

1951

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

Utah Supreme Court

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E. C. Jensen; John B. Snow; Robert John Jensen; Attorneys for Respondent and Plaintiff;

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In the Supreme Court of the State of Utah

JOSEPH GERALD MACDONALD

Respondent and Plaintiff,

vs.

VERA CATHERINE MACDONALD

Appellant and Defendant.

Case No.

7665

FILED

JUL 20 1951

Clerk, Supreme Court, Utah

RESPONDENT'S BRIEF

E. C. JENSEN

JOHN H. SNOW

ROBERT JOHN JENSEN

*Attorneys for Respondent and
Plaintiff*

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Respondent and Plaintiff,

vs.

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Appellant and Defendant.

Case No.

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

Respondent is not satisfied with appellant's statement of facts, and here makes a brief chronological resume of the evidence in the belief it will be of considerable aid to the court. References in this statement of facts are to plaintiff and defendant, who are the respondent and appellant, respectively.

Joseph Gerald MacDonald, the plaintiff, and Vera C. MacDonald, the defendant, were married on June 15, 1922 in Oakland, California (R 45). In 1927 the parties moved to Los Gatos, California, for a year and

a half and then returned to Oakland, and in December of 1930 they took up residence in Sacramento (R 76). The plaintiff came to Salt Lake City on November 15, 1945, and was joined by defendant some months later. In October, 1946, they purchased their home at 998 South 15th East (R 45). The defendant had three miscarriages preceding the birth of their present child, Barbara, who was born in Oakland in 1925 (R 77, 78), and is now an adult in a convent (R 45, 79), and not a dependent (R. 108).

During this period and for the last thirty years plaintiff has been employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (R 55). His employment required him to work away from home on the road, except for Saturdays and Sundays (R 46). He is at present its General Agent in Salt Lake City (R 45).

Defendant first started drinking to excess in 1941, four years prior to coming to Salt Lake. At that time the period between drinking bouts was ten days to a week and after the parties came to Salt Lake defendant began drinking continuously (R 46). The situation became more aggravated in 1947 and still worse in 1948 and 1949. During the latter period of the marriage, the defendant would drink for two or three weeks, until nauseated; then, after the period of nausea had passed, immediately start drinking again (R 48, 49, 95, 96). The defendant would wake plaintiff during the nights by pounding on his belly, screaming at the

top of her voice, kicking the door to his bedroom if he closed and locked it (R 51). She acted generally as a wild person while under the influence of intoxicants (R 68). During 1948 and 1949, plaintiff frequently stayed away from home at night in order to get his sleep (R 106).

Plaintiff and defendant are members of the Catholic Church. In 1946 the plaintiff sought help from Father LaBranch, his Priest, and also consulted with Dr. Walker. Dr. Walker recommended the defendant be taken to the Mountain View Sanitarium in Salt Lake City and the wife entered willingly (R 46, 47). The defendant was in the sanitarium on two occasions during this year and remained there about three or four weeks (R 64, 65). While there she got hold of some whiskey and caused a disturbance and attempted to cut her throat (R 47, 48). The defendant was taken to the County Hospital after cutting herself and thereafter was taken to the State Mental Hospital where she remained for thirty days. She was subsequently released and returned to the parties' home (R 65, 66). In February of 1948, the plaintiff left the defendant and filed an action for divorce. He did this only after consulting with his Priest, who was thoroughly apprised of the situation, and because he was unable to rest and do his work properly (R 50, 113). The action was dismissed with prejudice on plaintiff's motion on the 10th of May, 1948 (R 63, 113). After dismissing the complaint, the plaintiff returned home and lived with de-

fendant until October, 1949. The defendant had stated that she would stop drinking, but after the parties resumed living together the defendant began drinking again (R 69, 70).

The defendant was, in June 1949, committed to the State Mental Hospital for 30 days observation upon the plaintiff's affidavit and after hearing. (Insanity Record 6088, R 114, 66-67). There was at that time, however, no psychosis (R 110). This action was taken by the plaintiff after consulting with Dr. Walker and Msgr. McGuire (R 49, 67), and during a period when defendant had been drinking heavily (R 74). The plaintiff visited the defendant at the hospital on Sundays and she seemed perfectly normal. She was released sometime in July 1949 without plaintiff's knowledge and commenced drinking immediately (R 49-50, 70). After the defendant was released from the State Mental Hospital, plaintiff and defendant lived together at their home in Salt Lake, but plaintiff did not have marital relations with defendant and had not had such relations for approximately five years. The parties occupied separate bedrooms (R 68). Plaintiff did not forgive defendant for her drinking. From the summer of 1949 he tolerated the drinking and did no more than live with her and attempt to get her to stop drinking (R 70-71-72).

Plaintiff left defendant in October of 1949, and lived elsewhere, but he attempted a further reconcilia-

tion at Thanksgiving time in November of 1949. His attempt was unsuccessful because defendant got drunk (R 50-51).

On January 1950, plaintiff filed his complaint for divorce commencing this action (R 1).

