

1952

Gladys P. Hendricks v. Brigham Victor Hendricks : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

L. E. Nelson; Attorney for Plaintiff and Appellant;

Recommended Citation

Brief of Appellant, *Hendricks v. Hendricks*, No. 7893 (Utah Supreme Court, 1952).
https://digitalcommons.law.byu.edu/uofu_sc1/1811

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

GLADYS P. HENDRICKS,
Plaintiff,

vs.

BRIGHAM VICTOR HENDRICKS,
Defendant.

APPELLANT'S
BRIEF

Case No. 7893

FILED

DEC 4 - 1952

L. E. NELSON,
Attorney for Plaintiff
and Appellant.

Clerk, Supreme Court, Utah

Appeal from the District Court of the First Judicial
District of the State of Utah, in and for Cache County.

POINTS

Statement of Facts -----	3
Argument -----	12
Point 1. The Court erred in making it's findings of fact number four, it's conclusions of law and decree that plaintiff's complaint be dismissed on the merits with prejudice. (R. 7, 8, 9) -----	12
Point 2. The Court erred in making it's finding number five, "that each of said parties were guilty of crimination and recrimination, one against the other," (R. 7) because there is no pleading or evidence to support the same. -----	19
Point 3. The Court erred in striking the plaintiff's testimony and evidence.--	22
Point 4. The Court erred in refusing to award to plaintiff alimony and a property settlement, and in making the following portion of finding number three, viz,- "and used the proceeds thereof mostly for her own use and benefit." (Tr. 7, 8, 9) ----	23
Point 5. The Court erred in refusing to award plaintiff's attorney an attorney's fee. -----	29

TABLE OF CONTENTS

<i>Subject</i>	<i>Page</i>
1. Statement of Facts	3
2. Points Appellant rely on	11
3. Argument, Point One (1)	12
4. Argument, Point Two (2)	19
5. Argument, Point Three (3)	22
6. Argument, Point Four (4)	23
7. Argument, Point (5)	29

INDEX OF CASES AND AUTHORITIES CITED

Brandt v. Brandt, 33 N.W. 2d. 620	20
Burt v. Burt, (Utah) 204 P. 91	29
Cordner v. Cordner (Utah) 61 P. 2d. 601	18
Doe v. Doe, 48 Utah 200, 158 P. 781	17
Hyrup, v. Hyrup, 66 Utah 580, 245 P. 335	17
Lyon v. Lyon, (Utah) 206 P. 2d. 148	27
Openshaw v. Openshaw, (Utah) 12 P. 2d. 364	29, 30
Opperman v. Opperman, (Ohio) 65 N.E. 2d. 655	20
Tremayne v. Tremayne, (Utah) 211 P. 2d. 452	28
Welch v. Welch, (Florida) 152 So. 173	21
Woolley v. Woolley, 112 Utah 391, 195 P. 2d. 743	27
19 C. J. 116, Section 297	21
19 C. J. 253, Section 588	26
17 Am. Jur. 314, Section 352	21

IN THE SUPREME COURT OF THE STATE OF UTAH

GLADYS P. HENDRICKS,
Plaintiff,

vs.

BRIGHAM VICTOR HENDRICKS,
Defendant.

APPELLANT'S
BRIEF

Case No. 7893

STATEMENT OF FACTS

Plaintiff and defendant were married at Pocatello, Idaho, on June 30, 1943. (Tr. 10). This is a second marriage for both parties. Each of them have children by a previous marriage. (Tr. 10). The defendant is 57 and plaintiff is about the same age. (Tr. 83). At the time the parties herein were married, plaintiff resided at Logan, and defendant resided at Lewiston, Utah. Plaintiff had her furniture moved to defendant's home at Lewiston, and they lived there until July, 1946. (Tr. 12-13).

During the first year, defendant asked plaintiff to lend him \$1,300.00. (Tr. 30). In order to comply with his request and not having the money available, she made a bank loan of \$1,300.00, to be re-paid in monthly payments of \$50.00. (Tr. 56). Some time later, defendant re-paid \$200.00, but failed to repay the balance of \$1,100.00. (Tr. 30).

The record reveals that during the second and third years (1945-1946), defendant began to absent himself from their home for brief intervals, going away in his car, and remaining away for two or three days, without informing plaintiff of his intentions before leaving, and upon his return home he refused to inform plaintiff where he had been. (Tr. 15-17, 24-25). The defendant's conduct became progressively worse during the third year of their married life, with respect to leaving home without informing plaintiff where he was going or where he had been, (Tr. 24-25) and he also refused to take the plaintiff into his confidence with respect to what he was doing with his farm income. Defendant continued to leave home and remain away for several days at a time, and frequent quarrels ensued between the parties. (Tr. 24-25). Since defendant was a farmer and had no reason to make these trips, and when he refused to take plaintiff into his confidence, plaintiff became worried and upset. (Tr. 25).

During the second and third years of their marriage, partly because of the fact that the defendant would not purchase groceries or pay for groceries that plaintiff purchased, and partly because of the fact that he was frequently away from home for several days at a time as hereinbefore stated, plaintiff was compelled to use her money for groceries and household incidentals, and this condition continued more or less during the second and third years of their marriage and it became gradually worse. (Tr. 14-16).

