

1951

# Ruth M. Dixon v. William D. Dixon : Brief of Appellant

Utah Supreme Court

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Ben E. Roberts; Attorney for Defendant;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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RUTH M. DIXON,  
*Plaintiff and Respondent,*  
— vs. —  
WILLIAM D. DIXON,  
*Defendant and Appellant.*

}

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Appellant's Brief

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FILED

APR 3 - 1951 BEN E. ROBERTS,

Attorney for Defendant  
Clerk, Supreme Court, Utah

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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RUTH M. DIXON,  
*Plaintiff and Respondent,*

— vs. —

WILLIAM D. DIXON,  
*Defendant and Appellant.*

} Case No.  
7645

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## Appellant's Brief

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### STATEMENT OF THE CASE

This action was brought by the plaintiff against the defendant for a divorce, a property settlement and custody of the three minor children. Defendant's attorney filed a demurrer to the complaint, but later withdrew it and defendant consented that his default be entered. No answer was filed by the defendant.

In her complaint filed May 28, 1948 (T-4), in addition to asking for the custody of the children she asked that she be awarded title to an auto tourist camp in Vernal, Utah, which the parties had purchased in 1946

for the sum of \$10,000.00 of which sum \$5,000.00 was to be paid as a down payment and thereafter \$1,000.00 a year until the balance had been paid in full with interest at 6% per annum. The down payment was made in 1946 and one payment of \$1,000.00 was made in 1947, and that at the time the complaint was filed there was a balance due and owing of \$4,000.00 on a mortgage in favor of the Bank of Vernal. The complaint further asked that the defendant be required to pay off the balance of the indebtedness on the real estate. She also asked for the household furniture used in one of the cabins for a home for the family and the furniture and equipment in the other cabins and all other personal property they had accumulated except one White Truck which the defendant used in his work as a plumber and steam fitter.

The original decree was entered (T-9) on the 28th day of September, 1948, giving her the custody of the children and \$75.00 a month for their support. In distributing the property the court awarded her all of the personal property except the truck and also the tourist cabins in lieu of alimony and defendant was to quit claim all his right, title and interest to her subject to the mortgage and other indebtedness on the cabins, but that in the event that plaintiff defaults in making the payments on the mortgage and other indebtedness secured by the real estate then the defendant had the right to pay off the indebtedness, take over the cabins and plaintiff was to give a quit claim deed of all her right, title and interest in the cabins to the defendant.

In May of 1949, defendant filed a petition (T-1) to modify the decree alleging that the plaintiff had defaulted in her payments of insurance, interest and principal on the mortgage and defendant demanded that he be awarded the title to the cabins under the terms of the original decree and that the plaintiff be required to give him a quit claim deed to all her right, title and interest in said real estate.

The petition further alleged that on account of plaintiff's mental and physical condition that she had been unable to manage the cabins that she had incurred further indebtedness on the cabins and that if he had not paid off the indebtedness the property would have been lost.

He further alleged that she was not in a physical or mental condition to take care of the children and also asked that they be awarded to him with right of visitation. He also asked that she be awarded the sum of \$50.00 a month for her support and maintenance when she did not have the children. There was no answer on cross petition or affidavits filed by the said plaintiff to said petition and an order was made June 24, 1949 (T-15) setting a hearing on the petition for the 8th day of July, 1949, and that a notice was served upon her and her attorney requiring her to appear before the court on that date.

The parties were in court on that day, but it is difficult to determine just what took place because of the

discrepancies between the court reporter's notes and the order modifying the decree (T-17) which was subsequently filed.

On August 30, 1950, the plaintiff filed a petition (T-22) to modify the decree "for the return of the property awarded plaintiff and the custody of the minor children in accordance with the terms of the original decree of divorce and for other relief."

On September 15, 1950, defendant filed an answer to the petition (T-26) of plaintiff to modify the petition and asked the same to be denied. It was on the issues joined in the petition and answer that a hearing was held on the 28th day of September, 1950. It is from the Findings and Decision made and entered by the court on the 22nd day of November, 1950, following the hearing that this appeal is taken.

## STATEMENT OF ERRORS

The appellant relies upon the following errors for a reversal of the judgment rendered in this case.

### POINT ONE

That the Trial Court erred in making Findings number 3, 4, and 5 (T-63), to the effect that the formal order of modification, signed by one of the Judges of the court on March 8, 1950, did not conform to the purported minute entry and that the so called minute entry is con-



trolling, and that the formal order was of no legal effect and therefore, null and void, for the reason that the so called minute entry was not controlling as a matter of law in view of the fact that a formal order of modification was signed, made and entered by the court.

