

1953

Tommie Maurine Brown v. Harold Cook and Cora Cook : Brief of Defendant and Appellant

Utah Supreme Court

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Civil No. 7959

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FILED
In the Supreme Court 1953
of the State of Utah
Utah Supreme Court, Utah

TOMMIE MAURINE BROWN,

Plaintiff and Respondent,

vs.

HAROLD COOK and

CORA COOK,

Defendant and Appellant.

Brief of Defendant and Appellant

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and Appellant**

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In the Supreme Court of the State of Utah

TOMMIE MAURINE BROWN,

Plaintiff and Respondent,

vs.

HAROLD COOK and

CORA COOK,

Defendent and Appellant.

Civil
No. 7959

Brief of Defendant and Appellant

NATURE OF CASE

This action was brought by plaintiff (respondent) upon her complaint and a Writ of Habeas Corpus to determine the custody of a minor child. Upon failure to present the child in court, the defendent Harold Cook was found guilty of contempt. A judgment awarding the custody of the child to the plaintiff as against the defendants and a judgement of contempt against the defendant (appellant) Harold Cook was entered. From this judgment the defendant Harold Cook appeals.

STATEMENT OF CASE

The respondent the natural mother of a minor child, Ronald Glen Cook, age 3, brought this action by way of Writ of

Habeas Corpus served upon the paternal grandparents, Harold Cook and Cora Cook, who at that time were keeping and caring for the minor child during the absence of the child's father, Glen H. Cook, who was serving in the Armed Forces of the United States. The Writ was issued upon the complaint and request of the respondent, the plaintiff in the initial action.

The record shows that the Writ of Habeas Corpus was served by the Deputy Sheriff of Uintah County on the 1st day of December, 1952, wherein the appellant and defendants (hereinafter to be known as the defendants) were ordered to bring the person of Ronald Glen Cook, the minor child, before the court on the 9th day of December, 1952, to be dealt with according to law. The complaint prayed for an award of custody to the mother. The record indicates that, following the service of the Writ of Habeas Corpus, the grandparents, the defendants, contacted the father of the child, Glen H. Cook, and informed him of the nature of the action and that they were ordered by Writ of Habeas Corpus to bring the child to court and that the question of the child's custody would there be dealt with. Some time in the evening of the 8th day of December, 1952, the natural father of the child, Glen H. Cook, returned to the home of one of his sisters, where the defendants were with the child, took the child and left and did not return. The defendants were thus unable to be present in court with the child as ordered. This inability resulted in a judgment of contempt against the defendant Harold Cook.

The defendant, Harold Cook, the grandfather, was the only one to take the stand, and he testified that the father of the child came and took the child while he and his wife were at the home of their daughter, that the child was taken by his natural father to his own home. When the defendants returned,

they found the infant's clothing gone, but the car belonging to the father of the child was left at the home of the defendants.

The father of the child was never made a party to this action, nor was any attempt made to serve him either by personal service or by publication. The record shows that the plaintiff obtained a divorce from the child's father some time in June of 1952 and that she remarried immediately thereafter. These divorce proceedings were first instituted in January of 1952. After the plaintiff filed action for divorce, she admitted that she had never attempted to get the custody of the child from the father (R. 29).

Only the plaintiff and the defendant Harold Cook testified. The record shows that the court, upon hearing the evidence adduced, found the defendant Harold Cook guilty of contempt and ordered him to pay a fine of \$150.00 and sentenced him to be confined in the county jail for a period of 30 days. No affidavit was filed formally charging the defendant with contempt of court.

The execution of the sentence imposed for contempt was suspended for a period of 10 days, in which the court directed the defendant to obtain the child from the natural father and turn him over to the natural mother either in Utah or in North Dakota and take a receipt for said child. If this was complied with, the jail sentence together with \$100.00 of the fine would be suspended, and the defendant would be required to pay only the sum of \$50.00. The Findings of Fact filed and signed found the plaintiff was the mother of the infant, age 3, and that the defendants were his paternal grandparents; that the natural father had left the child with his parents (defendants) during his absence in the Armed Forces of the United States; that plaintiff had obtained a divorce from the natural father of the

child and remarried within a few days thereafter but that such action did not disqualify her to her rights of custody to the minor child; that the plaintiff as the natural mother was awarded the custody as against the defendants. A decree was accordingly entered awarding plaintiff custody as against the defendants grandparents of the minor child. No determination was made as between the rights of the natural mother (the plaintiff) and the father (who was not made a party to the action) to the custody of the child.

