

1951

## Winslow C. Cole v. Marguerite D. Cole : Brief of the Appellant

Utah Supreme Court

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King & Anderson; Attorneys for Defendant and Appellant;

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# In the Supreme Court of the State of Utah

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WINSLOW C. COLE,  
*Plaintiff and Respondent,*

*Vs.*

MARGUERITE D. COLE,  
*Defendant and Appellant.*

} Case No.  
7717

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## BRIEF OF THE APPELLANT

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Clerk, Supreme Court, Utah

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} Case No.  
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## BRIEF OF THE APPELLANT

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### STATEMENT OF FACTS

Winslow C. Cole, the respondent in the above-entitled matter, secured a decree of divorce from his wife, the appellant, in the District Court for Millard County, State of Utah, on the 19th day of May, 1936. In that action the defendant's counterclaim for divorce was denied and the divorce granted to the plaintiff on the ground of desertion.

With respect to the property of the parties, the court, in paragraphs 7, 8, and 9 of its Findings of Fact, found that each of the parties was entitled to one-half of the value of the community property and that one-half of said amount would be due the defendant. In addition to this specific finding with respect to community property, paragraph 10 of the Findings provided:

“10. That the defendant is entitled to alimony or support money in the sum of \$60.00 per month for a period of one year from date, and \$30.00 per month thereafter for one year, or until the further order of this court.” (See page 4 of the Tr.)

The Conclusions of Law which the court reached provided that the plaintiff should pay to the defendant the sum of \$1,037.50 as her share of the community property, plus the further sum of \$1,323.00 which represented the amount the plaintiff had borrowed from the defendant. In addition to the specific provisions with respect to the division of the property of the parties, the Conclusions of Law provided as follows:

“That the plaintiff should pay to the defendant as alimony for her support and maintenance, the sum of \$60.00 per month for a period of one year, commencing on June 1, 1936; and after the expiration of one year, that is after June 1, 1937, the further sum of \$30.00 per month for one year, or until June 1, 1938, or until the further order of this court.” (See page 5 of the transcript.)

The Decree of divorce based upon the Findings of Fact and Conclusions of Law made the following provisions with respect to the division of the property of the parties and the obligation for payment of alimony and support money:

“It is further ordered, adjudged, and decreed that

the plaintiff pay to the defendant the sum of \$1037.50, being one-half of the value of the community property, and the further sum of \$1323.00, the unpaid amount of the principal and the accrued interest on the same owing by the plaintiff to the defendant, and that upon payment by the plaintiff to the defendant of the aggregate amount of said sums, to-wit: a total of \$2360.50, the title to all of the community property shall ipso facto vest in the plaintiff, and if the record title to the same or any part thereof is not in the plaintiff, this court will enter a decree vesting in the plaintiff the record title, as well as the equitable title, to all community property.

"It is further ordered, adjudged and decreed that the plaintiff pay to the clerk of this court for the use and benefit of the defendant as alimony and for her support and maintenance the sum of \$60.00 per month for a period of one year commencing on June 1, 1936; or a total of \$720.00; and after the expiration of one year, that is, commencing June 1, 1937; the sum of \$30.00 per month for one year, or until June 1, 1938; or a total of \$360.00; unless the court otherwise order and direct; and all sums so paid to the clerk by the plaintiff for the use of the defendant shall be by said clerk transmitted and forwarded to her without delay." (See page 2 of the Tr.)

The above provisions are cited for the court's convenience, and to point out that specific provision was made with respect to the property of the parties that in no way was related to the provision for alimony.

At the time of the divorce the defendant was qualified as a public school teacher and was able to earn \$150.00 per month. This fact was found to be true by the Findings of Fact of the court, as shown in paragraph VI on page 22 of the transcript. On the 23rd day of February, 1951, the said

defendant filed a Petition for Modification of Divorce Decree with the District Court for Millard County alleging that conditions had substantially changed since the entry of the divorce decree in that she had lost her ability to support herself and had become dependent upon the charity of others. She further claimed that the financial condition of the plaintiff respondent had substantially improved since the entry of the decree, and prayed, based on these facts, that the court enter a further order for alimony for her support.