The defendant became very indifferent with respect to offering to support the plaintiff, and considerable controversy arose between the parties because of his failure

to support her, in view of the fact that he was operating a large farm and presumably had a good income. During 1945 and 1946, the plaintiff was also pestered with bill collectors who called on the telephone and also came to the house to collect bills against the defendant, and which annoyed the plaintiff considerably. (Tr. 18-19, 23-24).

In July, 1946, defendant invited plaintiff to accompany him to the Bear River State Bank at Tremonton, where he was then banking. After they arrived there, plaintiff was surprised to learn that defendant had lured her there to sign a note and mortgage for a loan, in order, as he explained to enable him to buy cattle for his son Sidney, so that the latter could engage in the cattle business. (Tr. 50-51). In view of the fact that defendant then owed a considerable number of old bills, had trouble with the Lewiston State Bank, (Tr. 23) and had failed to re-pay plaintiff the \$1,100.00, which he had previously borrowed from her, (Tr. 30) and moreover was not producing an income from a very good farm, she refused to sign the note, and as a result thereof, the defendant became very resentful with the plaintiff, and on the return trip from Tremonton he exhibited a quarrelsome attitude (Tr. 23) and, after arriving home they continued to quarrel all day. (Tr. 25). The plaintiff then concluded that she and the defendant could not live together with any degree of harmony, happiness or success, so she decided to pack her things and furniture and move back to Logan. Tr. 25).

When plaintiff separated from defendant in July, 1946, she returned to Logan and lived temporarily with her daughter and son-in-law. Shortly thereafter, they moved to Preston, Idaho, and plaintiff purchased their

home. (Tr. 26-27). Meanwhile, during the late summer and early fall of 1946, defendant visited the plaintiff at Logan more or less frequently with a view of reconciliation, and during September or October, 1946, they resumed cohabitation and lived together in plaintiff's home in Logan. (Tr. 26).

The record reveals (Tr. 31-34) that dissention again arose between these parties during the winter of 1946-47. On or about February 19, 1947, plaintiff consulted attorney Dobbs at Ogden, (Tr. 33) and as a result of her visit, Dobbs communicated with defendant by letter, advising him of plaintiff's visit and requesting defendant to call at Dobb's office (Pl. Ex. F.). About that time defendant was intending to sell the 80 acre tract of land, and in view of his lack of support for the period of their marriage, plaintiff refused to sign the deed, without a support agreement; and in consequence whereof the parties hereto, executed this agreement (Pl Ex. D.) of February 29, 1947, which called for repayment of loan made by plaintiff to defendant in 1944, upon which \$1,100.00 was owing. Tr. 30). And, because defendant had failed to support the plaintiff or meet the ordinary household expenses, plaintiff desired to fortify her position by requiring defendant to agree in writing, to provide \$100.00 a month "as an allowance for home and personal use," (Pl. Ex. D. Tr. 34) and when defendant executed the same on February 27, 1947, plaintiff signed the deed to convey the 80 acre tract. But after the deed was executed, defendant refused and neglected to pay plaintiff the monthly allowance of \$100.00 Tr. 34) and also the \$1,100.00, owing on the note.

In describing defendant's conduct towards plaintiff since their reconciliation in fall of 1946, the record discloses: (Tr. 34).

Q. From 1947 up to the time you filed your complaint in this action, did you live with the defendant during that period of time? A. Off and on. Q.. What do you mean by "off and on?" A. Well, he'd get into tantrums and if I wouldn't do everything he wanted to do he'd go for two or three weeks, and last summer he left for three months and didn't support me. He left me without any money or anything like that, and sometimes he's gone a week and sometimes three or four days. You never know. (Tr. 34).

Q. And then you had your final separation just about the time this complaint was filed, did you not? A. Yes.

Q. And what led up to that, Mrs. Hendricks? A. Well, his staying out nights, not coming home. He'd leave four or five o'clock in the morning and wouldn't get home until two, four, five o'clock in the morning. Things like that.

Q. The next morning? A. Yes. Sometimes he wouldn't come at all. He didn't support me. He gave me some money but not very much, and he wrote bad checks right and left.

Q. And did people contact you with respect to these bad checks? A. They certainly did. Q. By telephone or in person? A. Some in person, some by telephone.

Q. And how did that affect you, Mrs. Hendricks? A. *It disturbed me terribly.* Q. *Had you been accustomed to that?* A. *Never.* (Tr. 35).

Q. Now I'll ask you this general question, Mrs. Hendricks. During this period since about September or October of 1946 up until the time this action was filed, in a general way have you been able to get along very well with the defendant? A.

In a general way I'd say no, and it's been mostly money matters all the time with us. Q. Has that affected your health and your well-being? A. Well, yes, it's been a lot of worry and trouble with it all through my married life. Q. Have you had quarrels with the defendant as a result of his conduct? A. Yes. Q. And have they been frequent? A. Yes. Q. *And has that affected your well-being and peace of mind?* A. *Certainly it has.* (Tr. 37). Q. Mrs. Hendricks, from your experience with the defendant, do you know now or do you believe you could live with him with any degree of success? A. No. Q. You think it would affect your health if you were living with him? A. *That and my sanity.* (Tr. 44). (Emphasis supplied).