Plaintiff testified that he has been to celebrations at the clubs he has joined (see below) where it is a mixed party, and that he has had drinks with a particular female; that he has taken this particular woman to parties and that he has seen her several times a month; that their relationship is one of companionship (R 101). Plaintiff has been to her apartment where she lives with a daughter and a son; she and her daughter have been to plaintiff's apartment for dinner, and there have been occasions when she has come to plaintiff's apartment with him; he gave her a Christmas present (R 103). Plaintiff stated this acquaintanceship has existed for about a year prior to date of trial (R 102, 104).

The testimony and exhibits introduced on the trial of this case show the parties' financial condition as follows: That plaintiff and defendant have acquired a home and lot at 998 South 15th East, Salt Lake City, Utah, for which they paid \$15,000.00 on October 1, 1946, and that within 90 days of the trial of this cause an offer had been made of \$13,500.00, which had been rejected by the plaintiff (R 53). The plaintiff testified

that this house, except for minor repairs, was in good condition (R 94). Against the home of the parties is an indebtedness of \$6,000.00, secured by a mortgage to the First Security Bank of Utah. The parties have also acquired household furnishings in their home of a reasonable value of \$2,000.00 (R 56, 84-85). They have acquired a 1949 Hudson two-door sedan of the value of \$1400.00, against which there is a lien of \$212.80 (R 88, 54).

As their individual property: The wife received during 1950 as an inheritance \$8,000.00, of which she has \$6948.25 on deposit at Walker Bank & Trust Company (R 55, Pl. Ex. 1), and the wife has an expectancy from her mother's estate; her mother being at the time of the trial 82 years of age (R 56). The plaintiff has no bank account or property other than the car and is in fact under the following indebtedness: He owes \$200.00 to his sister for personal loan and he owes \$135.75 to the Continental National Bank & Trust Company (R 53-54).

Plaintiff testified that his gross earnings are \$481.00 per month, out of which are made a compulsory deduction of \$18.00 per month for railroad retirement, and a deduction for income taxes, reducing his income to \$387.56 per month (R 52). That the only income he has to live on is his salary (R 54). Plaintiff states that his work is the solicitation of business from shippers and receivers for his railroad in competition with other

railroads; that his area includes Wyoming, Oregon, eastern Nevada, Utah and Idaho and that he has an expense account when on the road to cover actual expenses (R 58). This expense account is a maximum of \$150.00 per month and covers meals, lodging and car expenses (R 81-82). His car expenses would be \$48.00 to \$50.00 per month at six cents per mile (R 82). He further testified that he is living in an apartment, eats at hotels and restaurants (R 59), and his meals cost him approximately \$90.00 per month (R 83). He pays rent of \$54.00 per month and utilities of \$10.00 to \$12.00 per month (R 85). He pays \$35.00 to \$40.00 per month for clothes and approximately \$15.00 for tobacco, liquor, etc. Plaintiff testified that the nature of his business is such that he must do entertaining not covered by company expenses and that he must belong to certain clubs and social organizations in connection with his business (R 55, 58, 59, 83). He further testified that he is required to have an automobile in his business (R 52).

Plaintiff testified that he had been paying \$125.00 per month temporary alimony since the filing of an order to show cause (R 53). That he had been paying in addition \$74.31 on the house loan, except for five months, which total of \$378.95 he acknowledges he now owes to the defendant (R 53, 61, 107). He may optionally retire at the age of sixty and is required to retire at the age of sixty-five, and that his retirement pay, based on his average earnings, during a particular period, would be approximately \$125.00 or \$126.00 per

month (R 60).

Plaintiff testified that the expenses in maintaining the house heretofore mentioned would be \$1.75 for light, \$3.54 for telephone and approximately \$5.00 average for the gas throughout the year (R 86), plus the mortgage payments.

The plaintiff stated that he is now in good health, that he is 54 years of age and that he does not know at this time whether or not he will retire at 60 or 65 (R 89). That his wife is in good health when she is not drinking and she has had three physical examinations which indicated she was in good physical condition, except for her addiction to drink (R 107). He testified that his wife is 59 years of age (R 104).

Based upon the foregoing facts in evidence, the trial court made the following findings of fact: That for a period of approximately four years defendant has been habitually addicted to the use of intoxicating beverages and is an habitual drunkard; that defendant has periods when she is perfectly competent to act for herself and is in possession of all her faculties; that defendant is competent to be sued in this action without appointment of a guardian; plaintiff has at no time forgiven nor condoned defendant's habitual drunkenness; that plaintiff has not treated defendant cruelly and he lives apart from her with just cause and because of defendant's fault; that the parties own a home worth \$13,000.00

against which is a lien of \$6,000.00 and which, on sale, should pay \$7,000.00 net proceeds; that the furnishings of said home are worth \$2,000.00 and defendant has as her own funds \$6,947.25; that plaintiff earns \$481.80 per month before deductions and has no other funds or income; that it would be fit and proper to award defendant the home and its furnishings, less one or two specified items, a nominal alimony and attorney's fees; that plaintiff should be awarded a divorce as provided by law and should be awarded the 1949 Hudson automobile; that should defendant's financial position become such that she is in danger of becoming a public charge, the duty of support should fall upon plaintiff (R 10, 11, 12).

STATEMENT OF POINTS

1. Defendant's Motion to Dismiss and Motion to Make More Definite and Certain were properly denied.

2. The Findings of Fact and Conclusions of Law are in conformity with the evidence and are supported in law. Plaintiff was properly awarded a divorce; the awards of property and alimony are proper.