ASSIGNMENTS OF ERROR

The defendant Harold Cook assigns the following errors upon which he relies for reversal of the decree and judgment appealed from and for an order of this court directing the trial court to make and enter judgment of dismissal of this matter.

1. The trial court erred in awarding the custody of the child to his natural mother, the plaintiff, since the child was out of the court's jurisdiction and was never before the court for the court to determine such custody as between the mother and any persons.

2. The court erred in holding the defendant Harold Cook in contempt without the filing of an affidavit as required by the provisions 78-32-3 (104-45-3).

3. The court erred in finding the defendant guilty of contempt since there is no evidence in the record to sustain or support such a finding.

4. The court erred in holding the defendant guilty of contempt on the basis that the defendant did not notify the Sheriff

of the father's return or his counsel or counsel for the plaintiff (R. 41).

5. The court erred in holding that the defendant permitted the natural father of the child to take the infant in question (R. 42) and that such was a violation of the order of the court. The evidence in the record fails to show that the defendants were ever in a position to refuse the natural father of the child his right to the control and custody of the infant.

6. The court erred in holding that the defendant could purge himself of the jail sentence and \$100.00 of the \$150.00 fine imposed by obtaining the custody of the child and transferring the same to the natural mother either in Vernal or in North Dakota. By so doing the court in effect determined that the plaintiff was entitled to custody of the child as against the natural father of the child, who is not made a party to the action, and was an attempt to coerce the natural father into the delivery of the custody of the child without due process of law and the opportunity to be heard.

7. The court erred in holding the defendant Harold Cook in contempt and imposing judgment and fine on him on the ground that he was not given the opportunity to answer and present evidence as required by 78-32-9, (104-45-9).

8. The court lacked jurisdiction to sentence the defendant for contempt on the ground that no findings of fact or conclusions of law were made or entered by the court and the same were not waived by the defendant.

9. The court erred in imposing punishment without notice of the charge of contempt as required by law.

ARGUMENT

POINT 1

THAT TRIAL COURT ERRED IN AWARDING THE CUSTODY OF THE CHILD TO ITS NATURAL MOTHER, SINCE THE CHILD WAS OUT OF THE JURISDICTION OF THE COURT.

The record shows that the infant, Ronald Glen Cook was never before the court, and there is no showing in the record that the court acquired jurisdiction of his person. The court held (R. 42) that the natural father had taken the child out of the court's jurisdiction. The attention of the court is particularly called to the wording of the Writ of Habeas Corpus served upon the defendants wherein they were commanded " . . . to appear before the Judge of the above entitled court on the 9th day of December, 1952, at the courtroom in the County Courthouse at Vernal, Utah, at the hour of 10:00 o'clock A.M., and to bring with you the person of Ronald Glen Cook, then and there to be dealt with according to law." The wording indicates that the jurisdiction of the infant was to be obtained upon his being presented in court. The authorities are in accordance that the jurisdiction of the courts of the state to regulate the custody of the infant does not depend upon the domicile of the parent but upon the residence of the child. This ruling is followed in cases where divorces are granted in states other than where the children reside. As an example of this, the record shows that the plaintiff obtained a divorce in the state of Wyoming but that custody was not awarded because the child was not there. The record shows that the child

was not in the court's jurisdiction and was probably out of the state of Utah at the time the court heard the matter (R. 43). No proceeding had been instituted against the father of the child, who had his custody, to place the child before the court to be dealt with according to law. (See *Sheehy vs. Sheehy*, 88 N.H. 223, 107 ALR 635; also *Finlay vs. Finlay*—New York Case—148 NE 624, 40 ALR 937).

POINT 2.

THE COURT ERRED IN HOLDING THE DEFENDANT HAROLD COOK IN CONTEMPT WITHOUT THE FILING OF AN AFFIDAVIT AS REQUIRED BY THE PROVISIONS OF 78-32-3 (104-45-3).