Plaintiff testified that defendant became intoxicated quite frequently during the time she lived with him. (Tr. 137). He was arrested for drunken driving at Smithfield, Cache County, about December 20, 1948, by Highway Patrolman Ed. Pitcher. This occurred during the nighttime. Defendant admitted his plea of guilty to this charge and payment of a \$100.00 fine, (Tr. 160-161) and his driver's license was revoked for the duration of one year. (Tr. 137-138).

Sometime in the year 1950, the defendant was driving his car easterly on second north street in Logan, about midnight, in what two Logan Police Officers, who were following him, considered to be in an unlawful manner. (Tr. 130). They stopped him and took him home, leaving his car parked at second north and main streets. (Tr. 131). Officer Ray Jones testified that, "We thought it best to take him home and not let him drive at the present (that

time.” (Tr. 130). After arriving at plaintiff’s home, plaintiff and defendant engaged in an argument, so the officer’s took defendant in their car and they rode around for a considerable length of time and, until they considered that he was sober enough to drive his car home. (Tr. 131). On this and other occasions defendant seemed to be under the influence of something, whether liquor or something else. Defendant admitted to plaintiff that he had smoked marijuana on several occasions. (Tr. 187).

When these parties were married, plaintiff owned an interest in the family home and in the sale thereof she received as her share \$1,200.00. She also owned the business property on main street in Logan, from which she received a monthly rental of \$125.00. The taxes on this property amounted to about \$25.00 per month. (Tr. 57). Thus she had about \$100.00 clear above taxes. When defendant loaned \$1,300.00 from plaintiff in 1944. (Tr. 30) she borrowed this amount from her bank for him and repaid it in monthly payments of \$50.00. Plaintiff testified (Tr. 57) this amount, “all went for our living, Vic (the defendant) had the money and one way or the other it went for our living.” (Tr. 57). Thus it appears that the said rental of \$100.00 from July 1, 1943, to the time the property was sold on October 31, 1946, amounting to \$3,600.00, was used to pay off defendant’s loan and for household support, and the \$1,200.00 received from her interest in the home, all amounting to \$4,800.00 was spent by plaintiff directly for defendant’s benefit.

When plaintiff and defendant separated in the summer of 1946, she had no home in Logan, so she purchased the home in which she is now residing. And in order to

purchase the same it became necessary to sell her business property, which was sold in October, 1946, from which sale she received the net amount of \$21,065.00, (Tr. 28). Plaintiff paid \$6,000.00 for the home, (Tr. 27) and approximately \$3,000.00, for interior painting, wallpaper, carpets, drapes and remodeling, or a total of \$9,000.00. She paid \$2,750.00 for a car and at the time of trial she had two war bonds of net value of \$1,640.00, or a total of \$13,390.00. When this amount is subtracted from \$21,065.00, it leaves a balance of \$7,675.00 which amount was expended by plaintiff for household expenses between October, 1946, and March 1, 1952, when this action was filed. When \$7,675.00 is added to \$4,800.00 it will be seen that plaintiff contributed \$12,475.00, toward supporting herself and defendant during their married life of 8 years and 8 months. And the evidence will show that defendant lived upon the plaintiff's income which is definitely proven by plaintiff's checks, and her bank statements offered and received in evidence. And defendant has not denied that the above amount was spent for family and household expenses.

Defendant has farm property at Lewiston, consisting of 154 acres of good irrigated farm land valued at \$350.00 per acre with improvements. (Tr. 4, 5). He also has certain warehouse property located near his home which he values at about \$1500.00. (Tr. 170). Thus the real property according to a conservative value would be approximately \$55,000.00. In January 1951, the defendant's boys intended to purchase this property, including all machinery and equipment and defendant then fixed the sale price at \$68,000.00. (Tr. 41). The mortgage indebt-

edness at time of trial was \$20,400.00. (Tr. 4). Defendant had two trucks in which he had an equity of about \$4,000.00. (Tr. 167-168). He also had a 1950 model Chevrolet. The farm without improvements is rented for the current year at a cash rental of \$5,000.00, and the property taxes are approximately \$600.00. (Tr. 164). Defendant is receiving a net rental income this year of \$5,400.00 (Tr. 164).

The foregoing statement covers most of the pertinent facts in the case, however, if any facts have been overlooked, they will likely be covered in the discussion of the evidence in the several points raised.

The plaintiff brought this suit asking:

1. For a decree of divorce dissolving the marriage contract.
2. Awarding to plaintiff the expenditures made for household support in the sum of \$12,475.00.
3. For a reasonable property settlement or, in lieu thereof a reasonable alimony.
4. Reasonable attorneys fee.
5. Costs of suit.

Statement of Points Upon Which Appellant Intends to Rely for Reversal of Judgement and Decree.

