Myers* (62 Utah 90, 218 P. 123), and the other cases cited by appellant under this point are authority for the rule stated in the first part of the quote from 27 C. J. S. 1239, on page 17 of her brief, to-wit: that an installment of moneys once due may not be cancelled out by a subsequent modification of the decree. They have no reference to questions

of withholding relief from those in contempt. If appellant were right, this Court should strike her appeal, since she makes no showing of any attempt to purge herself of her wrongful conduct.

Point No. 6: THE COURT DENIED APPELLANT'S REQUEST FOR MODIFICATION OF THE DECREE TO PERMIT CONTINUED RESIDENCE IN OREGON, AND WAS NOT REQUIRED TO AFFORD HER AN OPPORTUNITY TO PURGE HERSELF OF CONTEMPT.

The facts surrounding the two matters above referred to, which appellant urges as her Points V and VI, are so essentially the same that one argument is enough for both.

When this case closed, the status of appellant as to her intention to remain in Oregon had not changed. She had pleaded, as we have seen, that it was absolutely necessary for her to live there, and the nearest she had come showing willingness to right the wrong she had done respondent was her offer to bring or send down the children, once or twice a year (B. of E. 25) if opportunity served. She continued to persist in her wrongful conduct.

There may be instances where a court of equity should afford one in contempt the opportunity to right the wrong and escape punishment, but not so when the contemner pleads and by testimony shows her intention to persist. Where a continuing penalty attends persistence in the contempt, the contemner may accept the penalty, and continue the conduct, or escape the penalty

by conforming to the decree, and asking restoration of rights. The opportunity to purge her contempt, which appellant says has been denied her, has always been and is still open to her. Upon her return to Utah, the principal reason for reduction of her monthly payments, the added expense of visitation imposed on the respondent,—will terminate. If she then shows willingness to afford reasonable rights of visitation to respondent, the Court would feel that a large part, if not all, of grounds for reduction in support moneys was gone—and could not, as we see it, refuse her appropriate relief as to enforcement of her judgment for past due sums. Of course, if respondent had not the means to pay in full, it could afford him time in which to make up the back payments.

The Court, as the cases show, might well have directed her to bring the children back to Utah and, imposed, as penalty for non-compliance, loss of custody or complete loss of assistance towards support of the children. (Such an order as to change of custody probably, in view of the Oregon decision on that point, would have not been enforceable.) Appellant complains of the leniency rather than of the severity of the Court. The fact is, of course, that the Court simply accepted the situation as Mrs. Baker had made it, and tried to equitably adjust the matter so that the respondent would still be able to visit his children but with a part of his expense carried by appellant. From a practical point of view, that leaves appellant open to retain her Nyssa residence and accept the penalties, or return and avoid them.

To have modified the decree as she asked would have been to approve her conduct. The court might have done so, had circumstances justified it. But such justification must have been clearly established, based on factors affecting the best interests of the children, and not merely beneficial to the mother. The Court did not accept her contention that removal to Nyssa was required by the children's best interests. The whole record shows that it was only the mother's interests and desires which occasioned it.

The legal presumption prevailing when other circumstances are relatively weak against it, is that the welfare of the children is promoted by their residence in the jurisdiction of the court whose wards, by force of the divorce proceeding, they have become. So situated, they are where the Court may give better supervision of their affairs, and better determine matters as to their welfare if questions arise.

McGonigle v. McGonigle, (Colo.) 151 P. 197

In Re Hipple, (Supra.)

Busser v. Busser, (Okla.) 296 P. 401

Stirett v. Stirett, (Wyo.) 248 P. 1015

Williams v. Williams, (Colo.) 147 P. 2d 477

20 A. L. R. 840—under note cited by appellant,
(Br. 21)

The McGonigle case says: "It is against the policy of the law to permit its (a child of divorced parents) removal unless its well being and future welfare demand it." The A. L. R. note cites cases to the same

effect. The last two cases are among a number of decisions which sustain requirements that custodians, desiring to remove children from the judisdiction, may be required to give substantial bonnd to insure their return.

We submit that there are no factors here which required the court to regularize appellant's wrongdoing.

Point No. 7. THE COURT PROPERLY REJECTED
TESTIMONY ON MATTERS PRE-
VIOUSLY LITIGATED AND DETER-
MINED.

At the trial, appellant, without requesting modification of the decree as to rights of visitation, and without pleading the matter so that respondent would be apprized and prepared to meet it, tendered evidence as to matters, occurring prior to the trial of the original divorce case, and apparently offered to show that respondent was an unfit person to visit or have aught to do with his children. The files in the divorce action are part of the record before this court (B. of E. 33) and show (Tr. 014) pleading by appellant that Mr. Baker was an unfit person to have any care, custody or control over his children by reason of "his idea on sex and his ideas with respect to society and economics."

The finding on the divorce trial, (Tr. 018) are entirely wanting in any finding of his unfitness to have the entire custody of the children placed in him, but award that custody to the mother solely because "ever since the respective births of the children, plaintiff has had their care, custody and control." The case had been contested, (Tr. 021).

The Court, upon this record, excluded the testimony as being matter which had been settled and determined by the trial, and not open to further litigation. Its ruling was in accordance with the law appellant urges under her Point I,—that decrees are not subject to modification except by a showing of matters arising thereafter which invoke the equitable powers of the court. Had she filed a petition for modification respecting visitation by the father, and showed some ground for suppression of such evidence at the former trial which sounded in fraud or overreaching, then and then only, it might have been admissible.

The Court will not require argument that such evidence, so offered, without notice, under circumstances likely to induce perjury, and on matters where bare denial only would have been available to the other party, would have been of little weight to a fair minded judge, had it been received.

CONCLUSION

The judgment of the lower court should be confirmed.

That the Court should shift to appellant a greater part of the expense of maintenance of the children, and should withhold from her the right to use the processes of the Court while herself refusing rights given respondent thereunder is amply within the reasonable discretion of the Court, in cases of this character. Should the lower court refuse to restore the rights withheld upon due showing of compliance, and of want of other change in material factors, then this Court might well listen to the plea now made.

The theory that respondent had no standing in court has been shown to be absolutely without foundation; appellant's plea for an order regularizing her Oregon residence equally wanting in equitable considerations. We think the record free from reversible error, and wanting in any considerations which would lead an appellate court, having in mind the discretion pertaining to courts of the first instance in such matters, to make any modification in the orders and decree under consideration.

Respectfully submitted

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