The provisions of the applicable statute, 78-32-3, (104-45-3), require the issuance of an affidavit to be presented to the court when the alleged contempt is not committed in its presence. The law recognizes two distinct types of contempt—direct and constructive. The direct contempts are those matters of contemptuous conduct or those which tend to impugn the dignity of the court which are committed in its presence or in the presence of the judge while at chambers. A direct contempt consists of words spoken or acts committed in the presence of the court or during its intermissions which tend to subvert, embarrass or prevent justice. These are acts which the court can see and take cognizance of itself and which it need not be advised of by third parties. Indirect or constructive contempts are those actions committed not in the presence of the court but at a distance from it which tend to degrade the court or obstruct, interrupt or prevent or embarrass the administration of justice. 12 Am. Jur. 390-392.

The statute above referred to reads as follows:

"When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily, for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as prescribed in section 78-32-10 hereof. *When the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators or other judicial officers.*" (Italics mine)

This matter was thoroughly discussed in the case of *Robinson vs. City Court for Ogden*, Weber County, et al., 112 U. 36, 185 P. (2d) 256, wherein the petitioner made a remark on or about the time he entered an elevator in the presence of the judge relative to the court being a "kangaroo court." The judge immediately took Robinson to the court and there imposed a judgment upon him for contempt, which was brought before this court on a Writ of Prohibition. It was held that the objectionable remark was not in the presence of the court or the judge at chambers. The court there held:

"It is necessary, in all proceedings for contempt which are not committed in the presence of the court, in order to give the court jurisdiction, that an affidavit or affidavits be presented to the court stating the facts constituting contempt. *Young v. Cannon*, 2 Utah 560; *Crowther et al., vs. District Court of Salt Lake County*, 93 Utah 586, 45 P. (2d) 243; *Jones v. Cox*, 84 Utah 568 37 P. (2d) 777. A contempt proceeding is separate and apart from the principle action and in order for the court to acquire jurisdiction of the offense when committed, as here, it is necessary that an affidavit or initiating pleading filed. *Unless this is done, subsequent proceedings are palpably null and void.*" (Italics mine)

This case also holds the affidavit takes the place of the complaint, and, whether the contempt be regarded as civil or criminal when not committed in the presence of the court or the judge in his chambers, the court is without jurisdiction to proceed until a pleading of some nature has been served on the accused and filed with the court. One of the purposes for an affidavit is to advise the defendant of the particular facts of which he is accused so that he may properly defend against the charge or offer such extenuating and justifiable circumstances as the facts may warrant. *supra*. Such right is a right of due process guaranteed by the Constitution of the State of Utah, Section 12, Article I.

The above cited case emphasized very well the necessity for an affidavit in cases of this type where the contempt is not committed in the presence of the court prior to the court's obtaining jurisdiction thereof. The following from the opinion is quoted:

"Not having been informed against, there would be no pleading in the district court and no way for the petitioner to legally know the nature and cause of the accusation against him. One might as well say that the court could, from the bench, inform a person he was guilty of burglary and sentence him to jail. In both instances the accused has been told the nature of the offense but not in the manner or the way required by the constitution and statutes of this state. Section 12, Article I, of the Constitution of the State of Utah gives to an accused in a criminal action the right to demand the nature and cause of the accusation against him and to have a copy thereof. Section 104-45-3 (78-32-3), U.C.A., grants this same right to an accused in contempt proceedings when committed as in this proceeding."

Thus, the lack of an affidavit as contemplated by statute purged the trial court of any jurisdiction in its judgment of contempt and constitutes a reversible error.

POINT 3.

THE COURT ERRED IN FINDING THE DEFENDANT GUILTY OF CONTEMPT SINCE THERE IS NO EVIDENCE IN THE RECORD TO SUSTAIN OR SUPPORT SUCH A FINDING.

It is a general rule that the evidence required prior to a conviction or a judgment in cases of criminal contempt must be beyond all reasonable doubt; that is, the degree of proof upon which the judgment or conviction is founded must be beyond all reasonable doubt. In other cases the courts make a requirement that the evidence upon which a conviction for contempt is sustained shall be by clear and convincing proof, which is regarded by most courts as more than a mere preponderance of the evidence. In many jurisdictions in which the violation of a civil injunction is considered criminal in its nature, mere preponderance of the evidence is insufficient to support a conviction. 12 Am. Jr. 44-2, 29 ALR 127, 49 ALR 978.

This court has held that, though sufficient facts might appear in the evidence upon which the court might sustain a conviction of contempt, this is nevertheless not sufficient. The court is required to investigate the charge against the accused: and the accused cannot be held guilty without a hearing, evidence and proof, *Herald Republican Pub. Co. vs. Lewis*, 42 U. 188, 129 U624. In the case above cited, it was held that, before a conviction could be had, the guilt of the accused must be established by clear and satisfactory evidence. A mere preponderance of the evidence not being enough.