## POINT TWO

That the court erred by receding from his position at the trial of the case that the formal order of modification signed March 8, 1950, was res adjudicata for the reason that the defendant was precluded by the ruling of the court from offering any evidence to show what took place in the proceedings of the court on July 8, 1950.

## POINT THREE

That the court erred in making any modification of the previous order at the time of the hearing on November 4, 1950, upon the petition of the plaintiff and answer of defendant for the reason that as a matter of law the evidence presented was insufficient to show any material changes in the circumstances of the parties to warrant a modification of the decree as modified.

## POINT FOUR

That the court erred in making its calculations of the respective interests of the parties in the real estate as set forth in Finding 8 and 9 (T-64) to the extent of \$1,000.00.

## POINT FIVE

That the court erred in making its calculations of the amount of money defendant paid in clearing up the indebtedness of the real property in the sum of \$730.00 as set forth in Finding 10 and 11 (T-64 and 65).

## POINT SIX

That the court erred in making Finding number 13 (T-65) in which the court required defendant to secure payment of purported judgment in the sum of \$8,400.00 by obtaining a life insurance policy in the sum of \$5,000.00 making the plaintiff the sole beneficiary and to keep said policy in full force and effect until said judgment was paid in full for the reason that there is no evidence in the record to show that the defendant would be physically able to obtain such a policy, what the premiums would be at his age and whether he is financially able to carry such a policy.

## ARGUMENT

### Point One

**That the Trial Court Erred in Making Findings Number 3, 4, and 5, (T-63) to the Effect That the Formal Order of Modification, Signed by One of the Judges of the Court on March 8, 1950, Did Not Conform to the Purported Minute Order and That the So Called Minute Order is Controlling, and That the Formal Order Was of No Legal Effect and Therefore, Null and Void For the Reason That the So Called Minute Order Was Not Controlling As a Matter of Law in View of the Fact That a Formal Order of Modification Was Signed, Made and Entered By the Court.**

Under this assignment it is the contention of the defendant that the formal order made and entered March 8, 1950, was the court's decision and judgment and that it superseded any minute entry which was afterwards made a part of the record in this case.

In the case of *Canadian and A Mortgage Trust Company vs. Clarita Land and Investment Company*, 71 Pac. 301, it was held that a minute entry by the court directing that findings and decree be drawn in favor of defendants did not constitute the decision of the court nor prevent it from subsequently rendering a decision for plaintiff and against certain defendants in default.

It was also held in *McConville vs. Superior Court of Los Angeles*, 248 Pac. 553, that a formal order of the court constitutes statement of court's decision and supersedes a minute entry of court's decision.

In *Neblett vs. Superior Court of Los Angeles*, 194 Pac. 2nd, page 22, the reviewing court held that the findings and conclusion of law signed by the trial judge constitutes the court's decision and supersedes any prior minute entry directed to be entered by the trial court.

In *Kansas City Pump Company vs. Jones*, 104 S. W. 1136, the Court said that minute entries are a memorial of the court's action, but the judgment itself "is the judicial act of the court in pronouncing the law upon the facts in controversy as ascertained by the pleadings and the verdict."

McConville vs. Superior Court of Los Angeles,  
248 P. 553.

Kreisel vs. Snavley, 115 S. W. 1059.

In the defendant's petition (T-1) to modify the original decree and give force and effect to some of its provisions he set forth, that the plaintiff had defaulted under the conditions imposed upon her by the decree failing to pay the insurance, the interest and the balance of the principal \$3,500.00 and in accordance with the decree asked that it be modified awarding him the real estate because he had paid the indebtedness on the property and was entitled to a quit claim deed from the plaintiff. He also asked for the custody of the children on the grounds that the plaintiff was mentally and physically ill; that she was not able to take care of the children and was neglecting them and that he had established a residence with his mother in Payson who was willing and able to assist him in caring for said children while he was at work. He also asked the court to award her \$50.00 a month for the support and maintenance of herself when she did not have the custody of the children. There was no cross petition or counter affidavit filed by the plaintiff and that the court issued an order on June 24, 1949, setting the hearing for the 8th day of July, 1949. There was a hearing on that date with the parties and their attorneys and apparently from the stenographer's notes there was some testimony given and stipulations entered into. When the formal order which was dated July 8, 1949 was presented to the court for his signature on March 8, 1950, the first date was apparently changed

by the Judge, but the decree did not conform to the stenographer's notes which were later reduced to writing and made a part of the record and the provisions in the formal order were different from the previous intention of the court.