The plaintiff denied the alleged substantial change of conditions and the matter came to trial. As a result of the trial, the court denied the petition of the defendant appellant.

As reflected by the Memorandum of Decision and the Findings of Fact, the trial court found that there had been a substantial change in the condition of the defendant appellant's health and in the financial circumstances of the plaintiff respondent. In the case of the appellant, at the time of her petition for modification she was partially deaf, suffering from high blood pressure and a heart ailment, all of which prevented her from obtaining gainful employment. For several years she had been depending upon her family and others for her maintenance. (See paragraph VI of the Findings of Fact, at page 22 of the Tr.) The financial condition of the plaintiff respondent, on the other hand, had improved from the sum of \$1,037.50, which, at the time of the divorce represented one-half of the property of the parties, to the sum of \$37,857 in home, farm lands, and water stock, with an apartment building having an additional value of \$6,000.00, and his yearly income had increased from \$2,250.00 per year to \$5,250.00 per year, not including rentals received from the apartment building.



Although the trial court found a substantial change in the condition of the parties as described above, the requested award was denied.

The foregoing constitutes a brief statement of the facts of this case.

## STATEMENT OF POINTS RELIED ON IN THIS APPEAL

The defendant appellant represents to the court and urges a reversal of the decision of the lower court upon the following grounds:

POINT NO. I. THE TRIAL COURT ERRED IN HOLDING THAT THE ORIGINAL DECREE FINALLY ADJUDICATED THE RIGHT OF THE DEFENDANT TO ALIMONY. THE EXPRESS LANGUAGE OF THE DECREE RESERVED JURISDICTION FOR A SUBSEQUENT DETERMINATION OF ALIMONY.

POINT NO. II. THE TRIAL COURT ERRED IN HOLDING THAT WHETHER AN AWARD OF ALIMONY WOULD SEEM JUST AND EQUITABLE TO THE PRESENT DEPENDENTS OF THE PLAINTIFF WAS A LEGAL GROUND TO BE CONSIDERED IN MAKING AN AWARD.

POINT NO. III. THE FINDINGS OF FACT OF THE COURT SHOW THAT A SUBSTANTIAL CHANGE IN THE MATERIAL CIRCUMSTANCES OF THE PLAINTIFF AND THE DEFENDANT HAD TAKEN PLACE JUSTIFYING AN AWARD OF ALIMONY AS PRAYED, AND THE DECISION OF THE COURT THAT THE EVIDENCE DID NOT JUSTIFY AN ORDER FOR ALIMONY WAS CONTRARY TO THE UNDISPUTED FACTS AND TO THE COURT'S OWN FINDINGS.

## ARGUMENT

POINT NO. 1. THE TRIAL COURT ERRED IN HOLDING THAT THE ORIGINAL DECREE FINALLY ADJUDICATED THE RIGHT OF THE DEFENDANT TO ALIMONY. THE EXPRESS LANGUAGE OF THE DECREE RESERVED JURISDICTION FOR A SUBSEQUENT DETERMINATION OF ALIMONY.

The plaintiff respondent in this case has not raised any question with respect to the right of the defendant to receive an award of alimony as granted under the original decree. In view of this fact, pursuant to the law which obtains in this jurisdiction as set down by *Doe v. Doe*, 48 Utah 200, 158 P. 781, and *Schuster v. Schuster*, 88 Utah 257, 53 P. 2d 428, the award of alimony made in the original decree in this case must be presumed as having been granted upon such evidence as justified the award. The right to alimony of the defendant appellant was not forfeited by such conduct as may have entitled her husband to a divorce.