1. The Court erred in making it's findings of fact number four, it's conclusions of law and decree that plaintiff's complaint be dismissed on the merits with prejudice. (R. 7, 8, 9).

2. The Court erred in making it's findings number five, "That each of said parties were guilty of crimination and recrimination, one against the other," (R. 7) because there is no pleading or evidence to support the same.

3. The Court erred in striking the plaintiff's testimony and evidence. (Tr. 218-235).

4. The Court erred in refusing to award to plaintiff alimony and a property settlement, and in making the following portion of finding number three, viz,— "and used the proceeds thereof mostly for her own use and benefit." (R. 7, 8, 9).

5. The Court erred in refusing to award plaintiff's attorney a reasonable fee.

ARGUMENT

Point 1. The Court erred in making it's findings of fact number four, it's conclusions of law and decree that plaintiff's complaint be dismissed on the merits with prejudice. (R. 7, 8, 9).

It is very apparent from the courts oral findings made at the conclusion of the trial on June 9, 1952, that plaintiff had proven a case against the defendant on the grounds of cruelty as alleged in her complaint, as will appear from the following oral findings made by the court:

"The court feels that a divorce should be granted." (Tr. 206).

"The court finds the parties can never live together and that a divorce should be granted." (Tr. 207)
The court further found:

“If I can do it legally I want to grant them both a divorce, or I want to grant a divorce without referring to who gets it.” xxx “but on the whole case it does appear there should be a divorce.” (Tr. 207).

From the foregoing findings it definitely appeared that the plaintiff had produced sufficient evidence to entitle her to a divorce, but the court apparently did not want to create the enmity of the defendant.

It also appeared that the court did not want to assume the task of making a property settlement which plaintiff included in the prayer of her complaint. In this connection reference is made to the following oral finding, made by the court on June 23, 1952.

“Can I grant both parties the divorce or can I grant a divorce without referring to who gets it? That becomes important, as you will appreciate, because the court has in mind making certain property orders, and if I grant her a divorce I feel compelled to do certain things I wouldn’t otherwise do. I won’t grant either party a divorce. It’s a question of granting both of them a divorce or dismissing the proceedings on the merits, both of them being guilty of such acts of a criminal nature that the court cannot conscientiously grant a divorce to one side and brand one party as a guilty person and embellish another one as a lilywhite person entitled to a kind of relief this court should grant. So please do some research. *If I have a chance I’ll grant a divorce to both parties. Whether I can do it or not I don’t know.*” (Tr. 207). Italics added.

On June 23, 1952, in open court, the court made the following statement:

“Let the record show that both counsel are now present, as well as Mr. Hendricks. Mr. Nelson, as I indicated heretofore, unless somebody wants to suggest a stipulation or something, I’m going to direct Sjostrom to prepare findings of fact and conclusions of law and decree dismissing both the complaint and the counterclaim on the merits with prejudice. But if counsel care to make a suggestion to the court, or if you want to make a stipulation I’ll grant a divorce to both parties against each other.” xxx “What I would like to do is grant a divorce to both parties. They both have children, and there might be some ego advantage to each party to feel that they had each won the case. But in view of the dearth of authorities under which I dare do that, *I won’t do it unless you stipulate to it.*” (Italics added).

When the parties could not agree upon a property settlement, the court entered its formal findings, conclusions and decree on July 31, 1952. (. 7, 8). In paragraph two, the court finds as follows:

“That since about the month of May, 1944, defendant has treated plaintiff cruelly, causing her great mental and physical distress, as follows: “That said defendant has frequently become intoxicated, has frequently stayed away from home overnight without just cause, has exchanged “mash” notes with women friends, once or twice has threatened to do bodily harm to the plaintiff, all of which actions has caused the plaintiff great mental distress.”

As an apparent offset to the foregoing findings, the court’s finding number four is as follows:

“That since said marriage the plaintiff has also been guilty of cruel treatment of defendant, to the

extent of causing defendant great mental distress and travail, in this: That said plaintiff has been a frequent user of of intoxicating liquors, that she deserted and abandoned the defendant's domicile and residence at Lewiston and moved to Logan without just cause and excuse, that she wrongfully refused to sign a mortgage to the Bear River State Bank at Tremonton, which mortgage was asked for in good faith by the defendant in furtherance of his business, that plaintiff wrongfully accused the defendant of being a drug addict to a certain police officer of Logan City and attempted to have the defendant incarcerated and jailed on that charge."