3. Defendant did not prevail on her defense nor on her Cross Complaint for separate maintenance or divorce.

4. Defendant was responsible for her misconduct and it was proper that she be sued without a guardian.

ARGUMENT

Counsel for the Respondent answers the points and arguments of Appellant in a slightly different order than as presented in appellant's brief. Respondent proceeds upon the premise that those points set forth in the index to Appellant's brief which are not argued, are abandoned, but all points argued by Appellant are answered herein.

POINT 1. DEFENDANT'S MOTION TO DISMISS AND MOTION TO MAKE MORE DEFINITE AND CERTAIN WERE PROPERLY DENIED. (Appellant's Arguments (A) and (B).)

(a) The Complaint need not have been verified. The Rule 11 of the Utah Rules of Civil Procedure provides in part:

“Except when otherwise specifically provided by rule, pleadings need not be verified or accompanied by affidavit.”

This rule was adopted by the Supreme Court in conformity with the provisions of 20-2-4.10 U. C. A. 1943, which is not a delegation of legislative power, but an acknowledgment by the State Legislature of the inherent authority of the courts to control matters of procedure by court rule. This statute provides that upon the adoption of appropriate rules of procedure, all statutes in conflict therewith shall be of no further force and effect. Appellant's cases on the unconstitutional delegation of legislative authority to another branch

of the state government are not in point. If the Supreme Court, by rule, had attempted to enumerate the grounds for divorce, substantive rights of litigants would have been affected, but the rule deals only with the form of the pleading asserting such a cause of action.

There can be no doubt that Rule 11, as adopted, was intended to reach the provisions of 40-3-4. The court is asked to consider the Federal Rule, from which has been deleted the words "or statute" which follow the phrase "Except when otherwise specifically provided by rule" By leaving out the exception and the reference to specific statutes requiring pleadings to be verified, the Supreme Court has obviously intended that the only exceptions be those set forth in the rules.

In any event, the lack of a verified complaint is not jurisdictional and can be waived. See *Patterson v. Patterson*, 190 Pacific 2d 887, 164 Kan. 501. A motion to dismiss based upon the ground that the complaint fails to state a cause of action does not raise the point (R 4). Further, Appellant's Answer, Cross-Complaint and Counterclaim are not verified (R 5-8), and this cause proceeded to judgment without this matter having been previously presented and argued.

(b) The statement of grounds for divorce was sufficient and was definite and certain.

Paragraph 4 of Respondent's Complaint sets forth two grounds for divorce. They are cruelty causing

great mental distress and habitual drunkenness (R 1). Upon the trial of the cause he abandoned the ground of cruelty, he presented no evidence upon this ground except as it was pertinent to the ground of habitual drunkenness, and no findings were made on cruelty (R 10), nor was the decree of divorce based upon such a ground.

The grounds for divorce as set forth in 40-3-1, subsections 5 and 7, which are habitual drunkenness of the defendant, and cruel treatment of the plaintiff by the defendant, are equally brief. Respondent has certainly pleaded his grounds for divorce with as much certainty and definiteness as required by the Complaint set forth in Form 18 of the Appendix of Forms, U. R. C. P. It is to be noted that these forms are approved as sufficient under the provisions of Rule 84.

Appellant states that she was not properly apprised of the complaint which "she should have to meet." In this regard the Federal Courts in construing their Rule 12, have uniformly held that a motion for a more definite statement should only be granted when the information sought is necessary to frame a responsive pleading and is not for the purpose of preparing for trial. See *Federal Practice and Procedure*, by Barron and Holtzoff, section 362. Any further particulars which defendant may need in order to prepare for trial should be obtained by depositions, interrogatories, and other discovery procedure. See state cases cited on page 687 of volume one of the above work. Nearly a year expired

between the filing of the complaint and the trial of this cause (R 1, 24) in which time such information could have been obtained.

POINT 2. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE IN CONFORMITY WITH THE EVIDENCE AND ARE SUPPORTED IN LAW. PLAINTIFF WAS PROPERLY AWARDED A DIVORCE; THE AWARDS OF PROPERTY AND OF ALIMONY ARE PROPER. (Appellant's Arguments (D , (F) and (H).)

The evidence in this case clearly reveals the tragedy that occurs when a person becomes a chronic alcoholic. It also reveals the great patience and consideration with which the defendant met the daily difficulties of making a home with defendant. Since 1941 the defendant had been drinking excessively (R 46). Plaintiff sought expert medical help to meet this problem. He sought the help of his church (R 46-95). He placed the defendant in a private sanitarium on two occasions and when defendant appeared to be about to injure herself she entered the state mental hospital (R 47, 64), apparently voluntarily (See Insanity Record 6088, page 1). After seven years of defendant's excessive drinking, in February 1948, plaintiff filed for a divorce, but even then only after asking for the advice and help of his priest (R 50, 113). Plaintiff reconsidered, dismissed his complaint and attempted to make a go of the marriage, but defendant's resumption of her drinking made this impossible (R 69, 70). Violence to his person and a period of particularly heavy drinking caused plaintiff

to doubt his wife's sanity. She was committed for a period of thirty days observation; during which period she was dehydrated and acted normally. But again on her return home she commenced her drinking. Plaintiff left the defendant in October, 1949, and yet attempted a last reconciliation in November 1949. During this entire period defendant's drinking became progressively worse and more impossible to deal with (R 48, 49, 95, 96).