Inasmuch as the original award of alimony, therefore, must be presumed to have been based upon conditions meriting the same, notwithstanding any misconduct on her part, the award of alimony would be subject to the same rules with respect to a modification of the divorce decree in that regard as if she were the prevailing party. This represents a modification of the old rule that permanent alimony would not be awarded a wife where the husband obtains a divorce based upon her dereliction. But this general rule was productive of so much hardship, and in so many instances left the wife a prey to shame, that in circumstances which justified it an award of alimony was granted. Undoubtedly the wisdom of this public policy was given great weight when the problem of awarding the wife alimony under such circumstances first arose in Utah

in the Doe v. Doe, *supra*, case. Further affirmation of this policy is found in the recent case of *Alldrige v. Alldrige*, 229 P. 2 681, .....*Utah*....., Supreme Court of Utah, No. 7525, April 10, 1951, where the husband was granted a decree of divorce on the ground of cruelty resulting in great mental distress. It was shown that the parties had lived together quite some time, that both parties had contributed substantially to the marriage, and that there was evidence of her poor health. Consequently, an award of permanent alimony was directed by the Supreme Court, though refused by the trial court.

In the instant case the trial court, by its Memorandum of Decision and its finding in paragraph VII of the Findings of Fact at page 23 of the transcript, ruled that the original award of alimony was a final adjudication of the plaintiff's right to alimony, and that it therefore did not have power to make a subsequent award of alimony. In this respect the court's attention is directed to the Findings of Fact, Conclusions of Law and Decree made at the time of the granting of the Interlocutory Decree of Divorce. (See pages 2, 4, and 5 of the Tr.) The Findings of Fact, Conclusions of Law and Decree all deal separately with the problem of a division of the community property which should be made between the parties. The order awarding to each of the parties a one-half interest in their community property and ordering the plaintiff respondent to pay to the defendant appellant one-half of the value of said community property in accordance with said order are clearly separate and apart from the subsequent finding, conclusion of law and order of the court with respect to the payment of alimony.

In the face of the clarity of the findings, conclusions of law and decree it could not reasonably be argued that the

court intended the award of alimony to be part and parcel of the division of property. It is evident that two things were accomplished with respect to the property problems of the parties: (1) The property of the parties was given a total value and divided equally between them. Included was a further order requiring the plaintiff respondent to repay the defendant appellant for money loaned to him, and (2) the plaintiff respondent was ordered to pay defendant alimony, payable in monthly installments. In this connection no words of finality were used whatsoever. The award was not made "in lieu of all alimony" nor was language in any way synonymous with such phraseology used. Rather, in paragraph 10 of the Findings of Fact, as recited above in the Statement of Facts, the court found that the defendant appellant was entitled to alimony in certain monthly installments covering a certain period of time "until the further order of this court."

In the Conclusions of Law, in this connection, the court used the same phraseology. In the Decree the court, in a separate paragraph dealing solely with alimony, ordered that the monthly installments of alimony be paid for the period specified "unless the court otherwise order and direct." The language so employed does not partake in any way of the terminology of finality which would have to be found in order to substantiate the trial court's holding that the award of alimony was a final adjudication of the plaintiff's right to alimony. To hold that the award was a final adjudication in the face of the language employed would do obvious violence to the ordinarily accepted meaning of the words. Rather than being synonymous with finality the language employed would seem to indicate the intention of the court to reserve jurisdiction to make such further order as the circumstances might justify. The interpretation for which the appellant herein contends has been confirmed in the case of *Swallow v. Swal-*

low, 92 Atl. 872, 84 N. J. Equity 109, where the phrase "further order of the court" was interpreted to mean that the order of the court made at that time should obtain until a superceding order in connection with the same subject matter should be made. Further support for such an interpretation may be found in the following cases where, though the question of alimony was not involved, the phrases "until the further order of the court," "until otherwise ordered by the court," "unless otherwise directed by the court," etc. were the subject of interpretation: *Lowell Bar Ass'n v. Loeb*, 52 N.E. 2d 27, 315 Mass. 176; *Ex Parte Glines*, 94 P. 668, 20 Okla. 446; *Curtis v. Bachman*, 110 Calif. 433, 42 P. 910; *Hokum v. Chic. R. I. & P. Railway Co.*, 112 P. 1023, 27 Okla. 667; *People v. Priest*, 73 N.E. 1100, 181 N.Y. 300; *Federal Signs System v. Amavet*, 7 La. App. 680.

