

1951

Joseph Gerald Macdonald v. Vera Catherine Macdonald : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

JOSEPH GERALD MACDONALD,
Respondent,

— vs. —

VERA CATHERINE MACDONALD
Appellant.

APPELLANT'S BRIEF

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT

of the

STATE OF UTAH

JOSEPH GERALD MACDONALD,

Respondent,

— vs. —

VERA CATHERINE MACDONALD

Appellant.

Case No. 7665

APPELLANT'S BRIEF

STATEMENT OF FACTS

This is an appeal from a Decree of the Third Judicial District Court of the State of Utah, in and for Salt Lake County, granting a divorce to the respondent, and a division of property and Decree of certain payments of money to appellant, and to the awarding of alimony, and from the Findings and Conclusions upon which said Decree was based, and from the denial of the Motion for a New Trial on behalf of the appellant and the refusal to appoint a Guardian Ad Litem.

This action was commenced by the filing of a Complaint by respondent. (Tr. 2) The appellant Answered and Cross-Complained and the respondent Replied.

The evidence at the trial before Judge Ray Van Cott, Jr. is fully set out in the transcript. The record of Insane Register, No. 6088, in the District Court of the Third Judicial District, in and for Salt Lake County, State of Utah, was introduced. (Tr. 25-28) It had previously been introduced into the record on a hearing of an Order to Show Cause before J. Allen Crockett, one of the Judges of the above entitled Court. The record will show that the plaintiff (respondent here) had sworn to an affidavit on June 11, 1949, in the matter, No. 6088, charging the defendant with being insane. That thereafter, the said defendant was committed for thirty days observation period, by Judge A. H. Ellett, one of the Judges of the above entitled Court, on June 21, 1949, to the State Hospital at Provo, Utah. That the commitment was based upon the findings and certificate of Doctors R. H. Darke, M.D. and V. M. Sevy, M.D., appointed by the Court to examine said defendant. The doctors found that the patient's departure from normal was so far deranged as to endanger health, person or property. Thereafter, Owen P. Heninger, M.D., Superintendent of the Utah State Hospital, wrote a letter dated March 23, 1950, in which he stated that the patient, who was committed on a thirty day observation basis had been studied and found to be without psychosis, and that she was therefore released. Thereafter, an Order was made by Judge

A. H. Ellett, restoring said patient to competency. Said Order was dated March 28, 1950. Plaintiff's divorce action was commenced January 19, 1950.

That the trial of the divorce action referred to was commenced on January 10, 1951, and was taken under advisement and Decree rendered January 24, 1951. Thereafter, Motion for a New Trial was filed in the matter and was brought upon February 5, 1951 for hearing and was denied February 7th.

That on January 15, 1951, Joseph G. MacDonald, the respondent here, filed an Affidavit before the Third District Court, alleging, among other things, that the appellant here was mentally incompetent to manage her property, by reason of habitual drunkenness, and that she is in need of assistance to properly manage and take care of her property; and because of the foregoing, said Vera Catherine MacDonald is likely to be deceived or imposed upon by artful or designing persons, if such assistance is not provided her. (Tr. 67) That said case is No. 33120.

That on February 2nd and 3rd, 1951, a hearing was had before the Honorable Joseph G. Jeppson, on said Petition, and thereafter, Findings of Fact and Conclusions of Law and Decree was made by said Court in which the Court found that the said Vera Catherine MacDonald was for long periods of time in a state of intoxication, and that said intoxication extends over a period of two or

three weeks, followed by periods of sobriety of four or five days, and that while in such state of intoxication, she tends to fail to attend to matters of grave importance to her and matters involving her property rights, and found that she was mentally incompetent by reason of habitual drunkenness, and entered a Decree appointing Walker Bank & Trust Company as guardian of the estate of said Vera Catherine MacDonald, because the said Vera Catherine MacDonald is mentally incompetent to manage her property. Said Decree is dated February 7, 1951.