No possible finding of fact other than habitual drunkenness on the part of defendant could have been made by the trial court. Clearly it is a confirmed habit satisfying the requirements of the statute. *Holm v. Holm*, 139 Pacific 937, 44 Utah 242.

Appellant argues that because plaintiff knew of defendant's drinking and lived with her after her confinement in a sanitarium and after his filing divorce action that he had forgiven her and condoned her chronic drunkenness and cannot now complain of it.

It is submitted that forgiveness or condonation are not made out on the facts of the case. Further, the dismissal of a prior divorce action followed by repeated misconduct of a defendant does not constitute condonation. *Mayo v. Mayo*, 43 Pacific 2d 535, 3 California 2d 51. Condonation is conditional upon exemplary future behavior. *Thum v. Thum*, 98 Pacific 2d 279, (Colo.), and the cases therein cited. Forgiveness, if this record

disclosed it, would not bar plaintiff from seeking relief where the defendant's misconduct is resumed, and the law permits the injured party to assert all the prior misconduct, as well as that occurring subsequent to the ineffective condonation. *Thum v. Thum*, supra; *Lassen v. Lassen*, 7 Pacific 2d 120, 134 Kan. 436; *Burt v. Burt*, 72 Pacific 2d 524, 48 Wyoming 19; *Arnold v. Arnold*, 174 Pacific 2d 674, 76 Cal. App. 2d 877.

Apparently neither of the parties had any considerable amount of property at the time of their marriage. The wife at that time was not employed and lived with her parents (R 77). She brought no property to the marriage (R 76, 77). The property accumulated by the parties was purchased from the earnings of plaintiff, with the exception of two or three hundred dollars the defendant contributed to the purchase of a home in Sacramento, California (R 77, 99) which occurred sometime in the 1930s.

As set forth in the foregoing statement of facts, the parties have as their joint property, \$13,500.00, less a \$6,000.00 mortgage, in a house; \$2,000.00 in furnishings; \$1400.00, less a lien of \$212.80, in a car. Plaintiff has no separate estate. Defendant has \$6948.25 on deposit and a substantial expectancy in her mother's estate.

The net value of the joint estate as found by the court is approximately \$10,200.00 (house, car, furnish-

ings). Of this amount, \$9,000.00 was awarded to the defendant and \$1200.00 to the plaintiff. Combined with her separate estate the defendant has \$16,000.00 in property and cash, approximately.

The plaintiff's net is the \$1200.00 in the car and his net worth is reduced by the amount of the debts he has accumulated during the period he was paying on the mortgage and the temporary alimony. In addition to this, defendant was awarded attorney's fees of \$250.00, although there was absolutely nothing in the record to show a need or inability of defendant to pay her own attorney. Defendant was further awarded a nominal alimony for the purpose of placing her future needs, if any arise, upon plaintiff (R 12-15).

The record discloses that defendant's health is not good but that she is in good health when not drinking (R 107). Counsel for appellant asserts in his brief that she is now in a hospital, but there is no such evidence before the trial court, and this court should refuse to consider this matter as the full extent of her disability and prospects of recovery cannot be ascertained. In any event, plaintiff concedes that the possibility of defendant becoming gainfully employed is slim if not non-existent and that the situation is, therefore, not materially changed.

Plaintiff is employed and earning \$481.00 gross per month, after deductions, \$387.56 per month (R 52).

He has expenses per month of meals \$90.00, rent \$59.00, utilities \$10.00 to \$12.00, clothes \$35.00 to \$40.00, miscellaneous amounts for cigarettes and liquor, etc. \$15.00 (R 83, 85) and in addition to this he must make car payments of \$53.10 (R 82) for he is required to have a car (R 52) and he has entertainment expenses for which he is not compensated (R 55, 58, 59. 83). As always there are amounts paid out which cannot readily be accounted for which will come out of plaintiff's earnings and there is the need for plaintiff to pay attorney's fees, the back alimony and the five months back mortgage payments. The effect of the temporary order for support money was to take all of plaintiff's savings and reduce him to the device of getting small loans to meet current expenses (R 88).

Appellant misstates the record when she asserts that upon retirement plaintiff will have no income. The evidence was that he will have an income of \$125.00 or \$126.00 per month (R 60) and that he could take other work at that time if it was not connected with a railroad (R 89). It does not follow that a future need of the defendant will not be met because of a decrease in plaintiff's earnings, although his earnings will undoubtedly decline.

A plain inference from the facts and an undoubted consideration of the trial court was the expense of the purchase of liquor by defendant for the years of her excessive drinking (R 89, 90). With plaintiff constantly

on the road it would have been impossible for him to refuse to give defendant control over some of the family funds and she had a joint checking account (R 46, 89).

The defendant was clearly at fault. It is her misconduct, continuing over many years. which has caused this marriage to fail. During the latter period of the marriage the defendant failed completely to perform her wifely duties around the parties' home. (R 96, 97). This court has held that whatever doubt there may be concerning a property settlement, "it ought to be resolved against the guilty party whose fault and wrongs and breaches of the marital relation destroyed the home and forced or brought about the separation. *Dahlberg v. Dahlberg*, 292 Pacific 214, 77 Utah 137.

