

1953

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

Utah Supreme Court

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Case No. 7893

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

JAN 24 1953

GLADYS P. HENDRICKS,

Plaintiff,
Clerk, Supreme Court, Utah

— vs. —

BRIGHAM VICTOR HENDRICKS,

Defendant.

RESPONDENT'S BRIEF

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INDEX

	Page
STATEMENT AS TO ISSUES	1
STATEMENT OF LAW:	
1. Law	2
2. Recrimination	3
3. Was the Application of the Rule an Issue in This Case?	3
STATEMENT OF FACTS	5
AUTHORITIES CITED:	
30 C. J. S., 475 Section 93	4
Rules of Procedure, Rule 8, Sub-Division C	5
CASES CITED:	
Blankenship vs. Blankenship 276 Pac. 9 (An- notated in 63 A. L. R. 1127)	3
Brazell vs. Brazell 129 P 2d. 117	3
Chevez vs. Chevez 50 P 2d. 264 (Annotated 101 A. L. R. 635)	3
Comfort vs. Comfort 112 P. 2d. 259	3
DeBurgh vs. DeBurgh 240 P 2d. 625	3
Dupes vs. Dupes 184 Pac. 425	2
Eldridge vs. Eldridge 259 S. W. 209	4
Evans vs. Evans 157 P. 2d. 495	3
Gynex Corporation vs. Dilex Institute 85 F 2d, 103	4
Mueller vs. Mueller 105 P 2d. 1095	3
Heisler vs. Heisler 55 P 2d. 727	3
Phillips vs. Phillips 236 P 2d., 816	3
Richman vs. Bank of Perris 282 Pac. 801	4
Smith vs. Ajaz Pipe Line Company 87 F 2d. 567	4
Teuscher vs. Gragg 276 Pac. 753	4

IN THE SUPREME COURT of the STATE OF UTAH

GLADYS P. HENDRICKS,
Plaintiff,

— v.s. —

BRIGHAM VICTOR HENDRICKS,
Defendant.

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

STATEMENT AS TO ISSUES

On February 28, 1952, plaintiff filed for divorce alleging cruelty in general terms. On March 17, 1952, defendant filed his answer and counter-claim denying the allegation of cruelty on his part and by his counter-claim he sought a decree of divorce from plaintiff on the grounds of cruelty.

The trial court, with commendable patience, heard the evidence (which on plaintiff's part was offered piecemeal and could conveniently be stated like an opera as acts numbered one, two and three). After the closing chapter the court refused to grant a divorce to either

party and on his own motion prepared findings of fact, conclusions of law and a decree dismissing both the complaint and counter-claim. In its findings number 2 the court expressly found that defendant was guilty of cruel treatment to plaintiff. In finding number 4 the court found that plaintiff was also guilty of cruelty toward defendant. Whereupon the court applied the doctrine of recrimination and denied each party any relief.

It is self-evident that neither party was satisfied with this decree, but inasmuch as plaintiff has seen fit to appeal, it becomes respondent's duty to defend this action because, in the language of the trial court, we do not believe that the plaintiff can, by this appeal, become "lily-white" while the defendant is branded as the guilty party and charged with the responsibilities flowing therefrom.

1. *LAW*. Before discussing the evidence it seems proper to refer to a few general statements of law. First: In divorce actions great latitude is given the trial court and unless there has been a clear abuse of discretion an appellate court will not set aside the judgment. As stated by the court of appeals of California in the case of *Dupes vs. Dupes* 184 Pac. 425

"Whether acts and conduct constitute such cruelty as warrants granting a divorce is a question of such nature that the conclusion of the trial court is necessarily entitled to great weight and it is only where it is without any substantial support in the evidence that it will be disturbed on appeal."

This court has time and again announced the same rule. We do not believe that further citation of authority on this question is necessary.

2. *RECRIMINATION*. ..The rule of recrimination is stated that "Where each of the spouses has been guilty of misconduct which is cause for divorce, neither is entitled to a decree." We have not found a case dealing with the rule in this State and apparently appellant has not. Therefore unless we have overlooked such a case it would seem that this court has never been called upon to pass upon this question. However, the rule seems to be established by the great weight of American authority. Without attempting to exhaust the cases we cite the following from neighboring states:

Blankenship vs. Blankenship 276 Pac. 9 (Annotated in 63 A. L. R. 1127)