That at the trial of the divorce action, the plaintiff (respondent here), in Case No. 88081, testified that the defendant, (appellant here) started drinking so that he began to notice it when they were living in Sacramento, California. That this drinking continued to get progressively worse; (Tr. 91) and that after the couple moved to Salt Lake City, Utah, the drinking continued, and that plaintiff (respondent here) had the defendant (appellant here) at a Sanatorium for treatment and had a Doctor treating her. (Tr. 65) That thereafter, her drinking continued in a more pronounced fashion until there was only a short period between such drinking. (Tr. 48) That thereafter, she was confined again to a Sanatorium, (Tr. 47) and that she attempted to cut her throat. (Tr. 48) This was in the year 1946. That later on, she was taken to the State Hospital at Provo, and on another occasion was taken to said hospital for treatment during the period from 1946 to 1950. (Tr. 65-66)

That during this period, on or about February 18, 1948, the plaintiff filed an action for divorce against the defendant in the District Court of the Third Judicial District, in and for Salt Lake County, State of Utah, No. 82860, and in that action charged that the defendant was guilty of habitual drunkenness and intemperance, and for the past two years had been almost constantly under the influence of intoxicating liquor, and that she had become slovenly and careless in her personal habits and would not care for and maintain the home of the plaintiff. (Tr. 62-63) That this action was later dismissed (Tr. 63) (May 10, 1948) and the parties went back to living together at their home (Tr. 64) at 998 South 15th East Street, Salt Lake City, Utah. (Tr. 68-69) That the defendant did not drink when they were first married, (Tr. 41) and that at the time of the marriage she was approximately 30 years of age and the respondent was approximately 28 years of age. That at the time the action for divorce commenced in April, 1950, the plaintiff (Tr. 45) was 54 years of age and the defendant was 59 years of age. (Tr. 104) That the appellant drank Sherry Wine, and in the last year and one-half, the periods between sobriety were only a few days at a time. (Tr. 48)

That the plaintiff testified that he was of the opinion that a guardian should be appointed for her to protect her property. (Tr. 110)

He further testified, that in the winter of 1949, (Tr. 51), he left the home of plaintiff and defendant and went to live in an apartment, and while living in the

apartment, and another apartment to which he later moved, he knew a woman who used to visit him at said apartments, and he used to visit her at her apartment. (Tr. 101) That this had been going on for about a year, and that the plaintiff had given a gift to the said woman, although the plaintiff testified the relationship was merely companionable. (Tr. 103)

That although ordered to pay the monthly payments due on a mortgage on the home of plaintiff and defendant, held by First Security Trust Company, Salt Lake City, Utah, the plaintiff had not done so, and that on or about September 8, 1950, the defendant was required to pay the sum of \$378.95 (Tr. 61-62) to the said Trust Company so that the mortgage would not be foreclosed. That that money had not been repaid at the time of the trial, although on an Order to Show Cause, before Judge J. Allen Crockett, respondent had been ordered to pay said monthly payments, besides paying the amounts unpaid on \$125.00 per month alimony previously awarded on an Order to Show Cause. (Tr. 92)

That the Order to Show Cause referred to, was made before Judge A. H. Ellett, one of the Judges of the above entitled Court on May 20, 1950.

That the plaintiff further testified that there was some of the money of defendant, which she had when they were married, which went into the first house that was purchased by plaintiff and defendant, and the proceeds

of which were used to purchase the present home at 998 South 15th East Street, Salt Lake City, Utah. That this sum was of approximately \$300.00. (Tr. 77, 99)

That the plaintiff was earning approximately \$481.80 per month (Tr. 52) as a General Agent of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. Besides his salary, he is allowed certain expenses for the use of his car and for reimbursement of personal expenses.

That the house of plaintiff and defendant at 998 South 15th East Street, Salt Lake City, Utah, is mortgaged to the First Security Bank of Utah, Exchange Branch, and the balance owing was \$6,001.00. (Tr. 53) That the reasonable value of the property was \$13,500.00. (Tr. 53) That the defendant had on deposit with Walker Bank & Trust Company, the sum of \$6,947.25 (Pl. Ex. 1) which she had received as her share of the sale of a farm. (Tr. 55)

That the defendant did not appear at the trial and that a recess was called while plaintiff's attorneys and defendant's attorney went to her home to see why she wasn't there, but she did not come to the trial and the Court was informed as to the reasons for that. (Tr. 35-36)

That the plaintiff and defendant were intermarried, each to the other, June 15, 1922. (Tr. 45) That 4 children were born as issue of said marriage, 3 of which died in infancy, but that one, a daughter, is now living, and is 25 years of age.