It is respectfully submitted that the court erred in making finding number four in view of the fact that the court had already entered it's finding number two, which entitled the plaintiff to a divorce from the defendant. From an examination of the record, it will be seen that there is no substantial evidence upon which the court could make the findings contained in number four. There is no evidence in the record that plaintiff has been a frequent user of intoxicating liquors. There is no evidence in the record to prove that plaintiff deserted and abandoned the defendant's domicile when she moved from Lewiston to Logan, in July of 1946. Plaintiff's testimony is to the effect that for two years immediately prior to that time, defendant had treated plaintiff cruelly and things were going from bad to worse. (Tr. 15-17, 24, 25). And moreover, the evidence shows that within three months after plaintiff left the defendant as aforesaid, they became reconciled and lived and cohabitated together as husband and wife. (Tr. 26). Thus defendant condoned whatever cruelty, if any, theretofore existing between the parties. And

assuming, but not conceding, that plaintiff wrongfully refused to sign a mortgage to the Bear River State Bank, which was prior to their separation in July, 1946, upon the aforesaid reconciliation thereafter between the parties, (Tr. 26) plaintiff's refusal to sign said mortgage was also condoned. There is no testimony in the record that plaintiff accused defendant of being a drug addict. The undisputed testimony on this question was testified to by the police officers. The officers were called to plaintiff's residence because defendant was creating a disturbance there. On another occasion when defendant was found driving easterly on second north street in Logan City on the lefthand side of the street by two police officers, he was taken into custody by them and taken to his home. The plaintiff as well as the officers observed that there was something wrong with the defendant on that occasion. (Tr. 130). There is absolutely no testimony in the record that plaintiff at any time, attempted to have the defendant incarcerated and jailed.

However, the court seemed to overlook the fact that the defendant was arrested at Smithfield and charged with driving his automobile while under the influence of liquor. To this charge defendant entered a plea of guilty and paid a fine of \$100.00, and his drivers license was revoked for one year. This was admitted by defendant. (Tr. 160-161).

It is a matter of common knowledge that Police or Highway Patrolmen, do not usually arrest an individual for a first offense unless an accident has occurred, and it is very likely that defendant was warned by the Highway Patrolmen on previous occasions. When the record is carefully examined, it will be seen that there is no substantial

evidence to support the courts finding number four, but it was resorted to by the court in order to offset the courts finding number two, and thus pave the way for the court to dismiss plaintiff's complaint, and thus relieve the court of having to grant plaintiff the relief prayed for in her complaint. The court was, under the evidence, not justified or warranted in dismissing plaintiff's complaint with prejudice. The judgment as finally made by the court was in direct conflict to it's previous finding, viz:

"The court feels that a divorce should be granted. The court finds the parties can never live together and that a divorce should be granted." (Tr. 206, 207).

Assuming, but not conceding, that the parties were equally at fault, the court ignored the well known rule that on grounds of cruelty, the courts, including this Court, grant the wife a decree of divorce on much less evidence than they do the husband.

In the case of *Doe v. Doe*, 48 Utah 200; 158 Pac. 781, this Court applied this salutary rule:

"The adjudged cases show that courts, on the ground of cruelty, grant the wife a decree on much less evidence than they do the husband. That rests on sound principles, for acts and conduct on the part of a husband may well constitute cruelty to the wife causing her great mental distress, when similar acts and conduct on her part may not constitute cruelty to him, or cause him great mental distress. Before a decree is granted the husband on such ground, it ought to be a somewhat aggravated case."

In *Hyrup v. Hyrup*, 66 Utah 580, 245 P. 335, the rule was stated:

“A husband asking divorce for cruelty because of “great mental distress” caused by spouse must present a much stronger and somewhat aggravated case in comparison with that required of wife asking divorce on such ground, since wife may be more easily made to suffer great mental distress.”

In *Cordner v. Cordner*, 61 P. 2d. 601, this rule was re-stated by this Court —

“The adjudged cases show that courts, on the grounds of cruelty, grant the wife a decree on much less evidence than they do the husband. That rests on sound principles, for acts and conduct on the part of a husband may well constitute cruelty to the wife causing her great mental distress, when similar acts and conduct on the part of a husband may well constitute cruelty to the wife causing her great mental distress, when similar acts and conduct on her part may not constitute cruelty to him, or cause him great mental distress. Before a decree is granted the husband on such ground, it ought to be a somewhat aggravated case.”

And in the foregoing opinion the court stated the following rule:

“Two people who cannot adjust themselves should not by the court be required to maintain a relationship that has become intolerable to them.”

When the rule adhered to in the foregoing cases is applied to the courts finding two and four, judgment should be rendered in favor of the plaintiff as prayed for in her complaint. It is respectfully submitted that the trial court committed reversible error in its failure and refusal to grant plaintiff a divorce and the relief demanded in her complaint.

Point 2. The Court erred in making it's finding number five, "that each of said parties were guilty of crimination and recrimination, one against the other," (R. 7) because there is no pleading or evidence to support the same.

It is respectfully submitted that the defendant did not plead the defense of recrimination in his answer or counterclaim. In paragraph six of defendant's counterclaim, he alleges in very general terms that plaintiff's cruel treatment caused defendant great mental distress, and has made life with plaintiff impossible. It will thus be seen that defendant was seeking a divorce from plaintiff, as is further evidenced by the prayer in his counterclaim, viz,— "that defendant be granted a divorce against the plaintiff."

Thus there was no issue raised by the pleadings, (R. 2, 3) nor by the testimony of either party, on question of recrimination. The case was concluded and submitted to the court on May 12, 1952. (Tr. 205). The doctrine of recrimination was, to the surprise of both parties, first mentioned by the court on June 9, 1952, in announcing it's decision: (Tr. 206).