Appellant contends that a guilty party may still be awarded alimony and cites the provisions of 40-3-5 as opposed to the provisions of 40-3-9, U. C. A. 1943. Respondent has no serious quarrel with the proposition that in a *proper* case such an award can be made. It would be well to consider the cases where the problem has come up. Appellant cites three: *Schuster v. Schuster*, 53 Pacific 2d 428, 58 Utah 257; *Woolley v. Woolley*, 195 Pacific 2nd 743, 113 Utah 391; *Greener v. Greener*, 212 Pacific 2nd 194, (Utah).

Greener v. Greener is not in point. No divorce was granted in this case and no alimony awarded. In *Schuster v. Schuster*, alimony in the fixed sum of \$1500.00 was

awarded to the plaintiff-wife who was also awarded the divorce. Obviously under the court decision, she was not at fault. In *Woolley v. Woolley*, the defendant-husband was awarded a divorce, the wife was given approximately one-third of the accumulated property and the trial court was ordered to retain jurisdiction so that the wife could realize her share of the increase in value, if any, of certain speculative mining interests awarded to the husband. This latter arrangement could be more accurately characterized as a property division with provisions for a future adjustment. It is hardly the payment of alimony as it is usually understood.

Taking the tests and manner of dividing the property in the *Woolley* case, and applying them here, a division of the net joint estate would result in defendant taking approximately \$3400.00 and the plaintiff \$6800.00. The plaintiff only received \$1200.00 and the defendant received \$9,000.00 under the decision in this case. Defendant, therefore, received a \$5600.00 advantage from the property division. At \$100.00 alimony per month it would be 56 months before she would have the equivalent; and this does not account for the earnings on the sum she now has the use of for this period. At \$75.00 per month it would be $74\frac{2}{3}$ months before she would receive the equivalent. Undoubtedly the trial court considered these matters before making the awards in this case.

Under no case or authority in this state is the de-

fendant entitled to a majority share of the accumulated property plus a substantial award of alimony. A fair division of the property would be as stated in the *Woolley* case, *supra*, at page 745, Pacific Reports:

“In determining generally what a wife is entitled to when a divorce decree has been granted to the husband, we have considered one-third as being a fair proposition.”

The difficulty of doing justice between litigants in a divorce suit as to the division of property and the awarding of alimony is undoubtedly one of the greatest problems to confront a court, trial or appellate. Each case must be considered on its own facts. *Dahlberg v. Dahlberg*, *supra*; *Allen v. Allen*, 165 Pacific 2d 872 at 875, 109 Utah 99, and the cases and texts therein cited. Elements to consider can be set forth, *Pinion v. Pinion*, 67 Pacific 2d 265, 92 Utah 255, but in the final analysis a solution is dependent upon the exercise of a sound judicial discretion. Though the rule may have once been otherwise, an appellate court will not substitute its judgment for the trial court, and unless there is a clear abuse of discretion, the lower court's decision will be affirmed, *Anderson v. Anderson*, 138 Pacific 2d 252, 104 Utah 104; *Allen v. Allen*, *supra*, and cases therein cited.

Appellant raises many arguments as to future contingencies which are highly speculative. The uncertainties, of the effect of a divorce decree upon the litigants, under future conditions are inherent in any divorce

action; and this is the reason modification under changed circumstances is permitted. Further, a court cannot consider separately any one factor, but must look at the whole of the case.

A careful consideration of the lower court's decision in this cause reveals that a lion's share of the joint property was awarded to defendant, although she might well have not been entitled to it; that this award was made in lieu of any substantial alimony payments; that the court considered this property, in addition to defendant's separate estate, should care for defendant for a considerable period of time as stated, approximately ten years.

Whether or not the finding of ten years is correct, the principle is the same, because the court further provided defendant with a nominal alimony to protect her in future circumstances. The plaintiff, on the other hand, who has not been at fault, is given a \$1200.00 asset, the car, has no further interest in the joint estate, is saddled with substantial debts, private and under the decree, and has only his salary left to him. This is what the plaintiff takes after contributing his all to the marriage through the twenty-nine years of its existence. It is submitted that the decree is more than fair to defendant.

The trial court having found the foregoing awards to be fair, just and equitable, it follows, of course, that

the Conclusions of Law and the Decree should be in conformity with said Findings, as they are (R 12-15).

POINT 3. DEFENDANT DID NOT PREVAIL ON HER DEFENSE, NOR ON HER CROSS-COMPLAINT FOR SEPARATE MAINTANCE OR DIVORCE. (Appellant's Argument (E) and (G).)

What respondent has previously stated about the evidence, and particularly the matters first set forth in Point 2 of his argument are applicable here. It is submitted the plaintiff was justified in living separate and apart from defendant and he did so because of her fault. There is no evidence that he failed to support her, to the contrary that he permitted her to draw on his bank account (R 89, 93) and has paid her temporary alimony pending trial. The necessary elements set forth in Section 40-4-1 U. C. A. 1943 providing for separate maintenance were not proved.