That at the outset of the trial, the defendant asked for a guardian ad litem to be appointed for the defendant, based on the record before the Court, and after the testimony of the plaintiff, (Tr. 31) the Motion for an Appointment of a Guardian Ad Litem was renewed. (Tr. 37-41-42) These motions were denied. That thereafter, the matter was taken under advisement and on January 24, 1951, the Court rendered its decision.

That when plaintiff and defendant were intermarried, defendant was not trained to support herself, but was a woman of culture and came from a good family and had lived well and had a good background. (Tr. 77, 75)

STATEMENT OF POINTS

The Complaint did not state a claim upon which relief could be granted to the plaintiff and the Motion to Dismiss should have been granted.

That the Motion to Dismiss should have been granted, because the Complaint was not verified.

That the Motion to Make More Definite and Certain should have been granted so that the defendant could ascertain whether plaintiff was proceeding under a charge of cruelty or cruelty and habitual drunkenness or habitual drunkenness.

The evidence is insufficient to support the findings of the Court in this: That Finding Number Two is contrary to the facts and contrary to law.

That Finding Number Three is contrary to the facts and the evidence and contrary to law.

Finding Number Four is contrary to law and is contrary to the evidence.

Finding Number Eight is contrary to the law and contrary to the evidence; and that the evidence is insufficient to support said findings.

That the Findings and Conclusions are insufficient to support the judgment and are contrary to the allegations of the Complaint. That there is no finding on the issue of cruelty.

That the Court improperly refused to appoint a guardian ad litem for defendant although motion was made before trial and after the evidence of the plaintiff.

Appellant's Motion for a New Trial should have been granted.

Defendant should have been awarded sufficient alimony to support herself and should not have to wait before she was in danger of becoming a public charge before the plaintiff should be obliged to support her.

That the nominal alimony, in the sum of \$10.00 per year, was not fair and reasonable and was an abuse of discretion by the Court, and said finding is not supported by the evidence.

That the finding, that the amount of money she had, together with other sums awarded her, would keep her

for ten years, is not supported by the evidence and is contrary to known facts of which the Court can take Judicial notice.

ARGUMENT

I.

SINCE THE PLAINTIFF'S COMPLAINT WAS NOT VERIFIED, APPELLANT'S MOTION TO DISMISS SHOULD HAVE BEEN GRANTED.

POINT I. (A) ALTHOUGH RULE 11 UTAH RULES OF CIVIL PROCEDURE PROVIDES THAT COMPLAINTS IN DIVORCE ACTION NEED NOT BE VERIFIED, SECTION 40-3-4, UTAH CODE ANNOTATED, 1943, PROVIDES THAT SUCH COMPLAINTS MUST BE VERIFIED.

It will be noted that this Section does not fall under the Rules of Civil Procedure which are generally found under title 104, but is placed under the title relating to husband and wife and divorce. The Code Section was enacted by the Legislature and appears to be substantive. (Tr. 4) Can the Legislature delegate to another coordinate arm of the Government, the power to repeal legislation? I think not. This Chapter 33 Laws of Utah 43 (Section 20-2-4.10 Utah Code Annotated, 1943) attempts to do this and the delegation to the Supreme Court is an unconstitutional exercise of the legislative power and in violation of Article V, Section 1 of the Constitution of Utah, Article VI, Section 1 of the Constitution of Utah, and Article VIII, Section 1 of the Constitution of Utah. This matter is discussed in a number of cases in the State of Utah. The leading cases on the subject being:

Young v. Salt Lake City, 24 Utah 321, 67 P. 1066;

Mulcahy v. Public Service Commission, 101 Utah 245, 117 P. 2d 298;

Revne v. Trade Commission, 192 P. 2d 563;

Western Leather & Finding Company v. State Tax Commission, 87 Utah 227, 48 P. 2d 526;

Tite v. State Tax Commission, 89 Utah 404, 57 P. 2d 734;

Whitmore v. Hardin, 3 Utah 121, 1 P. 465;

State v. Goss, 79 Utah⁵⁵⁷, 11 P. 2d 340.