The record fails to show anywhere a contumacious or wilful attitude on the part of the defendant Harold Cook to violate the order of the court. The defendant informed the father

of the child that he as under order to present the boy in court on the prescribed date prior to the father's taking the child with him. The record fails to show any cooperation on the part of the defendant with any person in the removal of the child. The record indicates that the father of the child did not specifically state when he was going nor where he was going with the child but stated merely, "I ain't going to stay here. I'm going to take him and go." (R. 31). On cross examination, the record shows the defendant told the father of the child that he was under order to have the child in court on the designated date. (R 33). The record shows that, after service of the Writ of Habeas Corpus, the defendant contacted his son in California and advised him of the nature of the proceeding (R. 32). The record shows that the father advised the defendant that he had had legal advice in the army (R. 35); and that, after being so advised, the defendant let the father take the boy. From the above there is no indication that the defendant committed a contempt in his violation of the order.

Further, it is required as a matter of law, before a person can be found guilty of contempt, that he must have the ability to perform the act required. Thus, it is held in the case of *Limb vs. Limb*, 113 U. 385, 195 P. (2d) 263, that a person who puts forth every reasonable effort to comply with the court order and is still unable to do so is not guilty of contempt on account of such failure. In the case of *Foreman vs. Foreman*, 111 U. 72, 176 P. (2d) 144, this court held that, before a court is justified in awarding damages in a contempt proceeding, the court must consider the ability of the party charged with contempt to perform. In *Hillyard vs. District Court of Cache County*, 68 U. 220, 249 P 806, this court held:

"Under the authorities cited and the uniform holdings of the courts, it is a prerequisite in contempt pro-

ceedings of the nature here under review to an order committing to jail that the one charged should be found able to comply with the court's order or that he had intentionally deprived himself of the ability to comply with such order. The court did not make such a finding. The language of section 6829, *supra*, seems to be mandatory that findings are necessary to support a judgment in actions in which the court is required to make findings unless such findings are waived."

Thus, in the instant case, there must be evidence to show that the defendant, by his acts, deprived himself of the ability to perform the order of the court. This is not borne out by the evidence before the court.

POINT 4.

THE COURT ERRED IN HOLDING THE DEFENDANT GUILTY OF CONTEMPT ON THE BASIS THAT THE DEFENDANT FAILED TO NOTIFY THE SHERIFF, HIS COUNSEL OR COUNSEL FOR PLAINTIFF OF THE FATHER'S RETURN.

The defendant was charged with contempt, as far as can be determined from the record for permitting the child's father to take the child and on the basis that he failed to inform his counsel, the Sheriff, or counsel for the plaintiff of the father's returning and taking the child with him. It is axiomatic that one cannot be placed under obligation by indirect means to the court. Had the court through some process made the defendant the child's keeper and charged him with the well-being and safety of the child in question subsequent to the issuance of the Writ of Habeas Corpus and prior to the hearing by some proper proceeding, there may then have been some ground for the contention that the defendant violated a trust in not notifying the Sheriff or the court or some

other individuals of the father's taking the child. However, nothing contained in the Writ places upon the defendants any compulsion or obligation relative to the court other than that directly recited therein. The defendants were not the sheriff, nor were they officers of the court. They were merely individuals who were striving to the best of their ability to care for and protect their grandchild for a temporary and indefinite period of time, and the discharge of any such voluntary obligation did not or could not carry with it any obligations to the court upon which the court could hold the defendant in contempt. Such failure on the part of the defendant to immediately inform his counsel or other authorities as indicated by the trial court may have been imprudent, but it was certainly not contemptuous when one considers that the objectionable act or acts occurred in the wintertime, in the afternoon or evening and in a rural area, to-wit, Davis Ward (rural area 6½ miles southeast from Vernal). The record shows that early the next morning counsel for the defendant was notified and that immediately after notification counsel for the plaintiff was contacted and so informed of the removal of the child.