Further light on the question of whether or not the language used by the court in granting alimony in the present instance may be interpreted as a final adjudication of the right of alimony or as an award of alimony subject to modification according to changed conditions, circumstances, habits, and conduct of the parties may be obtained from the well-known *Cody v. Cody* case, 47 Utah 456, 154 P. 952. Under headnotes 4 and 5 of said case, the court discusses the problem of a final or full discharge of the obligation of alimony, and said with respect to the same:

"Thus I think the order awarding \$20 a month for the support of the child was, on such averments and proof, subject to modification. Such an order by its very nature is continuing. So also was the order awarding the custody of the child continuing and subject to modification according to changed conditions, circumstances, habits, and conduct of the parties. So

also would be an order allowing alimony for a designated amount per month or other stated period, or until the happening of a contingency or contingencies; but where, upon issues in evidence, the question of alimony is set at rest, either by awarding a gross sum in lieu of all rights in and to the husband's property, or where, in lieu of all such rights specific property is in fee awarded to the wife, or where, upon issues and evidence adduced no alimony whatever is awarded, then I think such an order is final and constitutes a full discharge, unless the order awarding no alimony is based upon the grounds that the husband then had no property and no means with which to support the wife, and physically was unable to earn support for her, and that he thereafter acquired property or otherwise became able to support her."

Reading the above excerpt from the opinion in the Cody v. Cody case, and applying the same to the present fact situation, it would seem evident that the award of alimony made in the present instance was an award which by its very nature is continuing. This is further borne out by the holding of the court in *Barraclough v. Barraclough*, 100 Utah 196, 111 P. 2d 792. In that case the trial court found that by stipulation the plaintiff had "consented to accept \$450 as alimony herein, payable in monthly installments of \$75," and based upon this finding, decreed that:

"Plaintiff be and she is hereby awarded and the defendant is hereby required to pay to her, the sum of \$450, as alimony herein, as follows: \$75 on or before the 1st day of June, 1939, and \$75 on or before the 1st day of each and every month thereafter until the said sum of \$450 shall have been paid in full; provided that all amounts paid on said award during the pendency of this action shall be credited thereon."

After the entry of the interlocutory decree the plaintiff pe-

tioned the trial court to modify the decree as to alimony. This was denied by the court on the ground that the stipulation between the parties constituted a lump sum complete and final settlement of all alimony between the parties and that such settlement had become a final judgment as to alimony in so far as a petition to modify was concerned. The plaintiff cited this holding as error and on appeal the Supreme Court held, under headnotes 2 and 3,

“Therefore, the trial court erred in determining the agreement here constituted a ‘complete and final settlement of all alimony between the parties and that such settlement has become a final judgment as to alimony \* \* \* insofar as a petition to modify is concerned.’ In a divorce action the trial court should make such provision for alimony as the present circumstances of the parties warrant, and any stipulation of the parties in respect thereto serves only as a recommendation to the court. If the court adopts the suggestion of the parties it does not thereby lose the right to make such modification or change thereafter as may be requested by either party based on some change in circumstances warranting such modification.”

Except for the fact that the provision for alimony in the Barracrough case was based on a stipulation, the legal aspects of the award of alimony in the Barracrough case and in the instant case are identical. In both instances a specified amount of alimony was ordered paid by way of monthly installments, extending over a specified period of time. The factual situation in the instant case is even stronger than that in the Barracrough case by reason of the addition of the words “unless the court otherwise order and direct,” reserving power to make a further order in the matter. In view of this decision, it seems evident that in the instant case the court in the original decree did not finally adjudicate the right of the defendant appellant to ali-

mony and that the language of the decree was, therefore, not such as would prevent the court from exercising the power granted by 40-3-5, Utah Code Annotated, to make a modification thereof, if circumstances justified the same.

POINT NO. II. THE TRIAL COURT ERRED IN HOLDING THAT WHETHER AN AWARD OF ALIMONY WOULD SEEM JUST AND EQUITABLE TO THE PRESENT DEPENDENTS OF THE PLAINTIFF WAS A LEGAL GROUND TO BE CONSIDERED IN MAKING AN AWARD.

The trial court in finding number VIII at page 23 of the transcript found that it would be "unjust and unequitable to the present dependents of the plaintiff" to make an order requiring him to pay further alimony to the defendant appellant.