Special attention is called to the case of *State v. Goss*, supra. The Supreme Court was, by said Chapter 33, given the power to prescribe the forms of pleadings, among other things, but to change the statute law is to do more than prescribe a form of a pleading, and a discussion of the delegation of power may be found in the following cases:

Rowell v. State Board of Agriculture, 98 Utah 353, 99 P. 2d 1;

In re: Handleys Estate, 15 Utah 212, 49 P. 829, 62 American State Reports 926, 151 U.S. 443, 38 L. Ed. 227.

POINT 2. (B) THE MOTION TO DISMISS SHOULD HAVE BEEN GRANTED. THE MOTION TO MAKE MORE DEFINITE AND CERTAIN SHOULD HAVE BEEN GRANTED.

The finding and conclusion of the Court indicates the difficulty which must be met by a defendant where the

plaintiff is not required to set out more definitely, (Tr. 97) under a general charge of cruelty, the cruelty upon which the charge is based. In this case, the Court did not find on the charge of cruelty and made findings on drunkenness. The defendant could draw only the conclusion that the charge was cruelty and based upon drunkenness. (Tr. 3) But the finding was contrary to this and the motion should have been granted, so that defendant would have been able to properly be apprised of the Complaint with which she should have to meet.

POINT 3. (C) THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING NUMBER TWO AND IT IS CONTRARY TO THE FACTS AND CONTRARY TO THE LAW.

This point requires a reference to the file, the record and the transcript.

At the commencement of the trial, defendant made a motion for a guardian ad litem, but defendant did not appear at the trial, and the Court allowed a recess so that counsel on both sides could go to the home of plaintiff and defendant to see why defendant did not appear. (Tr. 34) The Court had before it the report of counsel on that matter. The Court also had before it the file of the Insane Register, entitled: Vera Catherine MacDonald, No. 6088, in the Third Judicial District Court of the State of Utah, in and for the County of Salt Lake. That record was introduced in the case and had been in the case since the hearing before the Honorable J. Allen Crockett, one of the Judges of the above entitled Court on his Order to Show Cause on October 2, 1950. That

record showed that the plaintiff had sworn to an affidavit on June 11, 1949, charging the defendant with being insane. (Tr. 66-67-68) That thereafter, the said defendant was committed for thirty days observation to the Utah State Hospital by Judge A. H. Ellett, one of the Judges of the above entitled Court on June 21, 1949. That said committment was based on the Certificate of Dr. R. H. Darke, and Dr. V. M. Sevy, appointed by the Court to examine said defendant. That that Certificate is before this Court and the findings of the Doctors are before this Court. That the Certificate of the said doctors is to the affect that the departure of the patient from normal is so far deranged as to endanger her health, person and property. And the Court will observe that the doctors found that she was psychotic. Now, it is true, and was stipulated that if Dr. Darke was called, that he would say that she was not psychotic, (Tr. 110) but this is no contradiction of his Certificate and the Certificate of Dr. V. M. Sevy is uncontradicted. True, after the defendant was committed as insane on June 21, 1949, Dr. Owen P. Heninger, Superintendent of Utah State Hospital wrote a letter, dated March 23, 1950, stating that the defendant, who was committed on the thirty day observation basis was studied, and that she was found to be without psychosis and she was therefore released. In the first place, this is not a Certificate of the Superintendent.

See Section 85-7-11 Utah Code Annotated, 1943, as amended by Chapter 121 Laws of Utah, 1945.

This was not a Certificate stating that the patient had recovered her reason, nor does said letter fall within the provisions of Section 85-7-17 as amended by Chapter 121 Laws of Utah, 1945. In any event, there is no record showing that the Judge entered an Order restoring the patient to competency until after the divorce action was filed, nor did the Superintendent report as to whether the patient should be discharged to the care of a guardian, relatives or friends. Or, that she was harmless. Or, could be properly cared for by them. In any event, no order was made at all until after the commencement of the suit by the plaintiff against the defendant. The evidence showed also that the plaintiff in this action had previously commenced an action, No. 82860, before the District Court of the Third Judicial District of the State of Utah, in and for the County of Salt Lake, on or about February 18, 1948. In that action, the plaintiff charged the defendant was guilty of habitual drunkenness, and for the past two years had been almost constantly under the influence of intoxicating liquor. That she had become slovenly and careless in her personal habits and would not care for and maintain the home of plaintiff. That this action was later dismissed and the parties went back to living together at their home at 998 South 15th East Street, Salt Lake City, Utah. (Tr. 68-70-72)