Phillips vs. Phillips 236 P2d. 816

DeBurgh vs. DeBurgh 240 P 2d. 625

Evans vs. Evans 157 P2d. 495

Brazell vs. Brazell 129 P2d. 117

Comfort vs. Comfort 112 P2d. 259

Mueller vs. Mueller 105 P2d. 1095

Heisler vs. Heiser 55 P2d. 727

Chevez vs. Chevez 50 P2d. 264 (Annotated 101 A. L. R. 635)

Smith vs. Smith 31 P2d. 168

3. *WAS THE APPLICATION OF THE RULE AN ISSUE IN THIS CASE?* Plaintiff asked for a divorce on the grounds of cruelty. Defendant in his answer denied this allegation and by counter-claim

charged plaintiff with cruelty. By a reply she denied the same. The issues therefore before the court were (a) Was defendant guilty of cruelty? (b) Was plaintiff guilty of cruelty? (c) Was neither party guilty of cruelty? (d) Were both guilty of cruelty? We cannot see how the issue of recrimination could be more clearly drawn by the pleadings. What more could be alleged by way of recrimination? We say, therefore, that the rule was specifically raised by the pleading.

However, we believe that under better reasoning the rule can be applied even though not specifically alleged as an affirmative defense. The rule of recrimination is based upon the equitable doctrine that "he who comes into equity must come with clean hands." The application of this maximum bars relief to those guilty of improper conduct in the matter as to which they seek relief." (30 C. J. S. 475 Section 93)

"It is not strictly or primarily a matter of defense, but is invoked on grounds of public policy and for the protection of the integrity of the courts." (See above citation)

We cite the following cases which support this theory:

Gynex Corporation vs. Dilex Institute 85 F2d 103

Teuscher vs. Gragg 276 Pac. 753

Eldridge vs. Eldridge 259 S. W. 209

Richman vs. Bank of Perris 282 Pac. 801

Smith vs. Ajax Pipe Line Company 87 F2d. 567

In all these cases the maximum "He who comes into equity must come with clean hands" was applied, whenever the evidence disclosed a situation calling for its application.

We have heretofore cited a number of cases specifically dealing with the rule of recrimination. In most of these cases nothing is said about the rule being an affirmative defense which must be specially pleaded. Take for example the Mueller case. The issues were formed just as they are in the case at bar, and the same is true in at least most of the cases cited.

Furthermore since the adoption in this State of the new rules, pleadings have been greatly simplified. Only certain enumerated affirmative defenses need be pleaded. The list does not include the maxim "He who comes into equity must do equity" as an affirmative defense, which must be affirmatively pleaded (See Rule 8 Sub-division C).

As we view the situation the only question which can be raised on this appeal is resolved simply to a consideration of the question of whether or not there is substantial evidence to support the court's finding number 4 that plaintiff was herself guilty of cruelty toward defendant. If this finding is sustained on appeal, then the judgement must be sustained.

FACTS

While plaintiff has set forth in her brief a purported statement of facts, we think a reading of the entire record will disclose that plaintiff has, in many respects, overstated or at least greatly colored the facts. Her statement of the facts would lead one to conclude that her testimony was the only testimony offered in the case. This, of course, was not true. Then also it must be remembered that in a divorce action

the trial court has an opportunity to see the witness, consider her demeanor while on the witness stand and thereby obtain a better impression of the situation than can be obtained from reading the "cold record." In this case plaintiff attempted to prove her case in three separate stages. On the first stage plaintiff testified in full and rested. A reading of this testimony is quite enlightening. She complained principally of money matters and interference by a son of defendant. She stated that she had never lived on a farm before, that the first year on the farm at Lewiston they got along pretty well but that the second year was not so good. There was family interference, and that she purchased part of the groceries (Tr. 32); that she had an income of \$115.00 a month which was later raised to \$125.00 per month, which she spent for living expenses; that the third year matters got worse. There was family trouble with Vic's son and that on two or three occasions during the second year and possibly more frequently during the third year Vic would go away and remain overnight. "Our trouble was mostly bickering over money." (Tr. 35). It is interesting to note that during her recital of family troubles, not a word was said as to defendant drinking to any excess. Not a word was said about his carrying on with other women. Not a word was said about so-called "mash" notes or anything of the kind. In her own language their troubles were principally over money matters. She complained that Vic didn't give her all the money that she felt she was entitled to receive, and she claimed that she was spending the rentals collected by her for family expenses. On cross-examination she admitted that out of the monthly income was deducted the taxes on her own

property which amounted to approximately \$25.00 per month. She also admitted that she had borrowed money from the bank and that \$50.00 per month out of the monthly income was applied to the payment of this loan (although she now claims that the loan has never been repaid). She also admitted that Vic gave her money but her sole complaint was that it was insufficient to maintain her standard of living. The record showed that the plaintiff was the owner of considerable property, that she kept and maintained her own bank account, that she spent her own money as she saw fit without in any way consulting with her husband, that she operated her own automobile, that she made loans to her son by a previous marriage, that she purchased an automobile for him, that she was a woman of rather extravagant tastes and apparently quite improvident on the question of spending money.