Defendant was permitted at the time of trial to amend her cross complaint to state grounds for a divorce, though an amended pleading or written pleading was not filed and none appears in the record. The evidence upon which defendant contends she was entitled to a divorce, as we understand it, is that plaintiff signed an affidavit of insanity against defendant, that he had filed a prior divorce action, and that during the year preceding the trial of this cause he had a companionable relationship with another woman. The evidence on this latter point is contained in 4 pages of the transcript (R

101-104), and we submit that there is nothing therein contained which could be construed as being grounds for divorce in favor of defendant. Furthermore, there is no showing that plaintiff ever did anything improper, or that his conduct caused defendant any distress. And the entire relationship, such as it is, occurred only after plaintiff had separated from defendant in November 1949, and had only been in existence for approximately a year prior to the date of trial, January 10, 1951 (R 101-104), showing conclusively that it was in no wise the cause of defendant's long continuing prior misconduct.

As to the filing of the prior divorce case, a reading of the record discloses that this was done with great reluctance and after consultation by plaintiff with his priest (R 50). There is not a scintilla of evidence that the matters therein alleged were false, and undoubtedly at that time a valid cause of action for divorce existed in plaintiff. He cannot be penalized for exercising a right that the law gives him.

What has been said of the prior divorce action is true of the insanity affidavit. The evidence clearly shows that this step was taken in good faith after asking the advice of the family priest and the defendant's physician (R 67, 68).

POINT 4. DEFENDANT WAS RESPONSIBLE FOR HER MISCONDUCT AND IT WAS PROPER THAT SHE BE SUED WITHOUT A GUARDIAN. (Appellant's Arguments (C), (I), (J), and (K).)

This action was commenced by filing a complaint on January 19, 1950 (R 1). The case was not tried until January 10, 1951 (R 24). During the intervening period a hearing was had on an Order to Show Cause, and the defendant was then present and testified (R 91). At no time during this period did defendant contend she was insane or required a guardian to appear in this action. The motion for guardian ad litem was first made on the morning of trial (R 37) but counsel at that time was more concerned with obtaining her presence than anything else and first asked for a bench warrant (R 25, 27, 28). The trial court offered to appoint a guardian ad litem forthwith and proceed with the trial, but counsel for defendant wanted the defendant present (R 31), and further urged that the guardian should make a report to the court (R 31, 33). Court and counsel agreed that counsel and plaintiff should go to the family home and see defendant and report to the court (R 34, 35). As a consequence, a report was made to the court that the defendant knew of the hearing, refused to appear, and entrusted her cause to her lawyer (R 36, 37). Motion for a guardian ad litem was reasserted, resisted on the showing then made, and denied by the court on the ground that a guardian could do nothing to protect defendant's interest that couldn't be accomplished by her counsel (R 37, 38).

Prior to the ruling on this motion there were three matters, in addition to the report of counsel, put before the trial court. They were the Insanity Record 6088

(R 30), the stipulation as to Dr. R. A. Darke's testimony (R 34, 110) which was to the effect that at the time he examined defendant and at the hearing before Judge Ellett there was no evidence of psychosis, and, third, the representation by counsel for the defendant that defendant had been absent from the Utah State Hospital for some time, and had even been out of town (R 25). The evidence on the hearing of this matter showed that defendant had been absent from the hospital for eighteen months following her release and prior to trial.

The physician's certificate in the Insanity Record contains the clinical record of the defendant. It shows that she has no physical defects, that her orientation is correct, that her memory is good as to recent events, her mood is pleasant and cooperative, she has no delusions or hallucinations, she is rational, that she is dangerous to self, and the probable cause of patient's illness is alcoholic degeneration; on diagnosis there are no entries after the various mental diseases, but the words "alcohol addiction" are indicated. Following the words "psychosis undiagnosed" is the term "alcoholism with suicidal tendencies." Following this in the form are the signatures of R. A. Darke and V. M. Sevy, doctors. It is to be remembered Dr. Darke's testimony, contained in the stipulation (R 110), was to the effect that notwithstanding this certificate the patient was *not* psychotic at the time he examined her. The writer suggests that Dr. Sevy's testimony would have been to the

same effect. The court found defendant insane and committed her to the Utah State Hospital for *thirty-day observation*. It is to be noted that this antiquated form is made for the *permanent commitment* of a patient and contains no provision for temporary commitment as provided in Section 85-7-17, U.C.A. 1943, as amended in 1945, which section does not provide for a finding of insanity by the District Judge until notification that patient is insane by the Medical Superintendent of Utah State Hospital, and provides only for commitment on a thirty-day observation basis. An examination of the form reveals that Judge Ellett made the insertion that this commitment was “*for 30 day observation period.*”

Also contained in the file is a letter of Owen P. Heninger, the Medical Superintendent of the Utah State Hospital, a state officer under the provisions of Section 85-7-11, which letter is addressed to Judge A. H. Ellett and refers to a prior communication between these two. This letter states that the defendant was released because *no psychosis was found*. The date of letter referred to is not shown, but the evidence conclusively shows that said release occurred about three weeks after the commitment (R 67) and that the defendant took up her residence again with plaintiff in July of 1949 (R 70). There is no question that defendant has lucid intervals of two or three days, as stated in defendant's brief, when she has drunk to a point of saturation and is then nauseated (R 47). There is also

no question that she is completely normal when she ceases drinking (R. 96). Plaintiff saw her at the Utah State Hospital on several occasions when she had been without intoxicants and she was quite normal (R 49, 50).