That on or about January 16, 1951, in the Matter of the Estate of Vera Catherine MacDonald, Incompetent, No. 33120, before the District Court of the Third Judicial District of the State of Utah, plaintiff, Joseph G. Mac-

Donald swore that the said Vera Catherine MacDonald was mentally incompetent to manage her property by reason of habitual drunkenness and that she was likely to be deceived by artful or designing persons, and upon a hearing of said Petition on February 2nd and 3rd, 1951, the Honorable Joseph G. Jeppson, one of the Judges of the said District Court, found that Vera Catherine MacDonald is a habitual user of alcohol; that she is for long periods of time in a state of intoxication; that said intoxication extends over a period of two or three weeks followed by periods of sobriety of four or five days; that Vera Catherine MacDonald while in such a state of intoxication fails to properly attend to matters of great importance to her and matters involving her property rights; and, as a result, the Court Decreed that Vera Catherine MacDonald is mentally incompetent to manage her property, and that Walker Bank & Trust Company be and is hereby appointed guardian of the estate of said Vera Catherine MacDonald.

That the testimony of the plaintiff shows that the defendant started drinking so that he began to notice it, when they were living in Sacramento, California. That this drinking continued to get progressively worse; and that after the couple moved to Salt Lake City, and while they were living at the Piccardy Apartments, the said plaintiff had the defendant at the Mountain View Sanatorium for treatment and had a doctor treat her. (Tr. 66) But her drinking continued to get more pronounced, until there was only a period of ten days or a week be-

tween completely drunken stupors. (Tr. 48) That she was again taken to the Mountain View Sanatorium in 1946. That later on she was taken to the State Hospital at Provo, Utah, and on another occasion was taken to said hospital for treatment during the period from 1946 to 1950. The plaintiff further testified that the defendant drank to such an excess that the periods of sobriety for some time before the trial, were less than three days between intoxication. The plaintiff further testified that he was of the opinion that a guardian should be appointed to protect defendant's property.

POINT 4. (D) FINDING NUMBER THREE IS CONTRARY TO THE FACTS AND EVIDENCE AND CONTRARY TO LAW.

The evidence clearly shows that the plaintiff knew of defendant's drinking, had filed an action for divorce against her on that ground, and had dismissed it and had her treated at various sanatoriums, and that he went back to live with her at their home at 998 South 15th East Street, Salt Lake City, Utah. (Tr. 66-69-70-72)

POINT 5. (E) FINDING NUMBER FOUR IS CONTRARY TO THE LAW AND CONTRARY TO THE EVIDENCE.

The plaintiff's own testimony contradicts this finding and shows that for some period of time before he filed his divorce action (Tr. 102-104) he knew a woman, and while living in apartments down town, she visited him at these apartments, both in the daytime and at night, and he visited her at her apartment. True, he says that

the relationship was merely companionable, but he had given her a gift, and the evidence indicates that the plaintiff, a married man, was seeing considerable of the other woman. Besides that, he had commenced an action for divorce against defendant and had filed a petition against her on the ground that she was insane and she was committed to the Utah State Hospital at Provo, Utah.

POINTS 6-7-8-9-13. (F) FINDING NUMBER EIGHT IS CONTRARY TO THE LAW AND CONTRARY TO THE EVIDENCE AND THE EVIDENCE IS INSUFFICIENT TO SUPPORT SAID FINDING.