It is noted that there is contention made by the plaintiff that the defendant, by notifying the father by telephone or other communication, was in violation of the spirit of the Habeas Corpus. The record fails to show that the plaintiff at any time sought to make the natural father a party to any action concerning the custody of the infant. The record fails to show any effort on the part of the plaintiff or her counsel or any attempt by them to communicate with the natural father of the child. No service was ever sought upon the natural father by the plaintiff, and the record seems to indicate that this action was merely an abortive attempt on the part of the plaintiff to acquire the custody of the child in the ab-

sence of his natural father without affording him any opportunity to be heard or to testify relative to any right that he might have which may have been paramount to the right of the plaintiff to said custody.

POINT 5.

THE COURT ERRED IN HOLDING THAT THE DEFENDANT PERMITTED THE NATURAL FATHER OF THE CHILD TO TAKE THE INFANT IN QUESTION AND THAT SUCH WAS A VIOLATION OF THE ORDER OF THE COURT.

As a matter of law, it is held, where there is no adjudication to the rights of children, it is prima facie that the parents have equal rights to the custody and control of their children. The common law rule is that the father has a paramount right to the custody of his children; however, this has been modified by statutes and recent holdings and particularly by our courts, which give the parents equal right to the custody and control of the children where there is no adjudication otherwise. In the case of *Sherry vs. Doyle*, 68 U. 74, 249 P 250. 48 ALR 131, this court has sustained the paramount right of the father to the care, custody and control of his children. The facts of that case are similar to those involved here in that the child had been left by its parent with the defendants Doyle while he worked at various places, the child being about 4 years of age at the time of the action. Upon refusal to deliver the custody of the child, which had been turned over to the Doyles under contract for care and keeping thereof, the father obtained a Writ of Habeas Corpus; and the court sustained his right to the custody of the child as against the Doyles. The father at that time had no home, but the court held that any

right the defendants might have must yield to that of the father. Thus, by analogy, we find that the father in this particular case had a paramount right to the care, custody and control of his child and that the defendants were in no legal position to forbid him that right or refuse to permit the child to accompany its natural father wherever he chose to take it.

It should be borne in mind that the litigation here in the instant case does not concern the right of custody between the natural parents of the child, but merely whether or not, by virtue of the issuance of the Writ of Habeas Corpus, the defendant (not one of the natural parents) could deny the natural parent the right to the custody and control of the child, particularly where such custody and control had been, during the latter months of the marriage of the plaintiff and the child's father and subsequent to the divorce, continuously with the natural father of the child.

POINT 6.

THE COURT ERRED IN HOLDING THAT THE DEFENDANT COULD PURGE HIMSELF OF THE JAIL SENTENCE AND \$100 OF THE \$150 FINE IMPOSED BY OBTAINING THE INFANT CHILD AND DELIVERING ITS CUSTODY TO THE CHILD'S NATURAL MOTHER.

The courts uniformly hold as a matter of law that parents shall be entitled to the care, custody and control of their children and that they may not be deprived of the same without due process of law, which presupposes that notice and hearing will be had prior to the depriving the parents, or either

of them, of the custody of their children. The holding in the present case (R. 43) that

“the court therefore is going to suspend, and its is ordered that the execution upon this judgment of contempt be suspended, for a period of ten days, all of it, and at the end of that time it will be further suspended upon the condition that the defendant or the natural father delivers the custody of this child to the natural mother in accordance with her order, whether that is at her home in Taigo, North Dakota, or here, as it may be most desirable for her, and taking a receipt from the natural mother for the child and filing that receipt with the clerk of this court. If that is done, all except the \$50.00 of the judgment—the jail sentence and the balance of the fine, all but the \$50.00 fine—will be suspended.”

indicates that the court by such judgment attempted to award the custody of the minor child to his natural mother without giving the natural father of the child an opportunity to be heard. This was sought to be done by coercion in that the natural father would surrender his child rather than see his father go to jail and pay the fine imposed. This is borne out by the record (R. 43) where the court states:

“and I have no reason to believe that the natural father won’t consider this situation that, the court feels, he has helped to impose upon his father as being rather serious and that he will not be pleased at all with this judgment.” Also: “. . . the Court feels that there will be some cooperation—and I hope that there will be—by the natural father, who is not before this Court, and has not been served with any process, and that he will be glad as soon as he knows what the lay of this case is, to cooperate with the Court, and with these good people, to get the child to its proper custodian in accordance with the judgment and finding of the Court.”

The above, in the face of no attempt on the part of the plaintiff to contact the natural father of the child or to make

him a party to the action, constitutes reversible error insofar as it is an attempt to obtain an objective by circuitry without affording the party directly connected therewith a full opportunity to be heard.