Section 85-7-17, as amended in 1945, *supra*, is the only provision dealing with the *judicial commitment* of a person on a *temporary basis*, and is undoubtedly the section the court was acting under in regard to defendant's commitment in June of 1949, as shown by this record. This section provides:

“Temporary Commitments—Discharge—Further Proceedings.

“Upon the filing of a verified application alleging that a person is in such mental condition that his commitment to the hospital is necessary for his proper care or observation, if such person is found by two duly licensed physicians to be in such mental condition, he may be committed by any district judge having jurisdiction, to the hospital for a period of thirty days *pending the determination of his mental condition*. Within thirty days after such commitment the superintendent of the hospital shall discharge him, *if he is not insane*, and *shall so notify the judge who committed him* or, if he is insane, he shall report the patient's mental condition to the judge with the recommendation that he be committed as an insane person, or discharged to the care of his guardian, relatives or friends, if he is harmless and can properly be cared for by them. Within said thirty days the committing

judge may authorize a discharge as aforesaid, or he may commit the patient to the institution as an insane person, if in his opinion such commitment is necessary. If in the opinion of the judge additional medical evidence as to the mental condition of the alleged insane person is desirable, he may appoint a physician to further examine him and report thereon.”

(Italics ours)

As seen above, this statute provides a commitment for observation for the purpose of determining, in doubtful cases, the mental condition of a patient. The finding of insanity, or lack of insanity of the patient, is made by the Medical Superintendent of the Utah State Hospital. If sane the patient must be discharged. If insane the Superintendent makes his recommendation and the District Judge acts appropriately under the latter provision of the statute. If no psychosis is found, as is the fact in the insanity proceeding under question in the present case before this court, the Superintendent shall “notify” the judge of that fact. The letter in the Insanity Record is such notification and clearly shows that under the above procedure the Medical Superintendent found the defendant sane and discharged her.

It is to be noted that the procedure for definite commitment is provided in Section 85-7-18 and the sections following and this procedure is entirely different than that followed in regard to the defendant.

Notwithstanding the foregoing argument, which we believe is controlling in this case, if this court concludes that the commitment of the defendant was on a permanent basis then we submit the following:

That under provisions of 85-7-11, as amended in 1945, the Medical Superintendent has the following duty:

“He shall discharge such of them (patients) as, in his judgement are no longer in need of care and treatment by the hospital staff. He shall immediately notify the judge of the district from which the patient was committed, the fact of his discharge. If in the judgment of the superintendent a patient so discharged has recovered his reason, he shall certify to the judge of the fact of his recovery, whereupon the judge shall immediately enter an order restoring the patient to competency.”

That the letter contained in the Insanity Record is such a certificate. See *Black's Law Dictionary* which defines a certificate as follows:

“Certificate. A written assurance, or official representation, that some act has or has not been done, or some event occurred, or some legal formality been complied with.

“A ‘certificate’ by a public officer is a statement written and signed, but not necessarily or customarily sworn to, which is by law made evidence of the truth of the facts stated for all or for certain purposes.

“A writing by which testimony is given that a fact has or has not taken place.”

There is no order in the Insanity Record by the judge, but in the absence of a showing to the contrary, the judge and the Medical Superintendent are presumed to have done their official and legal duty. 20 *American Jurisprudence on Evidence*, Section 170, and cases there cited. Legally, therefore, the trial court must have concluded that such an order was made and that the defendant was restored to capacity at the time of her release.

On the evidence and the law above related, the trial court in this case should have found that defendant was sane at all times, and in any event, the trial court would be compelled to find that the defendant was sane at the time of her release in July of 1949 and had been ever since.

As to defendant's claimed incompetency, other than the asserted insanity, to be sued in this action, the defendant raises two matters: One that defendant is intoxicated for long periods extending up to three weeks, and, two, that shortly after the decision in this case, the defendant was adjudged incompetent to handle her property because of her habitual drunkenness. Plaintiff petitioned the court for the appointment of a general guardian of the estate of defendant in the belief that she would very likely squander a large part of her separate estate, which was cash, and also the proceeds from the sale of the family home in the event it was sold, during a period in which she was intoxicated, and be-

cause, generally, he felt that she might well be deceived or imposed upon by artful or designing persons. This was a step taken for defendant's own benefit. Defendant, and her counsel here, resisted the appointment of such general guardian, filing an answer to plaintiff's petition, demanding a trial, and contesting the matter at the hearing. The defendant and her counsel at that time and in that incompetency proceeding took the position that the defendant was *not* incompetent; that she was capable of handling her own separate property, and that she was not in need of a guardian of any sort, either of her person, or her estate, or to represent her in any legal actions. See Probate File No. 33120, in the Matter of the Guardianship of the Estate of Vera Catherine MacDonald, and yet, in this proceeding, the defendant has taken an altogether different stand.