Both the plaintiff and defendant were precluded by the court from going back of the formal order to show what took place at the proceedings.

It is the further contention of the defendant that the petition of the plaintiff (T-35) to modify the decree and "replace the same in accordance with the terms contained in the original decree of divorce" did not give the plaintiff the right to re-open the judgment or authorize amendment by petition. The only remedy that the plaintiff had at that time was to either make a motion for a new trial or appeal from the formal judgment.

Errors of court alone can be corrected only by appeal from judgment or motion for a new trial or other statutory motions.

Reichert vs. Robun, 265 Pac. 260.

In another case *McKanney vs. McKanney*, 230 Pac. 218, that an error of law upon which a decision of judgment rests cannot after entry of judgment be reviewed and rectified by trial court summarily or on motion, but can only be reviewed by granting a new trial on an appeal.

The legislature in adopting Section 40-3-5 of the U.C.A. 1943, relaxed in divorce proceedings the rules

of law calculated to maintain the sanctity and stability of judgments. But it is the general rule that sanctity and stability must be given to judgments and they should not be disturbed except for cogent and controlling reasons.

In *Hamilton vs. Hamilton*, 89 Utah, 554; 58 Pac. 2nd 11, this court says “that the power of District Courts to make amendments in the particulars authorized by this Section 40-3-5 U.C.A. 1943 is not without limit, and that in the absence of changed conditions or circumstances a modification cannot be had.”

Cody vs. Cody, 47 Utah, 456; 154 Pac. 952.

Tribe vs. Tribe, 59 Utah, 112; 202 Pac. 213.

Chaffe vs. Chaffe, 63 Utah, 261; 225 Pac. 27.

It is to be noted that in the petition of the plaintiff filed the 30th day of August 1950, she asked “to modify decree and replace the same in accordance with the terms contained in the original decree of divorce and for other relief.”

She charged in her last petition that the grounds on which the modification was obtained that she was not mentally or physically ill that such statement was untrue, had no basis in fact whatsoever, and that said petition was based upon a false premise and no evidence was introduced that she was mentally incompetent or physically unfit to take care of her children or the property. She further charged that on July 9, 1949, the day after the previous hearing at Vernal, Utah, that the



defendant came to her place of residence, forcibly took the minor children into his possession and forcibly removed or had plaintiff removed to the State Mental Hospital in Provo, Utah. However, the uncontradicted testimony showed that her sister and brother-in-law went to Vernal and forcibly put her in an automobile and took her to the State Mental Hospital at Provo. The evidence further showed that the defendant knew nothing about this move and was in no way responsible for such act and he did not know that she was in the State Mental Hospital until after she had been there one month. When she was released from the hospital she did not return to Vernal, but went to Salt Lake City and lived with a family by the name of *Bekkemellon*. Mrs. Bekkemelon being her cousin. There was no evidence submitted regarding her requirements, no evidence to show that she was in a position where she could take care of her children and no change in circumstances which would sustain the judgment rendered by the court.

## Point Two

**That the Court Erred By Receding From His Position at the Trial of the Case That the Formal Order of Modification Signed March 8, 1950, Was Res Adjudicata For the Reason That the Defendant Was Procluded By the Ruling of the Court From Offering Any Evidence to Show What Took Place in the Proceedings of the Court on July 8, 1950.**

In cross-examining the plaintiff, defendant's counsel began to open up the matter of the proceedings on the 8th of July 1949. The plaintiff was asked whether or not she was ordered to appear on that date and she answered

in the affirmative and when asked did you appear, the court said,

“THE COURT: Mr. Roberts (T-88), I wonder if we are concerned about that? That isn't a move to set aside that order modifying the decree. There is no attack upon the jurisdiction of the Court in entering it.

(Argument.)

THE COURT: That's all res adjudicata (T-88). This is no move to set aside that decree that was entered. I stopped Mr. Shields from going back of it, and I think I should stop you from going back of it, because that decree now stands, as modified by the modification order entered by Judge Tuckett, on the day that was found in examining the files. So now our only question is: Have there been material changes since the modification of the decree, which now warrant a modification of the decree as modified? Is there any doubt in counsel's mind about that?

MR. ROBERTS: Not a bit.

THE COURT: All right.”