The evidence shows that the defendant is 56 years of age, and that she was approximately 31 years of age (Tr. 75) when married, and that the plaintiff is 54 years of age, and that he was approximately 29 years of age when married. The evidence shows that the defendant was a cultured woman when she married the plaintiff and came from a good family. (Tr. 75-76-77) That the plaintiff and defendant have lived in a manner consistent with the plaintiff's salary and his position, and with the culture of the defendant. That the plaintiff is in good health, and the defendant is in very poor health, and as a matter of fact, as this Brief is written, is confined to the Holy Cross Hospital. Evidence shows that the plaintiff will retire at the age of 65 years and may retire at 60 years. (Tr. 60) At that time, he will have no earning capacity, and the defendant will be 67 years of age, if then living. True, the defendant has approximately \$6,-

900.00 in the bank, and the furniture is hers, and the husband's share of the house has been awarded to the defendant. But, with it goes the duty of paying off the mortgage, paying the upkeep on the house and the taxes, and the costs incident thereto. At the time that the plaintiff is retired, he will not be receiving as much in salary as he now is, (Tr. 60) and at that time, the defendant may require support from plaintiff and not be able to get it. It is contrary to common judgment that the amount awarded defendant will keep her from becoming a public charge for ten years. With present day prices and costs incident to sickness, it may well be that she will not have sufficient to care for her for more than five years. But in any event, that is her own money and she is entitled to more than to be required to live on her own money. Finding Number Eight presupposes that the defendant can come into the Court when she is in danger of becoming a public charge and ask for a modification of the Decree awarding her \$10.00 a year, and get an award of alimony. (Tr. 12) But at that time, this may be a useless procedure. The plaintiff may have retired, or he may have remarried, or he may have become ill and unable to work, or sickness may engulf the defendant so that she may be required to spend her money very rapidly. She may not be able to sell the house for as much as supposed, but she must continue the payments thereof.

As the Court said in the case of *Pinion v. Pinion*, 92 Utah 255, 67 P. 2d 265, the rule as to the elements to be taken into consideration in awarding alimony are as follows:

1. The amount and kind of property owned by each of the parties.
2. Whether the property was his before coverture or accumulated jointly.
3. The ability and opportunity of each to earn money.
4. The financial condition and necessities of each party.
5. The health of the parties.
6. The standard of living of the parties.
7. The duration of the marriage.
8. What did she give up by the marriage.

The function of alimony is not to prevent a person from becoming a public charge but is to provide for the defendant as her station in life demanded and her contribution to the marriage over a long period of life entitled her to, and as her condition of health and ability to work demanded.

Cody v. Cody, 47 Utah 456, 154 P. 952;

Friedli v. Friedli, 65 Utah 605, 238 P. 647;

Stewart v. Stewart, 66 Utah 366, 242 P. 947.

While it is true that the granting or withholding of alimony is a matter of discretion of the court,

Anderson v. Anderson, 55 Utah 544, 188 P. 635.

the Court will not allow an abuse of discretion and the Supreme Court may substitute its judgment.

Dahlberg v. Dahlberg, 77 Utah 157, 292 P. 214;

Hendrix v. Hendrix, 91 Utah 553, 63 P. 2d 277.

It may be contended that Section 40-3-9 Utah Code Annotated, 1943, bars the defendant from all rights to alimony, but Section 40-3-5 clearly shows that an allowance may be made for the defendant.

Schuster v. Schuster, 88 Utah 257, 53 P. 2d 428;

Wooley v. Wooley, Utah, 195 P. 2d 743, 113 Utah 391;

Greener v. Greener, 212 P. 2d 194 (Utah).

The said Section 40-3-9 Utah Code Annotated, 1943, is the same as the Iowa Section and the Iowa Supreme Court in the cases of *Blain v. Blain*, 200 Iowa 910, 205 NW 785, and *Mitchell v. Mitchell*, 193 Iowa 153, 185 NW 62, held that the Court has power upon the granting of a divorce to award alimony to the guilty parties in a proper case. Our Court has consistently awarded alimony in such cases.

See *Wooley v. Wooley*, *supra*;

Note 82 A.L.R. 548.

Kennedy v. Kennedy, 302 Michigan 491, 5 NW 2d 438, 143 A.L.R. 617.

Though the decision was against the defendant, she is entitled to alimony sufficient to maintain her. And in any event, if the Court wishes her to fail to be a public charge, it would seem more reasonable to require a certain sum of alimony to be paid to her or to her guardian, who has now been appointed, during the earning years of the plaintiff's life, so that it can be stored up against the time when she will need it to avoid becoming a public charge.

