

1950

# Leile A. Brown v. Thomas E. Brown : Brief of Appellant

Utah Supreme Court

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Edward W. Clyde; Woodrow D. White; Allan E. Mecham; Attorneys for Appellant;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

LEILA R. BROWN,  
*Plaintiff and Respondent,*

— vs. —

THOMAS E. BROWN,  
*Defendant and Appellant.*

Case No.  
7475

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## Brief of Appellant

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EDWARD W. CLYDE  
WOODROW D. WHITE  
ALLAN E. MECHAM

*Attorneys for Appellant.*

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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LEILA R. BROWN, <i>Plaintiff and Respondent,</i> — vs. — THOMAS E. BROWN, <i>Defendant and Appellant.</i>	}
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## Brief of Appellant

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### THE FACTS

This is an action for divorce, in which the original decree was entered on June 27, 1947. In that decree defendant was ordered to pay to the plaintiff \$15.00 per week for the support and maintenance of two minor children. (R. 2.) On August 25, 1949, pursuant to a stipulation of the parties, the court entered an order decreeing that the defendant had on that day paid plaintiff \$500.00, which constituted payment in full for all judgments of the court theretofore entered, and that the defendant was not obligated to plaintiff in any

amount except for the monthly payments thereafter to accrue under said order. It was further ordered that the decree entered June 27, 1947, as modified by the order dated January 6, 1949, be further modified so as to require the defendant to pay the sum of \$40.00 per month (rather than \$60.00) in two installments of \$20.00 each payable on the first and fifteenth of the month commencing September 1, 1949. (R. 16-18.) This order, so modifying the decree, further provides as follows, in paragraph 4:

“It is further ordered that in the event the defendant shall default in the payment of the sum of \$40.00 per month as herein provided, and shall remain in default for a period of thirty days, then the provision of the decree heretofore entered requiring the defendant to pay to the plaintiff the sum of \$60.00 per month for the care and support of the two minor children of the parties shall be automatically reinstated.” (R. 19.)

Pursuant to the order of the court, the defendant paid \$20.00 on September 1, 1949, \$20.00 on September 15, 1949, \$20.00 on October 30, 1949, and \$20.00 on November 7, 1949. (R. 42.) The defendant was delinquent at the time of the hearing in the amount of \$20.00, representing the payment due November 1, 1949. (R. 41-42.)

Counsel for plaintiff pressed the issue of contempt and in exoneration of such charge the defendant testified that he was self-employed and was engaged in the servicing of refrigerators and household appliances; that he had no regular date upon which he received any income; that he didn't make the payments on October

1st and 15th because he did not have sufficient money; that during the month of October he made about \$110.00; that aside from the payment of \$20.00 which he made to the plaintiff on October 30th, he paid for groceries for his family and bought himself a pair of work shoes; that he was married; that he did not spend any part of his income on drink or entertainment; (R. 45-46) that from November 1st to the date of the hearing he earned about \$100.00, out of which he paid \$20.00 to plaintiff on November 7th; that he also spent some of his income on food, phone and lights; that he needs a telephone to operate his business. He expected to have a check on the following day that would enable him to make the payment that was due November 1st; that he borrowed the money to pay the \$500.00 settlement in August and he was under obligation to pay that money back at 5 per cent interest, the payments being \$15.00 per month, but that he had not made any payments on that loan. (R. 46-47.) During the previous month when he made the payments as ordered, defendant earned about \$175.00. There are five members in his present household, (his wife and her three children) and his food expense runs about \$20.00 per week; that out of the money earned in September he paid \$10.00 in repairs to his car, which is essential to the carrying on of his business. During September he also bought \$15.00 worth of hand tools, which he used in his business; that he didn't spend any money in September on liquor; that during the month of September he went to two or three shows, and spent about \$20.00 on some delinquent bills that were incurred prior to the divorce. (R. 48-49.) The car he operates is

a 1937 Packard, which belongs to his present wife. (R. 53.) The defendant testified that he had written a letter inquiring about a job, and that he would accept such work if he could obtain it, provided it was more profitable than his present work.