The natural father of the child was not before the court, nor was he served with any process, nor at any time has the court denied him, by implication or otherwise, the custody or the right of custody to his child. His taking of the child could under no stretch of imagination constitute a violation of any order of the court since he, as the natural father, being not deprived of its custody, would be entitled thereto. (See *Sherry vs. Doyle*, supra.)

The record indicates that in December of 1951 the plaintiff left the infant child with his father and went to Wyoming and that plaintiff had not had the child with her since July, 1951, except for a short period of time in November and December, 1951, (R. 4, 14, 16); that thereafter she, according to her testimony sought to have the custody of the child. The extent of her efforts was to write to her husband. In January of 1952, she filed an action for divorce in the state of Wyoming. The divorce was granted in June of the same year. The plaintiff testified that at no time after the filing of the divorce did she attempt to obtain the custody of her child (R. 28-29). Immediately after her divorce, she was remarried and admitted that no attempt was made by her to obtain the custody of the child until immediately prior to the filing of this action (R. 23-24). The actions of the plaintiff, the natural mother of the child in this respect, by abandoning the infant with his natural father, without inquiries relative to his whereabouts or an attempt to obtain his custody for a period from about August 1951, till November of 1952 casts grave

question upon any presupposed paramount right that she, as the natural mother of the child, might have to his custody or control over that of his natural father.

Thus, we see that the error above noted was an attempt by the court to give the custody of the infant child to his natural mother, to whom any paramount right of custody can well be considered to have been forfeited, and this through coercion upon the only parties before the court upon whom the court might use force to bring about such ends.

POINT 7.

THE COURT ERRED IN HOLDING THE DEFENDANT HAROLD COOK IN CONTEMPT AND IMPOSING JUDGMENT AND FINE ON HIM ON THE GROUND THAT HE WAS NOT GIVEN THE OPPORTUNITY TO ANSWER AND PRESENT EVIDENCE AS REQUIRED BY LAW.

The provisions of 78-32-9 (104-45-9) provides as follows:

“When the person arrested has been brought up or has appeared the court or judge must proceed to investigate the charge, and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him; for which an adjournment may be had from time to time, if necessary.”

In the case of *Foreman vs. Foreman* (citing other cases), supra, in discussing the distinction between civil and criminal contempt, this court held if the contempt proceeding was merely one of fine and/or imprisonment, then it is criminal in nature; thus, the instant case is one of criminal contempt falling within the scope of the above statute.

In the case at issue, the defendant had no notice of any charge of contempt; no affidavit was filed formally charging

him with contempt as required; and no hearing was held. The defendant was found guilty by the court without having any opportunity to present evidence or to subpoena witnesses in his behalf or to deny the charges placed against him. This case is analogous to the case of *Robinson vs. City Court for the City of Ogden*, supra, wherein it was held that Section 12 of Article I of the Constitution provided that in cases of this kind the accused has a right to demand the nature of the cause of the accusation against him and have a copy thereof. It was also held that the same right is given to one accused of criminal contempt when the alleged contempt is not committed in the presence of the court or judge in chambers. It further held that the accused is entitled to be informed of the charge against him, to be permitted to plead to the charge, to be represented by counsel of his own choosing and to be afforded the right and opportunity to be heard.

In the case of *Herald-Republican Pub. Co. vs. Lewis*, supra, this court held that the above statute does not contemplate the rendition of a judgment on the pleadings as in civil cases. The court "must hear any answer" in proceeding to investigate, and nothing short of a plea of guilty or its equivalent will justify a judgment of conviction without evidence, and without an investigation of the charge. If further holds that a recital in a judgment of conviction for contempt not committed in the court's presence that "the matter is submitted upon its merits upon affidavit and the answers," etc. does not show a waiver of a trial or a hearing, or a consent to render final judgment in the cause on the pleadings and without trial. It is also noted that a recital in the judgement of conviction that the accused had not legal reason to give why judgment should not be pronounced against him cannot support the contention of a trial or a hearing or an investiga-

tion or an opportunity to be heard. "*The right which an accused has to be heard on the merits is before and not after after he is condemned.*" (Italics mine) *Herald-Republican Pub. Co. vs. Lewis*, supra.