"The court finds both parties guilty of crimination and recrimination, finds all of the allegations and proof of both parties true and correct, except that the court finds that Mr. Hendricks was never, within the issues of the case, a user of narcotics or drugs." (Tr. 206).

It will thus be seen that by injecting the doctrine of recrimination in this case after both parties had submitted all of the testimony, and the case was closed, the court

thereby introduced a new theory, not submitted to the court by either the pleadings or the evidence of either party.

If a trial court could thus ignore the issues as presented to the court by the pleadings in this case, and introduce a completely new and strange theory not contemplated by either party, then pleadings would serve no purpose and be of no avail. And moreover, if a court could ignore the issues presented to it by the parties in the case at bar, then a court could ignore the issues presented by the pleadings in any case. Such a procedure would completely destroy the orderly conduct and purpose of a trial. Neither counsel or client could vouchsafe what the result of such a trial might be.

The courts hold that the doctrine of recrimination must be pleaded in order to be available as a defense.

In *Oppeman v. Opperman*, 65 N.E. 2d. 655, it was held by the Ohio Court of Appeals that,—

“The doctrine of recrimination is recognized as a defense which must be pleaded in order to be available.”

In the case of *Brandt v. Brandt* (N.D.) 33 N.W. 2d. 620, the Supreme Court of North Dakota held:

“We conclude, however, that the general rule is that recrimination is a defense which must be pleaded in order to warrant the court in considering it. *Young v. Young*, (25 A.L.R. 1049); *Jones v. Jones*, 18 N.J. Eq. 33, 90 Am. Dec. 607; *Keezer on Marriage and Divorce*, Sec. 805; *Nelson on Divorce*, 2nd Edition,

Sec. 10.10; 17 Am. Juris. 314, Sec. 325.” xxx “We hold that recrimination is an affirmative defense to be availed of only when pleaded and relied on by the defendant.”

In *Welch v. Welch* (Florida) 152 So. 173, it was held that,—

“Recrimination as a bar to divorce otherwise grantable, except where adultery is the basis of recrimination, should be asserted as an affirmative defense in answer and pleaded with same particularity as charged in complaint for divorce.”

The rule is also concisely stated in 19 C.J. 116, in the following language:

“As a general rule recrimination, to be available as a defense, must be set up in the answer. The misconduct must be set out in the answer with the same particularity as to time, place, and circumstance as is required in a complaint for divorce on the same ground.”

In 17 Am. Jur. 314, Sec. 325, the rule is stated:

“Strictly, recrimination is an affirmative defense which must be specially pleaded or set up in answer as a defense in order that the defendant may have the right to give proof of such defense.” (Annotation 76 A.L.R. 991 — *Young v. Young* (N.J.) 119 A. 92 25 A.L.R. 1049).

It is respectfully submitted that the trial court committed reversible error when it introduced the doctrine of recrimination as a defense in this case and decided the case upon that theory when it was not either pleaded or relied upon by the defendant.

And moreover, the judgment as rendered is unusually drastic, in providing that it is entered with prejudice, (Tr. 214). This is tantamount to placing the parties in a strait-jacket. Plaintiff testified that she could not endure to live with defendant. That it would seriously effect her health and her sanity. (Tr. 44). Thus the court was advised of her attitude, yet notwithstanding such information he announced: "This dismissal will be with prejudice. I don't want either of them to file a new lawsuit based on anything in the past. They'll have to go back together and start fighting again. (Tr. 214).

Point 3. The Court erred in striking the plaintiff's testimony and evidence.

It is respectfully submitted that the court erred in striking the testimony offered by plaintiff (Tr. 218-235) because this evidence definitely disclosed that while the parties were living together the defendant was consorting with other women. During the summer of either 1949, or 1950 (Tr. 224) plaintiff took some of defendant's clothes to the farm at Lewiston and upon her arrival there found a Mrs. Stewart of Preston, Idaho, at the home with defendant and they were in an intoxicated condition. Plaintiff had previously heard about Mrs. Stewart having been at the Lewiston home with the defendant on prior occasions. (Tr. 224). Apparently, when plaintiff entered the home and found defendant and Mrs. Stewart there, it had a tendency to sober Mrs. Stewart, since as plaintiff testified, Mrs. Stewart went out of the house "like an antelope." (Tr. 224). At that time plaintiff had actual knowledge of what had previously been a rumor. Plaintiff remonstrated with the defendant, but he was too intoxicated to know

what she was talking about. (Tr. 225). When plaintiff arrived at the home and found Mrs. Stewart there alone with the defendant, she felt terrible about it. (Tr. 225). Plaintiff remonstrated with defendant at a later time about his promiscuity with Mrs. Stewart and other women. (Tr. 225).

The evidence also discloses that defendant received a letter (Pl. Ex. BB) from a Mrs. J. H. Jones of San Francisco, California, couched in very intimate and endearing terms. (Tr. 225-227). Plaintiff's Exs. AA, CC and DD were written by a woman from a neighboring town near Lewiston. They reveal that a very intimate relationship existed between herself and the defendant. Exhibit "DD" refers to defendant's Chevrolet, which he owned and operated prior to purchasing a new 1950 model Chevrolet. (Tr. 177). From the text of Ex. DD it definitely appeared that their relationship covered a considerable period of time.