POINT 18. (G) THE COURT ERRED IN GRANTING A DIVORCE TO PLAINTIFF IN VIEW OF PLAINTIFF'S TESTIMONY SHOWING THAT THE PLAINTIFF DID NOT PERFORM THE OBLIGATIONS OF MARRIAGE ON HIS PART AND WAS GUILTY OF MISCONDUCT WHICH IN ITSELF WAS A GROUND FOR DIVORCE.

In this connection, plaintiff testified he drank with a certain other female and took her to parties. (Tr. 101) That he has seen her seven or eight times a month. (Tr. 101) That during the year 1950, (Tr. 104) she had come to his apartment. That he has had drinks with her. (Tr. 103-102)

The evidence brought out on cross examination of the plaintiff brings him clearly within the rule that one

who seeks redress for the violation of a contract resting upon mutual and dependent covenants, must himself have performed the obligations.

17 American Jurisprudence, Section 233,
page 267.

The testimony of the plaintiff with relation to his visits with the unnamed woman show that he did not perform the obligations of this contract, but violated it.

Oberland v. Oberland, 201 Miss. 228, 29 S.
2d 822;

Pavelich v. Pavelich, 50 N.M. 224, 174 P. 2d
826;

Chavez v. Chavez, 39 N.M. 48, 50 P. 2d 364,
101 A.L.R. 634, Note 646.

The Court, in the Chavez case, said the action of defendant, which was the subject of recrimination in that case, would be a bar to the plaintiff's suit if discovered at any time before the Decree was entered.

POINTS 12-14. (H) THE FINDINGS AND CONCLUSIONS ARE INSUFFICIENT TO SUPPORT THE DECREE AND THERE ARE NO FINDINGS ON THE ISSUE OF CRUELTY WHICH WAS PRESENTED BY PLAINTIFF'S PLEADING.

What has been said about the evidence applies to this point.

Friedli v. Friedli, 65 Utah 605, 238 P. 647.

POINTS 10-11. (I) ALL OF THE ACTS RELIED UPON BY PLAINTIFF WERE COMMITTED BY DEFENDANT WHILE SHE WAS NOT RESPONSIBLE FOR HER ACTIONS.

It is a good defense to an action for divorce to show that the acts relied upon as grounds were committed while the defendant was insane.

17 *American Jurisprudence*, Section 230, page 267;

Power v. Power, 18 Kans. 371, 26 American Reports 774;

Coombs v. Coombs, 171 Minn. 258, 213 NW 906;

Walker v. Walker, 140 Miss. 340, 105 S. 753, 42 A.L.R. 1525;

Anderson v. Anderson, 89 Neb. 570, 131 NW 907, Annotated cases 1912 C 1, 42 A.L.R. 1533, 34 LRA 164, 65 American State Reports 82;

Waid v. Waid, 117 Ind. App. 4, 66 NE 2d 907.

The acts complained of, after the dismissal of the first complaint and the condonation of those acts, happened so shortly before the time the defendant was committed on June 21, 1949, and so shortly thereafter, that the acts of the defendant can not be those of a competent person, and the cruelty or drunkenness relied on must be presumed to be committed by a person who is not responsible for her actions. (Tr. 64-66-68-70-86-97)

Walker v. Walker, 140 Miss. 340, 105 S. 753, 42 A.L.R. 1525 at 1530. See Note 34 L.R.A. 164.

Here was a defendant who had been in a sanatorium twice, who the plaintiff testified had tried to injure herself by cutting her throat, against whom the plaintiff had previously filed a complaint charging her with habitual drunkenness and in which he charged that the defendant had been almost constantly under the influence of intoxicating liquor. That the plaintiff had sworn to an Affidavit alleging the defendant to be insane on June 11, 1949. (Tr. 66, 68) The Certificate of the doctors shows that the doctors appointed by the Court found her to be psychotic and insane. The evidence of the plaintiff shows that she had drunk to such an extent for the last few years, that the periods of sobriety were, most of the time, less than three days. The letter of the Superintendent of the Utah State Hospital is not a Certificate saying that she is restored. Section 85-7-11, Utah Code Annotated, 1943, as amended by Chapter 121 Laws of Utah, 1945. Nor does such letter fall within the provisions of Section 85-7-17, Utah Code Annotated, 1943, as amended by Chapter 121 Laws of Utah 1945. In any event, the only record showing that the Judge restored the patient to competency is the entry made on March 28, 1950.