After she had rested her case the defendant testified concerning the marital difficulties. He admitted that he had had some financial reverses, that he was heavily indebted and that he was unable to give plaintiff all the financial aid which she seemed to demand. However, he furnished her a good home on a farm and contributed regularly to her support. He produced checks going back to the year 1945 (he was unable to find checks antedating this date). His checks showed that during the year 1945 he gave Mrs. Hendricks or paid out for her use and benefit the sum of \$576.75; in 1946 the sum of \$1059.67; in 1947 the sum of \$1557.87; in 1948 the sum of \$2336.82; in 1949 the sum of \$1303.80; in 1950 the sum of \$2787.07; and in 1951 the sum of \$1672.04. (See plaintiff's Exhibit No. AA). He further testified,

and we think there can be no question as to this fact, that in addition to the checks above referred to he paid out in cash for groceries, household expenses, etc. additional sums which he could not specifically list but which he estimates to be nearly as great as the total amount of the checks, so that this was not a case where the plaintiff was left without means. It was a case where the plaintiff was discontented and disgruntled with living on a farm and not being given all of the money which she thought the defendant ought to supply her with. The cold facts are that the plaintiff simply did not like the quiet and somewhat secluded living on a farm, and she became dissatisfied. Imagine her complaint that two or three times during a whole year the defendant remained away from home overnight, no suggestion of any improprieties committed by him at any time.

The defendant then offered evidence in support of his answer and counter-claim. He testified, and there doesn't seem to be any particular dispute about it, that immediately following the marriage they established their home on the defendant's farm in Lewiston, that the plaintiff brought her furniture with her from Logan, that plaintiff gave away most of defendant's furniture to members of the family, that they completely re-furnished the home and apparently made it very comfortable and livable. He corroborated the fact that during the first year they got along very well, but apparently during the second and third years there was some discord, mostly money matters. Defendant contends that he gave plaintiff money regularly to support the family, which consisted only of the two of

them except for a period when plaintiff's son lived with them, yet plaintiff appeared to be disgruntled and dissatisfied. She didn't like living on a farm, she apparently did not care to mix socially with the farmers in Lewiston, she evidently had little to do and it is quite apparent that she began showing evidences of dissatisfaction.

Defendant testified that they had very little trouble from the time of the marriage until 1946. He admitted that during this period of time he was away from home a few nights, during which time he was engaged in business transactions (Tr. 107-108), but he states that he did not think the plaintiff made any particular objection to that. During the summer of 1946 defendant's son returned from the Army. He was married and lived on adjoining property. Defendant had previously been in the dairy business and had the facilities for going back into the business, but lacked the capital to do so. He and his son had some discussion as to again restocking the farm with dairy cows and allowing the son to operate the farm. The evidence further shows without conflict that the defendant was doing considerable trucking and as suggested he was heavily in debt. He concluded, therefore, to make a loan from the Bear River State Bank in order to provide capital for purchasing some dairy cattle and pay some of his pressing obligations. However, when the subject was discussed with the plaintiff she objected and refused to go along with the deal (Tr. 109), so defendant took the plaintiff to the Bank at Tremonton for the purpose of having her sign a note and mortgage. When she got there and learned the object of the visit she absolutely

and unequivocally refused to sign any note or mortgage and so they returned to Lewiston without closing the loan. No doubt a quarrel did ensue between them. Defendant felt that plaintiff should have joined with him in the consummation of the loan. She evidently disagreed and so without further ado she packed all of her belongings, ordered a van and left defendant's home practically stripped of its contents. She returned to Logan and refused to live any longer at Lewiston. At that time she advised defendant that she needed no help from him and she could manage her own affairs without his assistance.