Based upon the finding, the trial court, in the Conclusions of Law, concluded that it would be unjust and unfair to the present dependents of the defendant to make such an order. Based upon this Finding of Fact and Conclusion of Law, and the others included therein, the court denied the defendant appellant's prayer for a further award of alimony.

It seems evident that whether or not an award of alimony would be fair and just to the present dependents of the plaintiff respondent is not a material issue in this case for the reason that they are not parties to the suit, and that his obligation to the defendant appellant with respect to alimony arises out of a prior obligation which he owed to her by reason of their marriage and the provisions of their subsequent divorce decree.

Assuming that the appellant is correct in her position that the provision of alimony in the original divorce decree was a continuing award which was subject to modification, as more fully explained above, then respondent's obligation pursuant



to said decree would precede any subsequent obligation which he might undertake or contract. Numerous annotations at 30 A.L.R. 79, 64 A.L.R. 1269, and 112 A.L.R. 246 all bear out the fact that remarriage and contraction of new obligations and responsibilities thereby, subsequent to the time when a decree of the court was entered requiring the payment of alimony, does not constitute a fact to be considered in determining whether or not a change of circumstances has taken place sufficient to justify a modification of the decree of divorce.

Furthermore, the finding of the court concerning plaintiff's rather substantial financial picture, cannot justify the court's conclusion that his financial condition and earning ability are insufficient to make an award.

POINT NO. III. THE FINDINGS OF FACT OF THE COURT SHOW THAT A SUBSTANTIAL CHANGE IN THE MATERIAL CIRCUMSTANCES OF THE PLAINTIFF AND THE DEFENDANT HAD TAKEN PLACE JUSTIFYING AN AWARD OF ALIMONY AS PRAYED, AND THE DECISION OF THE COURT THAT THE EVIDENCE DID NOT JUSTIFY AN ORDER FOR ALIMONY WAS CONTRARY TO THE UNDISPUTED FACTS AND TO THE COURT'S OWN FINDINGS.

The old rule which obtained independent of statute, that permanent alimony will not be awarded a wife where the husband obtains a divorce on grounds of her fault or marital misconduct, was modified because it was productive of so much hardship and so frequently left the wife a "prey to starvation and shame." (*Am. Juris.*, Vol. 17, page 478.) In the present case the Findings of Fact and Conclusions of Law show ample justification for the application of the modified rule.

In paragraph VI of the Findings of Fact, at page 22 of the Tr., the court finds as follows:

“That the defendant, at the time of the divorce, was qualified as a public schoolteacher, and was able to earn \$150.00 per month. That she is now partially deaf and has high blood pressure and a heart ailment, all of which prevent her from obtaining gainful employment, and that for several years she has been dependent upon brothers and sisters and other relatives for her maintenance. That the defendant has no property, except an interest as an heir of her father in a home, which interest is of a value not exceeding \$500.00.”

Most certainly the above finding must be acknowledged as meaning that a very substantial change in her material circumstances has taken place, that she is suffering a great deal of hardship and that she has well-nigh been left “a prey to starvation and shame.”

On the other hand, the financial circumstances of the plaintiff respondent have materially improved. His present holding of property totals approximately \$40,000, exclusive of the interest of his present wife in the apartment house. This represents an increase of more than fifteen times in the value of his holdings from the time of the original divorce. His salary per year, not including apartment rentals, has more than doubled, increasing from \$2,250 per year to \$5,250 per year.

In view of the apparent material change in the circumstances of the appellant and the respondent, as reflected in the findings of the trial court, it is evident that there is not only a need for assistance in her behalf but that there is more than sufficient legal justification for the court to exercise the power which it has under 40-3-5, Utah Code Annotated, 1943, and grant to the defendant appellant an award of alimony.

## CONCLUSION

The defendant submits that the court committed error in refusing her petition for modification of the decree of divorce upon the grounds that the original Decree was a final adjudication of the defendant appellant's right to alimony and that a further award of alimony would not only be unjust and inequitable but was not justified under the circumstances. It is, therefore, submitted that the case should be reversed with directions to the trial court to grant the petition of the defendant for further award of alimony.

Respectfully submitted,,

KING & ANDERSON,

*Attorneys for Defendant and Appellant.*