Plaintiff concedes that the defendant is in need of aid, direction and control of her property and concedes that she is incompetent to manage and handle it herself, but plaintiff asserts that, notwithstanding the foregoing, it was proper for the defendant to be sued in the divorce action before this court without the appointment of a guardian ad litem. The record shows, as stated above, that the primary concern of the defendant and her counsel was for defendant to be present at the trial. There is no way that a guardian ad litem could assure this being done and in the event that a guardian ad litem had been appointed, the matter would have proceeded exactly as it did. It was a contested

proceeding, with defendant's counsel fully protecting defendant's rights throughout. The trial court, being aware of the situation, allowed counsel for the defendant full opportunity to present any matters which he cared to and permitted a full hearing on the merits of this case. The only specific proposition which defendant's counsel urged as a need for a guardian ad litem was that such a guardian could make a report to the court on the possibility of defendant appearing in court (R 31, 33). The court permitted a recess so that counsel for both sides could apprise themselves of this situation and report personally to the court in regard to this matter (R 35). Defendant in her brief fails to state or put forth any matter that would have been handled differently, or any evidence that would have been put before the court had a guardian been appointed, nor does she in any way suggest anything that was done that in any way prejudiced her trial in this matter, nor does she contend that the result would have been otherwise had a guardian ad litem been present in her behalf.

It does not follow that because defendant is quite frequently intoxicated that she is incompetent to defend a law suit, although such drunkenness may indicate she is unable to care for her property. The law recognizes many different degrees of capacity from idiocy, to a person insane, to the lack of capacity to handle affairs in the competitive business world, to a lack of capacity to make a testamentary disposition of property, and so on. Drunkenness does not fall in any of these

catagories because the status is wilful and voluntary and can be avoided. And during periods of sobriety the character of the person is entirely changed. But habitual drunkenness certainly satisfies the provisions of Section 102-13-20, U.C.A. 1943, which provides:

“The words ‘incompetent,’ ‘mentally incompetent’ and ‘incapable,’ as used in this title, shall be construed to mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, *or from any other cause*, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons.”

(Italics ours)

The trial of a cause long set should not be postponed nor should the courts go through idle gestures to protect a person who is voluntarily intoxicated and who, after notice, deliberately refuses to be present in court, particularly where such person has adequate representation by an attorney.

In any event, the failure to appoint a guardian ad litem does not make this proceeding void and is at most an irregularity. *Neilsen v. Emerson*, 9 Pacific 2d 260 (Cal.) at page 262. And the subsequent adjudication of the defendant incompetent does not make the proceeding void. In the case of *Sterling v. Goulden*, 12 Pacific 2d 812 (Kans.), wherein the plaintiff was adjudged incompetent a month after judgment was rendered against her, and for whom a guardian was ap-

pointed to take the appeal, the court held that the judgment was not void and refused to set it aside. It is interesting to note that the basis of the incompetency, as set forth by the court, was acts and conduct of the party antedating the trial of the cause in which the judgment was taken against her, which is the same as in this proceeding.

The general rule in the United States is that a court has jurisdiction to enter a judgment against an *insane* defendant and that the proceeding and judgment are not void. 28 *American Jurisprudence*, Insane and other incompetent persons, Section 103, et seq. Where the validity of the judgment rendered is raised, the courts are primarily concerned with whether or not the proceeding was open, adverse, devoid of fraud and whether or not the party's interests were adequately protected and she was given a fair and impartial trial. 34 *American Law Reports* 221, at 223. As to the present case the court's attention is called to the fact that this was not a default matter, nor is there any claim of fraud, prejudice or unfairness in the trial.

As we have stated above, the trial court having properly found the defendant to be sane, it follows that she must have been responsible for her misconduct. Respondent agrees with the proposition of law put forth by appellant, that an insane party cannot be held responsible for misconduct which occurs during the period of insanity, which would ordinarily give rise to a cause

of action for divorce, but here there is absolutely no showing that the defendant's drinking started during a period of insanity, nor that she was insane during any substantial period of her drinking, if at all, or that her drinking was anything but voluntary. And, of course, if habitual drunkenness is made a ground for divorce by the Legislature, as it is, a person guilty of such misconduct cannot assert that she is not responsible for her habitual drunkenness because she is intoxicated or drunk or cannot control her drinking.

It, therefore, further follows that the court's Findings and Conclusions in regard to these matters were proper.

CONCLUSION

The record in this case discloses that the plaintiff had a long and trying experience in his attempts to deal with his wife's addiction to intoxicants; that he met this difficulty, which lasted over a period of ten years prior to trial, with the utmost patience and consideration until finally the situation became intolerable; and that now he is deprived of nearly all the accumulation of property made during the course of the marriage. His conduct is most unusual in comparison with the usual fact situation coming before the courts in a divorce proceeding and he endured the conduct of his spouse long after many another husband would have given up. The record further discloses that the awards of family property

were more than fair to the defendant, that they are substantially greater than would ordinarily be given to a wife not at fault. That these awards in conjunction with her separate estate will care for her for a considerable period of time and even if she should have future needs, she has the right and opportunity to again call upon plaintiff for a modification of the nominal alimony award. This case was presented with vigor and resourcefulness by defendant's counsel and defendant's rights were fully protected at the trial.

That the judgment and decree of the trial court should be affirmed is respectfully submitted.

E. C. JENSEN

JOHN H. SNOW

ROBERT JOHN JENSEN

Attorneys for Respondent