There is some dispute as to the time before any attempted reconciliation was effected. Defendant contends that he remained on the farm for better than a year. The plaintiff contends it was about three months. However, apparently the parties' attempted some kind of a reconciliation. Plaintiff in the meantime had repurchased her home which she had previously sold to her son-in-law and she had spent quite lavishly in remodeling, redecorating and refurnishing the same. From that time until the filing of the complaint there seemed to have been intermittent trouble between the parties. Defendant wanted plaintiff to come back to the farm. Plaintiff refused and insisted on living in Logan. This did not create an atmosphere of good will between the parties. Defendant, being a farmer, had to leave early in the morning and if he put in a full day on his farm he could not return until late at night. This annoyed the plaintiff, she being used to city life felt that they should have an early dinner and she resented waiting dinner until his return, with the result that defendant,

if he did come home, would find it more convenient to eat at a restaurant. But on the contrary to avoid frictions and turmoil he would remain for considerable periods at the farm, cooking his own meals and getting along as best he could.

During this period plaintiff decided to further improve her home and without any consultation with defendant she incurred a debt in excess of \$2400.00. She paid \$1200.00 and demanded of defendant that he pay the remainder, which he did. This was a considerable time after he had borrowed the \$1100.00 from her. He contends that this payment was made to her in discharge of the debt. She claims it was not. And so it went—bickering and turmoil in which plaintiff apparently contributed her share.

Finally, because defendant came home whistling and in apparently a friendly mood, plaintiff called the officers and made the direct charge that defendant was addicted to the use of drugs and she wanted him arrested. She made this charge on one or two different occasions. The defendant testified positively that he had never touched drugs, and the court found this to be true. After defendant had offered his evidence and rested, then plaintiff came to the second act of the play. She asked the court's permission to reopen her case when court reconvened on April 28, 1952, (Tr. 143.)

Then for the first time she attempted to inject into the case the question of gambling, something she had entirely omitted in her case in chief. Her complaint seemed to be that the defendant sometimes played the slot machines; however, it is quite apparent that the

plaintiff enjoyed the same recreation except she contends that she played with smaller coins than the defendant. Apparently her greatest complaint arose from the fact that on one occasion while they were at Malad defendant won \$50.00. Plaintiff asked him to split with her his winnings, and he gave her only \$5.00, stating he was going to use the rest of it to buy a suit. (Tr. 154-155). They then went to Downey and they played the slot machines, where he again won enough to pay for their dinner. However his luck changed and he lost the \$50.00 which he had won. The plaintiff's chief complaint, therefore, seems to be that the defendant (foolish man) could not always win at the slot machines.

She then for the first time injected into the case alleged intoxication of the defendant. Apparently in the first act of the drama she had neglected to mention either the gambling or the alleged drinking and had insisted that their principal trouble was merely over money matters. On cross-examination plaintiff admitted that she also partook of intoxicating liquors on occasions and that they had both drunk socially (Tr. 158). The case was again closed.

On Monday, June 9, 1952, further discussions were had with the court and the case continued until July 7, 1952. After the court had indicated his views concerning the matter, plaintiff's counsel stated that plaintiff wanted to testify again, and so on the 28th day of July, 1952, we entered Act 3 of the drama.

After the court had announced how he felt about the matter and indicated an intention to find against

both parties, the plaintiff moved the court to again reopen the case and allow her to offer further evidence. The court indicated some impatience with plaintiff because of the piecemeal way in which she had presented her evidence, but the court indicated that he would again allow plaintiff to offer some additional testimony of cruelty provided it was not cumulative in character.

The plaintiff then for the first time testified that she had gone through the defendant's desk during the summer of 1951 and had found some so-called "mash" letters, which were marked AA, BB and CC. The plaintiff admitted that she had these exhibits in her possession and knew of their existence prior to the date of the trial. She offered no explanation as to why she had not gone into this question and offered them as a part of her case. It is true that after she had offered these exhibits the court struck the testimony, but we fail to see wherein the plaintiff was prejudiced in any way by reason of this ruling because the court notwithstanding his previous ruling included in his findings that "he exchanged 'mash' notes with women friends." This evidence which the court ordered stricken was the only evidence with respect to this matter and notwithstanding the court's order he considered the evidence which was offered and made it a part of his finding. Irrespective of this fact plaintiff is in no position to complain because the court expressly found defendant to be guilty of cruelty. The only question which can be presented on this appeal is whether or not the court's finding of fact number 4 is supported by the evidence. We assert that the evidence hereinbefore referred to abundantly establishes cruelty on the part of the plain-

tiff. The defendant as the husband had the right to designate where the plaintiff should reside so long as he was providing a reasonably decent place for her abode. He was dutybound to provide reasonably for plaintiff's support, but he was under no legal obligation to do more than he was financially able to do. Certainly two people could and should have lived very comfortably on a farm on the amount of money which the defendant gave to plaintiff by check and the additional amounts that he spent for groceries and other household expenses from cash in his pocket. If the plaintiff wanted to spend her own money she had that right, but she certainly had no legal grounds to complain if defendant was doing all in his power to make her reasonably comfortable. The court found that the plaintiff deserted and abandoned the defendant's domicile and residence at Lewiston and moved to Logan without just cause and excuse. We think the evidence amply supports this finding. The court also found that plaintiff had been a frequent user of intoxicating liquors. This finding is amply supported by the evidence, as plaintiff admits that she and her husband both drank intoxicating liquors.