Prior to the time the foregoing testimony was adduced the court stated,—

“but if there's any branch of cruelty we haven't heard, I propose to hear the nature of it.” (Tr. 217).

The foregoing testimony had not been previously offered during the trial. And this testimony was material and relevant to prove mental cruelty. The court totally ignored the foregoing statement when it later granted defendant's motion to strike this testimony. (Tr. 235).

Point 4. The Court erred in refusing to award to Plaintiff alimony and a property settlement, and in

making the following portion of finding number three, viz,— “and used the proceeds thereof mostly for her own use and benefit.” (Tr. 7, 8, 9).

The evidence is without dispute in this case that as a result of this marriage the plaintiff has suffered a serious property and financial loss. At the time of the marriage between these parties, the plaintiff owned business property in Logan, from which she was receiving a monthly rental income of \$115.00, and a few months later it was raised to \$125.00, per month. The taxes were about \$25.00 per month. (Tr. 56). The evidence disclosed that from the date of this marriage, in June, 1943, to the summer of 1946, this income aside from taxes was all spent by plaintiff for household expenses because of defendant's failure to support plaintiff. This is proven by plaintiff's cancelled checks and bank statements offered in evidence. At the time of the marriage, plaintiff also owned a share in the family home and at the time of the sale thereof she received the sum of \$1200.00, Tr. 40) and this amount was also spent for household expenses.

It will thus be seen that during the period of approximately three years while plaintiff was living with the defendant on his farm at Lewiston, she spent from her own funds approximately \$4,800.00, for household expenses, which became necessary because defendant failed to provide support. And during which period of time the defendant spent very little, if any, of his own funds for that purpose.

In the summer of 1946, when these parties separated, plaintiff had no home in Logan, so she purchased the home

in which she is now residing. (Tr. 27, 28). And to purchase the same it became necessary to sell her business property, which was sold in October of 1946, from which sale she received the net amount of \$21,065.00. (Tr. 29). From this amount plaintiff paid \$6,000.00 for the home, and approximately \$3,000.00 for interior painting and decorating, carpets, drapes and remodeling. She paid \$2,750.00 for a car and at time of trial she had two war bonds, net value of \$1,640.00, or a total of \$13,390.00. When this amount is subtracted from \$21,065.00, it leaves a balance of \$7,675.00, all of which was expended by the plaintiff for household expenses between October, 1946, and March 1, 1952 when this action was filed. (Tr. 38, 39). When this amount is added to \$4,800.00, plaintiff has contributed altogether \$12,475.00, toward supporting herself and defendant during their married life of approximately 8 years and 8 months. The evidence thus shows that defendant lived upon the plaintiff's income, which is definitely proven by plaintiff's checks, (Ex. A-O) and her bank statements offered and received in evidence. And defendant has not denied that the above amount was spent for family and household expenses.

And while plaintiff was spending her money for family support, resulting in the depletion of her estate, the defendant's property remained intact. He has not lost anything by way of diminution of property; and the present mortgage on his property was placed there by the defendant to pay his debts, and that the balance owing on the principal amount of the mortgage debt is \$20,400.00. The evidence further shows that his property is worth in the neighborhood of \$68,000.00. (Tr. 41). Mr. Watkins,

agent and appraiser for Prudential Life testified that the defendant's farm property was worth \$350.00 an acre with improvements. (Tr. 4, 5). This did not include personal property such as trucks, automobile, farm machinery and equipment, nor the warehouse property. Plaintiff testified that about a year ago when defendant intended to sell the farm, improvements thereon and personal property to his boys, the sale price was \$68,000.00 (Tr. 41). This contemplated sale did not include the warehouse property. Defendant testified that this property was worth about \$1,500.00. (Tr. 170) and it is extremely doubtful that defendant would sell his entire property at this time for less than \$70,000.00.

Thus there is definite proof that when the present mortgage indebtedness of \$20,400.00, is subtracted from the total worth of defendant's farm property, the net value thereof is about \$50,000.00. It is rather unusual that plaintiff should be required to spend approximately \$12,475.00, of her money in less than nine years, when the defendant owned one of the best farms in Lewiston, (Tr. 5) with a net worth of approximately \$50,000.00.

It is respectfully submitted that plaintiff is entitled to have restored her property holding and earnings hereinbefore referred to, which totals \$12,475.00. In addition to that she should be entitled to permanent alimony.

The general rule provides that the size of the husband's estate is material in fixing the amount of permanent alimony for the support of the wife. In 19 C.J. 253, Section 588, the following rule is stated:

“Permanent alimony being in the nature of property, the court in awarding it should consider primarily the amount of the husband’s property (cases cited). The estate of the husband which is taken into consideration in fixing the amount of alimony is usually the estate which he owned at the time of divorce.”