In the instant case the court found the defendant Harold Cook guilty of contempt without granting him any opportunity to be heard relative to the contempt charged. He was never informed of the charge against him, and at no time was he given an opportunity to speak until the court stated:

"The court, *having found the defendant Harold Cook guilty of contempt*, asks counsel if defendant is prepared to receive the judgment of the court." (Italics mine)

Thus, we find that the court in its judgment did not afford the defendant opportunity to be heard as required by the above quoted section and as such constitutes reversible error.

POINT 8.

THE COURT LACKED JURISDICTION TO SENTENCE THE DEFENDANT FOR CONTEMPT ON THE GROUND THAT NO FINDING OF FACT OR CONCLUSIONS OR LAW WERE MADE OR ENTERED BY THE COURT AND THE SAME WERE NOT WAIVED BY DEFENDANT.

In the instant case the only findings of fact entered relative to the contempt of the defendant are found in the record. None are separately made or filed herein. The record is very meager in its recital of the statements it holds to be contempt (R. 41-42). The only reference made by the court is that the defendant permitted the father to take the child out of the jurisdiction of the court. In the Utah case of *Ex parte*

Gerber, 84 U. 441, 29 P (2d) 932, which was decided by this Court, the Court held that it was necessary that the Court make findings prior to any judgment of contempt, and a failure to do so rendered the judgment of the Court null and void. In the Gerber case the petitioner, Gerber, who had previously been committed for a contempt of court for failure to pay certain payments to his divorced wife, applied for a Writ of Habeas Corpus; and, in reviewing the facts, the Court held as follows:

“ . . . no findings of fact were made or otherwise stated that the defendant had property, means, or present or any ability to comply with the decree or any part of the judgment or any order of the court with respect to the payment of any of the default payments, or that the defendant had willfully refused to pay any of such back installments, or that he had intentionally or otherwise deprived himself of ability to comply therewith nor is it recited or otherwise indicated that the order of contempt or commitment was based on any evidence adduced before the court or on which the order of contempt and commitment was based. Because of the failure of the court to make findings in one or more of such particulars or the equivalent thereof, unless waived, of which there is no evidence, the order or judgment of the court adjudging the defendant guilty of contempt for failure to pay the installments as decreed and ordering him committed, as was done, has no support, and thus was rendered without jurisdiction, and is null and void . . .

“Such holding is to the effect, and is supported by ample authority, there cited, that, unless the court on a hearing before it invoking jurisdiction has made and filed findings of fact to the effect that the defendant had ability or was able to comply with the decree or orders of the court, or intentionally and contumaciously had deprived himself of ability to comply therewith, the court was without jurisdiction to commit the defendant as for contempt.”

This court, in the case of *State vs. Bartholomew*, 85 U. 94, 38 P. (2d) 753, held that findings of fact are necessary to support a judgment of contempt. In this case the defendant Bartholomew was cited in on an order to show cause supported by an affidavit that he had not complied with the order of the court requiring him to pay certain sums of money growing out of bastardy proceedings. The Court declared:

“Since the ability of the defendant to comply with the order of the court is essential to constitute a contempt, it being conceded that the order has not been obeyed, a consideration of certain facts to determine whether a contempt has been committed is necessarily required. The fact, covering the essential facts involved, must be made by the court in order to support a judgment of contempt. 104-26-3, R. S. 1933, provides that: ‘In giving the decision the facts found and the conclusions of law must be separately stated, and the judgment must thereupon be entered accordingly.’

“This section, together with 104-26-2, has been before this court in numerous cases, and we have consistently held that ‘it is the duty of the court to find upon all material issues raised by the pleadings, and the failure to do so is reversible error. *Piper vs. Eakle*, 78 Utah, 342, 2 P 2d) 909,910. It has also been held that findings which are only mere conclusions such as that all the allegations of a complaint are true, or that defendant has failed to establish a defense, or that the court finds for plaintiff and against defendant, are wholly insufficient to meet the requirements of the above statutes and cannot support a judgment. *Piper vs. Eakle*, supra; *Munsee vs. McKellar*, 39 Utah, 544, 118 P. 564; *Baker vs. Hatch*, 70 Utah, 1, 257 P. 673’.”

Hence from the above, it is noted that the action of the above court, in failing to make findings as required, constituted reversible error. This is also borne out by the cases of *Parish vs. McConkie*, 84 Utah, 396, 35 P (2d) 1001; *Hillyard vs. District Court of Cache County*, supra; and *Watson vs. Watson*, 72 Utah, 128, 269 P. 775.