POINTS 14-15-16. (J) THE COURT SHOULD HAVE APPOINTED A GUARDIAN AD LITEM TO APPEAR AND REPRESENT THE APPELLANT IN THIS ACTION AND AID IN HER DEFENSE.

An action for divorce should not be tried against one who is incompetent without the appointment of a Guardian Ad Litem.

Section 104-3-6, Utah Code Annotated, 1943. Especially, time should be allowed for her recovery.

Toepffer v. Toepffer, 151 Kans. 942, 101 P. 2d 904;

Hugley v. Hugley, 204 Ga. 692, 51 SE 2d 445.

The usual procedure in such cases is to appoint a Guardian Ad Litem to appear for the defendant.

Garnett v. Garnett, 114 Mass. 379, 19 American Reports 369.

The Court had before it the Insane Register, Number 6088, and the previous action filed by the plaintiff, Number 82860. It heard the testimony of the plaintiff, the motion for the appointment of a guardian ad litem was made both before and after the testimony of the plaintiff. The Court should not have proceeded without appointment of a guardian under the provisions of Section 104-3-6, Utah Code Annotated, 1943, because, at least, the defendant was incompetent to properly present her defense and cross-complaint. It must be remembered that this divorce action was not brought upon a complaint alleging the permanent insanity of the defendant, nor was the procedure in such cases followed.

Section 40-3-1, Utah Code Annotated, 1943, as amended by Chapter 46 Laws of Utah, 1943.

POINT 17. (K) THE APPELLANT'S MOTION FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED.

While the Motion for a New Trial was pending, proceedings were heard on the alleged incompetency of the

defendant and a finding of incompetency made by another Judge of the same Court, before whom the matter was heard.

The Court, on or about January 16, 1951, in the case before the Court, Number 88081, stated that there was grave danger that the funds of the defendant on deposit at Walker Bank & Trust Company would be dissipated by the defendant, so the Court ordered her not to withdraw or expend any money from said account.

In the case of *Steed v. Steed*, 54 Utah 244, 181 P. 445, the Court held that since the acts of cruelty and the misconduct of the defendant were at the time that the defendant was insane, that the plaintiff was not entitled to a divorce. It must be remembered in that case, there was a guardian ad litem appointed. However, the facts in the case are parallel with the case at issue, in that there showed a long period of progressive deterioration. The Supreme Court of this state, in the Steed case, said that an action for divorce was an equity case and the party was entitled to the Supreme Court's judgment on the evidence and the Court further said that if the Court's finding was clearly against the evidence, it was the duty of the Supreme Court to direct findings in accordance with the evidence. And the Court called attention to the fact the plaintiff could commence an action under the provisions of the Section relating to insanity and that in

such an action the State would be represented by the County Attorney and the defendant by a guardian ad litem, and the best interests of the insane spouse, as well as all interested in the controversy would be safeguarded and preserved.

Respondent has a social responsibility here that cannot be denied, and one he should not be permitted to avoid. The defendant should not have to be faced with becoming a public charge before respondent is obliged to support the appellant. The parties have been married about twenty-nine years and several children have died in infancy. The mother has been through many heartaches and mental suffering and whatever her shortcomings, the respondent should not be allowed to lightly cast her aside and let society pick her up and assume a burden he accepted when he solemnly said "For better, for worse; in sickness or in health."

CONCLUSION

The decision of the lower Court should be reversed and a new trial ordered and direction be made that a guardian ad litem be appointed to represent the defendant and that she should be awarded alimony pending the retrial of said matter in the sum of \$200.00 per month, and that she should be awarded her costs and attorney's fees, and plaintiff should be required to pay the monthly payments on the mortgage pending a new trial and to be

required to reimburse the appellant for payments of said mortgage that she is required to make pending disposition of this appeal, and that the requirement that he pay to defendant the sum of \$378.75 which appellant paid to prevent foreclosure on the house, should be ordered to be paid to the appellant forthwith by respondent.

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