This case was tried on the theory that the plaintiff must show material changes since the modification of the decree which would warrant a modification of the decree as modified. There was no testimony offered to show any changes of circumstances or her requirements that were different from when the original decree was modified. The court receded from his position that the modified decree was res adjudicata and set it aside in its entirety and went back to the original decree and modified that, and in his memorandum agreement ordered



an entirely new judgment which certainly was beyond the pleadings and the issues raised at the hearing.

In *Barlow vs. City of Inglewood*, 197 Pac. 2nd, 721, it was held that the court had no power to vacate its own judgment in order to correct an alleged judicial error as distinguished from a clerical error.

There was also held in *Wyllie vs. Kent*, 152 Pac. 194, that while the trial court may order that clerical mistakes in the entry of judgment be corrected to show the judgment pronounced, that judicial error can only be reached by motion for new trial or appeal.

Martin vs. Ray, 170 Pac. 2nd, Page 75.

Holmes vs. Holmes, 211 Pac. 2nd 946.

### Point Three

**That the Court Erred in Making Any Modification of the Previous Order at the Time of the Hearing on November 4, 1950, Upon the Petition of the Plaintiff and Answer of Defendant For the Reason That As a Matter of Law the Evidence Presented Was Insufficient to Show Any Material Changes in the Circumstances of the Parties to Warrant a Modification of the Decree As Modified.**

Very little testimony was offered at the hearing as to any change in circumstances which would warrant a modification of the decree as amended. She had been living with a cousin in an apartment for several months prior to the hearing. She gave birth to her child in November of 1949 and had adopted it to the Bekkenmellons with whom she lived. She had received \$5,057.00

(T-85) up to the time of the hearing from her mother's estate. There was no testimony of what her intentions were in regard to establishing a home or the conditions of her health, so that it is apparent that the judgment of the court went beyond the pleadings and issues presented and therefore must fall.

#### **Point Four**

**That the Court Erred in Making Its Calculations of the Respective Interests of the Parties in the Real Estate As Set Forth in Finding 8 and 9 (T-64) to the Extent of \$1,000.00.**

In Finding 8 and 9, it is set forth that \$2,000.00 was paid for the year 1947 and 1948. One thousand dollars was paid in 1947, making \$6,000.00 which had been paid and the balance of the purchase price in 1948 was \$4,000.00 represented by promissory notes secured by mortgage making up the \$10,000.00. If there had been \$1,000.00 paid in 1948 it would have made the purchase price \$11,000.00. The plaintiff went in possession of the cabins under the original decree in September 1948, but she made no payments on the mortgage after that date.

#### **Point Five**

**That the Court Erred in Making Its Calculations of the Amount of Money Defendant Paid in Clearing Up the Indebtedness of the Real Property in the Sum of \$730.00 As Set Forth in Finding 10 and 11 (T-64 and 65).**

In the calculations of the court in determining how much the defendant paid in clearing up the indebtedness

on the real property the court failed to give him credit for \$500.00 that was paid on the principal on the \$4,000.00 note of \$500.00, \$60.00 interest on June 8, 1948, and \$60.00 interest on September 4, 1948, \$21.00 interest on October 29, 1948, and \$39.00 interest in December 1948, and \$50.00 insurance in 1949, making a total of \$730.00.

### Point Six

**That the Court Erred in Making Finding Number 13 (T-65) in Which the Court Required Defendant to Secure Payment of Purported Judgment in the Sum of \$8,400.00 By Obtaining a Life Insurance Policy in the Sum of \$5,000.00 Making the Plaintiff the Sole Beneficiary and to Keep Said Policy in Full Force and Effect Until Said Judgment Was Paid in Full For the Reason That There is No Evidence in the Record to Show That the Defendant Would Be Physically Able To Obtain Such a Policy, What the Premiums Would Be At His Age and Whether He is Financially Able to Carry Such a Policy.**

There was no evidence to support Finding No. 13 in which the court required the defendant to obtain a \$5,000.00 life insurance policy to be issued in the name of the plaintiff as beneficiary and to pay the premiums until the judgment was paid in full. There was no evidence that he would be able to obtain such a policy at his age or that he was financially able to pay the premiums on such a policy, and it is elementary law that a Finding not based upon the pleadings and evidence issues must fail.

In conclusion we submit that under the evidence introduced in this case and under the argument and the

authorities herein presented, the new decree should be set aside and the former decree be declared in full force and effect or have a new trial.

Respectfully submitted,

BEN E. ROBERTS,  
*Attorney for Defendant*