This Court has fixed the alimony and property settlement on an amount, equal to one-third or one-half of defendant’s estate. The following Utah cases so hold:

In the case of *Lyon v. Lyon* (Utah) 206 P. 2d. 148, this court said:

“The right in lieu of dower in Utah is only one-third to the wife. Strict divisions of property have gone as high as one-half each.”

In the case of *Woolley v. Woolley*, 112 Utah 391, 195 P. 2d. 743, this court confirmed a settlement made for the parties by the trial court in the following language:

“The court in its decree provided for the distribution of the property on the following basis: There was a cash offer of \$30,000.00 made for the Cottonwood property and the trial court ordered this sold. From the proceeds received, the plaintiff was to receive \$8,000.00 more than the defendant. Plaintiff was decreed war savings bonds of the face value of \$10,000.00, and the defendant was awarded the balance of the property. Assuming the Cottonwood property was to sell for \$30,000.00, then the distribution as ordered by the court is as follows: Plaintiff is to receive \$19,000.00 from the sale of the home and \$10,000.00 from the war bonds, or a total of \$29,000.00. 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 proportion."

It should also be kept in mind that although Mrs. Woolley was given one-third of the property, the court granted Mr. Woolley a divorce against his wife on grounds of mental cruelty. *And she had not supported the family from separate income.*

The case of Tremayne v. Tremayne 211 P. 2d. 452, the trial court awarded plaintiff (wife) the divorce and about four-fifths of property acquired during marriage. On appeal by husband the judgment was affirmed.

In view of the foregoing decisions when applied to the above stated facts, relative to plaintiff's lack of income and her inability to work (Tr. 70) and the fact that the defendant has the ability to work and has a substantial yearly rental income from the farm of \$5,400.00, after taxes, (Tr. 164) and he can thus devote his full time to other employment which should yield a substantial income. When these factors are considered it would seem fair to both parties, if this court award to the plaintiff the sum of \$12,475.00, which she has contributed for household expenses, together with reasonable alimony.

The court erred in its finding (No. 3) that plaintiff had used most of the proceeds from the sale of her business property for her own benefit. The income from said property from the date of her marriage to the date of sale, amounted to approximately \$4,800.00, which was used for family support. (Tr.57). When this amount is added to the

net sale price of \$21,065.00, the total is \$25,865.00. From that amount plaintiff expended approximately \$12,475.00 for household support, which is just a little less than one-half of \$25,865.00. Thus plaintiff used approximately one-half of the amount of money she received from the income and sale of business property for her own use, and the other one-half was used for family support.

Point 5. The court erred in refusing to award plaintiff's attorney an attorney's fee.

It is respectfully submitted that the court erred in refusing to make an award for plaintiff's attorney. It was stipulated and agreed by court and counsel that plaintiff would not be required to submit proof on the reasonableness of the fee in this case. (Tr. 76).

Considering the amount of property involved in this case and the amount of legal services performed in the preparation and trial of this case and, the services to be rendered in this appeal, it would seem that an award of \$750.00, would not be excessive. *Burt v. Burt*, 204 P. 91; *Openshaw v. Openshaw*. 12 P. 2d. 364.

In approving of \$750.00, in the *Burt* case, this Court said:

“The record here shows that at the time of the trial plaintiff was earning a salary of \$5,500 per annum. According to plaintiff's own estimate he is possessed of household goods and effects of the approximate value of \$2,500, a house and lot in Pasadena of the value of \$3,500 and his liabilities do not exceed \$2,500, including the liabilities incurred by him in

his efforts to litigate and settle his matrimonial difficulties. Under all the circumstances as disclosed by the record here, we are not prepared to say that the district court, in awarding an attorney fee of \$750, so abused its discretion that this court would be justified in making any intervention. It therefore follows that the allowance of alimony and the expenses of a trial of this nature, including attorneys' fees, are largely matters within the discretion of the court who tried the case."

And moreover, when this Burt case was decided by this Court in January, 1922, the value of the dollar was greatly enhanced over the value of the current dollar.

This situation was also true in the year 1932, when this court decided *Openshaw v. Openshaw*, supra, yet this Court approved a fee of \$500.00, fixed by the trial court. In the course of the opinion this Court stated:

"It is asserted that there is no evidence to support the finding made by the trial court that \$500 is a reasonable amount to be paid for the wife's attorney's fee, and that there is no evidence upon which this court can make an award on that account. We do not agree with either of these contentions. It is true that no witness testified as to what is a reasonable fee to be allowed. But the whole record was before the trial court. The record disclosed all facts that are generally taken into account by the trial courts in this state in making awards for attorney's fees in divorce actions. The same facts likewise appear by the record in this court. Without enumerating them it is sufficient to say that we think they are ample to support the finding that a fee of \$500 is a reasonable fee to be paid for the services of plaintiff's attorney in the trial court."

The appellant respectfully submits to this Honorable Court that the findings, conclusions and judgment of the trial court be reversed, remanding the case and directing that the trial court enter findings, conclusions and decree, awarding to plaintiff a decree of divorce, a reasonable property settlement, reasonable alimony, attorney's fee and costs.

L. E. NELSON,
Attorney for Plaintiff
and Appellant.