The statute 104-26-3 noted in the above quotation has been superseded by Rule 52(a) of the Utah Rules of Civil Procedure, which is much more comprehensive than the former section of the civil code. Rule 52(a) in part provides as follows:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall, *unless the same are waived*, find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the ground of its action. *Requests for findings are not necessary for purposes of review . . .*" (Italics mine)

From the above it is evident that the failure to make findings on all the material issues rendered any judgment of contempt by the trial court against the defendant Harold Cook, null and void and as such constitutes reversible error. This is borne out by the cases of *Hillyard vs. District Court of Cache County*, supra; *Parish vs. McConkie*, supra; *State vs. Bartholomew*, supra; and *Piper vs. Eakle*, 78 Utah 342, 2 P. (2d) 909.

POINT 9.

THE COURT ERRED IN IMPOSING PUNISHMENT WITHOUT NOTICE OF THE CHARGE OF CONTEMPT AS REQUIRED BY LAW.

Section 78-32-4 provides that no warrant of commitment can be issued without a previous attachment to answer or a notice of order to show cause. This section provides that, upon the filing of an affidavit with the court as contemplated by 78-32-3, the court may order an attachment of the person or the service of an order to show cause upon the person accused of

contempt. (The above has reference to cases where the contempt alleged is not committed in the immediate view and presence of the court or judge in chambers.) From the above it is evident that in the instant case there could be no commitment by the court of the defendant, Harold Cook, for the alleged charge without giving him the opportunity to be heard relative to the charge placed against him or notice as provided by law. In the cases of constructive or indirect contempt, before a person can be found guilty of contempt, he must have due and reasonable notice of the proceeding; so ordinarily there should issue an attachment or an order to show cause why the accused should not be punished or why an attachment should not issue.

The notice required to be given a person charged with contempt not committed in the court's presence was held to be reasonable notice only where the accused has notice which will fairly and fully enable him to know the specific acts with which he is charged. A statute requiring a notice of a contempt proceeding to be in writing must be complied with. 17 C.J.S. 97-99. The only notice defendant had of any charge of contempt was the answer of counsel for plaintiff to a direct question from the Court as to whether the grandparents (defendants) might be guilty of contempt in allowing the child to go with his father after the service of the Order counsel stated, "It would *seem* to me that they would be, because the child was here when they were served with an order requiring them to have him in court this morning." (R. 2); also at page 38 of the record where the court points out that the questions before the court are (a) the right to the child's custody and (b) the contempt. The notice mentioned and afforded the defendant of the charge of contempt was not sufficient nor of the dignity required by the statutes of this State nor did it afford the de-

fendant sufficient time in which to prepare, or trial, present evidence, or answer any charges made.

Thus, from the above it is evident that the failure of the trial court to give the defendant reasonable notice of the charge of contempt was reversible error.

CONCLUSION

It is the defendant's contention that the trial court committed the fundamental errors herein assigned in that:

1. It was without jurisdiction to award the custody of the child to anyone, the child being out of the jurisdiction of the court according to its own finding;

2. There was no affidavit setting forth the acts constituting the contempt alleged ever filed or served upon defendant in order to clothe the court with jurisdiction to hear the contempt charged;

3. The record yields no evidence upon which a judgment or conviction of contempt can be sustained;

4. The court's holding that defendant's failure to notify certain officials of the departure of the child was an attempt to place the defendant under an obligation to the court by indirection without specific instructions in relation thereto;

5. It held that the defendant could have denied the natural father the right to take the child with him;

6. The court, by providing that the defendant could purge himself of part of the sentence of contempt upon the performance of conditions, attempted to secure the custody of the minor child to the plaintiff by circuitry and by coercion which

would result in a denial of the natural father's opportunity to be heard;

7. The defendant was given no opportunity to present answers as provided for by law;

8. The court failed to enter findings and conclusions as required by law, thus rendering its judgment null and void;

9. The defendant was not given due and proper notice of the charge of contempt against him prior to his conviction.

WHEREFORE, the defendant prays that the action of the trial court be reversed; that the judgment and conviction of contempt against defendant be vacated and declared null and void; and that the award of custody to plaintiff be declared a nullity because of the trial court's lack of jurisdiction.

Respectfully submitted,

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and Appellant