Upon these facts, which were uncontradicted, the District Court found and adjudged the defendant to be in contempt of court for the non payment of the \$20.00 delinquency, and the court in its decree reinstated the terms of the earlier decree and modified the order entered on August 25, 1949, to the extent that the defendant was ordered to pay plaintiff the sum of \$60.00 a month in two semi-monthly installments commencing December 1, 1949. (R. 29-30.) The court further ordered the defendant to pay \$50.00 to the plaintiff for her attorney fee. The defendant requested a stay of execution for a couple of weeks to enable him to pay the delinquency, but the motion was denied. (R. 57.) Thereupon the commitment was issued and the defendant was confined in the County Jail, from which he was liberated upon the filing of a notice of appeal and bond. (R. 33-37.) The defendant has prosecuted this appeal from that decree.



## POINTS UPON WHICH APPELLANT RELIES FOR REVERSAL OF JUDGMENT

1. THE DISTRICT COURT ERRONEOUSLY FOUND AND ADJUDICATED DEFENDANT TO BE IN CONTEMPT OF COURT.

2. THE DISTRICT COURT ERRED IN MODIFYING THE ORDER ENTERED AUGUST 25, 1949, AND IN REINSTATING THE ORDER ENTERED JANUARY 6, 1949.

3. THE DISTRICT COURT ERRED IN ORDERING DEFENDANT TO PAY PLAINTIFF A \$50.00 COUNSEL FEE UNDER THE CIRCUMSTANCES.

### ARGUMENT

#### POINT I

THE DISTRICT COURT ERRONEOUSLY FOUND AND  
ADJUDICATED DEFENDANT TO BE IN  
CONTEMPT OF COURT.

It is true that the defendant did not strictly comply with the District Court order entered August 25, 1949, in that he failed to make the payments in October and November at the times on which such payments fell due and he was delinquent in the sum of \$20.00 at the time of the hearing. It is well established, however, that a mere failure to strictly comply with the order of the court does not constitute a civil contempt unless such non-compliance was deliberate, willful or contumacious. *Hillyard v. District Court of Cache County*, 68 Utah 220, 249 P. (2d) 806, and the cases therein cited. *Parish v. McConkie*, 84 Utah 396, 35 P. (2d) 1001.



There is nothing in the record which supports the court's finding that the defendant willfully failed to comply with its order, nor is there evidence in the record to support the court's finding that the defendant was then capable of complying with the order. The defendant had demonstrated his good faith by borrowing \$500.00 from his father to pay on the delinquent account incurred prior to the order of August 25, 1949, and he had made the payments requested by that order on September 1st and 15th. Having earned only about \$110.00 in October, he was unable to make the payments as they fell due during that month. With a wife and three children sitting at his table, with utility bills to be paid, with an irregular income amounting to \$110.00, it is inconceivable to us that the court could find evidence in the record to support its finding that the defendant willfully, contemptuously and deliberately disregarded its order. Although in legal contemplation the first duty of defendant was to support the two children by his first marriage, the needs of the present members of his household could not altogether be disregarded. There is nothing contemptuous or willful in the diversion of portions of defendant's income for the feeding of the hungry mouths that surround his present table; and if the needs of the first household and second household were to be compared, certainly the \$500.00 paid in August and the \$40.00 paid in September would insure against any suffering on the part of the plaintiff and the two children in her custody. The record discloses no misuse of the defendant's income during the period in controversy. The expenditure of \$10.00 to keep the

automobile running, of \$15.00 for tools used in his work, and the purchase of a pair of shoes for the defendant, can not be regarded as other than requisite. There was no waste or squandering of income on drink, clothing, travel, luxuries, gambling or entertainment. Even the \$3.00 spent during the two-month period for entertainment was spent during the month of September, when the defendant had sufficient income to comply with the court's order. In view of the defendant's limited income, it is nothing short of miraculous that he could arrive at the date of the hearing with just a \$20.00 delinquency. We do not know what more the defendant could have done that he failed to do in the equitable distribution of his limited wealth, nor can we perceive in what manner his ability to comply with the court's order with respect to the delinquency and with respect to future payments could be enhanced by a ten-day sentence in the County Jail, accompanied by awards of attorney's fees and court costs. The punishment the District Court inflicted upon the defendant, if approved by this court, will add and not detract from the sufferings of the children in the two households defendant is required by law to maintain.