The court found that plaintiff wrongfully refused to sign a mortgage to the Bear River State Bank, which mortgage was asked for in good faith by defendant in the furtherance of his business. This finding is amply sustained by the evidence. All of that property belonged to the defendant before the marriage. Admittedly he was hard pressed for ready cash. He was attempting to better his financial position and put him-

self in a position where he could contribute more to plaintiff, but plaintiff stubbornly refused to sign the papers, and then she precipitated a quarrel which led to her abandoning the defendant.

The court further found that plaintiff wrongfully accused defendant of being a drug addict to certain police officers of Logan, Utah, and attempted to have the defendant incarcerated and jailed on that charge. We think the evidence amply sustains this finding. She sent for the officers and told them her husband was full of dope. If this charge were untrue, and defendant testified it was and the court so found, we can think of nothing which would cast a reflection on defendant's character more than to make such accusation to third parties. There was absolutely no justification for her making such an ungrounded charge except to bring the defendant into disrepute.

In addition to these facts we have heretofore suggested the court was best qualified to judge the parties from their demeanor and behavior on the witness stand and to draw reasonable inferences therefrom. Why did the plaintiff elect to only tell part of the story then the going seemed to be tough add to the story and again a third time repeat the same procedure? The court had a right to conclude and infer that plaintiff was not entirely honest and frank with the court. The court had the right to infer from the whole proceedings that much of the domestic difficulties was precipitated by the plaintiff's own conduct, so we contend that finding number 4 is amply sustained by the evidence, and that this court upon a review after indulging the trial court in a wide latitude of discretion should not disturb this finding.

This leaves only one other point to consider. Counsel for the plaintiff has spent a great deal of time in his brief in discussing the finances of the parties. There is no question but what both plaintiff and defendant owned considerable property at the time of this ill-advised marriage. Plaintiff's property was practically clear and not encumbered. Defendant on the other hand owed a good deal of money. From the start the plaintiff kept her own money and her own property entirely separate. She did not consult with defendant relative to the same, but spent it as she chose. The plaintiff contends all of this money went for living expenses and proposes therefore to charge it all against the defendant (See pages 9 and 10 of plaintiff's brief). He also contends that because plaintiff received \$21,065.00 net cash in October, 1946, and that she paid \$6,000.00 for her home, \$3,000.00 for remodeling, \$2,750.00 for a car and at the time of the trial she claimed to have only \$1,640.00 left which was represented by two United States bonds; that she had therefore spent \$7,675.00 for household expenses notwithstanding the fact that plaintiff admits that she drew a check for \$1,103.75 in 1947 for an automobile for her son and another check for \$1,200.00 was paid to Raymond, the contractor, for additional alterations (See Tr. 162.) If plaintiff was so improvident with her money she is in no position to seek to recover the same from the defendant, who had absolutely no say as to how plaintiff spent her money or what she did with it. If, as contended by plaintiff, she spent large sums of money for household expenses, then we ask where did the money go which was admittedly paid to her by defendant? How

could her living expenses be so great unless plaintiff used her own money for extravagancies over which defendant had no control. We wonder how much of this money, if it was spent, went for needless things. How much might have been used for the benefit of her children who were in no way dependent on plaintiff for support. Certainly plaintiff was in no position to show that she ever gave defendant any money except one check for \$5.00 during the period they lived together. Appellant also states that the defendant was the owner of two trucks in which he had an equity of about \$4,000.00; however, his trucks are not paid for. Plaintiff also says that defendant is receiving a net rental income of \$5,400.00 a year. This, of course, is not true. Plaintiff entirely overlooks that fact that defendant has a \$20,999.00 mortgage on his property which requires periodic payments, and that the rent money has to be used for that purpose as well as for the purpose of paying taxes, interest on other indebtedness and incidental expenses. It is, however, defendant's contention that the judgment as entered by the court must be sustained; and therefore all questions relating to financial positions of the respective parties are of no concern on this appeal.

We respectfully suggest that this court should sustain the judgment.

Respectfully submitted,
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