## POINT II

THE DISTRICT COURT ERRED IN MODIFYING THE ORDER ENTERED AUGUST 25, 1949, AND IN REINSTATING THE ORDER ENTERED JANUARY 6, 1949.

No new circumstances were either pleaded or proved in this matter and the sole authority for the court to

modify its decree must find basis in the interpretation of paragraph 4 of the decree as applied to the facts of this case. As we read it, the decree provides that in the event the defendant shall be in default to the extent of \$40.00 and shall remain in default to that extent for a period of thirty days, then the provisions of the earlier order requiring the payment of \$60.00 per month could be automatically reinstated. There is no ambiguity in the provision, and we do not believe it to be fairly susceptible to any other interpretation. Aside from that, the defendant was never in default in any amount for a period of thirty days. The payment due October 1st was made October 30th, the payment due October 15th was made November 7th. The only payment remaining due at the time of the hearing was the one which accrued on November 1st. The longest period of delinquency was in October when the \$20.00 delinquency existed for twenty nine days and there was a \$40.00 delinquency for a period of fifteen days. At the time of the hearing the defendant was delinquent in the amount of \$20.00 for a period of fourteen days.

It is a well-established principle of law that where a debtor makes payments on a running account and neither he nor his creditor makes a particular application of such payments, the law will apply them to the first items in the debt. *Naidech v. Hempfling*, (New Jersey) 24 Atl. (2d) 524; *Birkhauser v. Ross*, (California) 283 Pac. 866; *Radichel v. Federal Surety Company*, (Minn.) 212 N.W. 171; *State ex rel. Spillman v. Security State Bank of Eddyville*, (Nebraska) 218 N.W. 407; *March*

*v. Butler*, (South Dakota) 220 N.W. 461. In the case at bar neither the plaintiff nor the defendant indicated that portion of the support account to which the payments made on October 30th and November 7th were to be applied. Under the authorities above cited, it is clear that the October 30th payment should be applied by the court to the amount due October 1st and the November 7th payment should be applied by the court to the amount which fell due October 15th. The conclusion is, therefore, inescapable that the defendant was never in default in any amount for a period of thirty days, and the court, therefore, erred in reinstating the terms of the earlier decree in violation of the provisions of the stipulation and decree entered on August 25, 1949.

### POINT III

#### THE DISTRICT COURT ERRED IN ORDERING DEFENDANT TO PAY PLAINTIFF A \$50.00 COUNSEL FEE UNDER THE CIRCUMSTANCES.

This case has another unfortunate aspect, in that the circumstances of the defendant are not such that he is able to support and maintain two households and in addition to that an attorney who deems a \$20.00 default of sufficient moment to warrant the institution of contempt proceedings—and this within two months after his client has been paid \$500.00 by the defendant, who had to borrow from his father in order to make such sum available to the plaintiff. Was her need and the need of the children so desperate that the defendant must be haled into court without being given the courtesy of a

letter warning him of the dire consequences that would follow his monumental default? Although it is conceded that ordinarily the sum of \$50.00 is of minimum reasonableness in connection with the prosecution of a hearing on an order to show cause to enforce compliance with a support decree, yet whether or not the defendant should be required to pay such fee is a matter within the sound discretion of the court. Obviously, with the \$500.00 which she had received August 25, 1949, and the \$80.00 that she had been paid thereafter, the plaintiff was in a much better position than the defendant to defray her own legal expense. We earnestly submit that it was a clear abuse of discretion on the part of the District Court to allow a \$50.00 attorney's fee for the collection of a \$20.00 delinquency under the circumstances of this case. Certainly the practice of instituting a contempt proceeding for a \$20.00 delinquency with attendant claims for counsel fees and court costs should not be encouraged. It would seem that our courts have sufficient litigation before them without such improvident enlistment of their facilities.

## CONCLUSION

We, therefore, respectfully conclude that the judgment of the district court should be reversed.

Respectfully submitted,

EDWARD W. CLYDE  
WOODROW D. WHITE  
ALLAN E. MECHAM

*Attorneys for Appellant.*