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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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TOMMIE MAURINE BROWN,

Respondent,

vs.

HAROLD COOK and

CORA COOK,

Appellants

Case No.

7959

RESPONDENT'S BRIEF

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FIL
JUN 2 - 1953

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Respondent.*

Clerk, Supreme Court, U.

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TOMMIE MAURINE BROWN,

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STATEMENT OF FACTS

The respondent, plaintiff below, and mother of Ronald Glen Cook, age 3 years, instituted a habeas corpus proceeding directed against the defendants Harold Cook and Cora Cook, to gain custody of said child from the defendants, who, as paternal grandparents having physical custody of the child had refused to allow plaintiff custody of the child (Tr. 25, 33).

Plaintiff was divorced from her former husband, Glen H. Cook, father of the child, in the State of

Wyoming, by a decree of divorce which failed to award custody of the child to either party. The former husband, Glen Cook, is a member of the Armed Forces and as such was not within the state amenable to process, and had left the child with his parents, the defendants.

Plaintiff was refused custody of the child by the paternal grandparents, and accordingly instituted these proceedings out of which the contempt proceedings arose. Her testimony was to the effect that they (the grandparents) wouldn't let her take the child out of the yard (Tr. 25) and appellant Harold Cook admitted on examination that his wife had refused to let plaintiff take the child (Tr. 33).

A writ of habeas corpus was served upon the defendants on December 1, 1952 ordering them to come before the court on December 9, 1952 at 10:00 a.m. and to bring with them Ronald Glen Cook. (R. 3, 4.) The defendants appeared before the court on the day and at the hour appointed, but failed to bring with them the child, as ordered. Out of this failure arose the contempt proceeding and judgment.

The record reveals that after the writ of habeas corpus was served upon him the grandfather immediately telephoned and telegraphed his son who was in the Army in California (Tr. 32, 33). When he called his son, he told him that he had better come home (Tr. 36). In response to this call and tele-

gram, the son arrived in Vernal apparently on the evening of December 8, 1952 (Tr. 31) and immediately proceeded to take the child, saying "I ain't going to stay here, I am going to take him and go." (Tr. 31), and further, that he was going to get out of the State of Utah (Tr. 32). The grandfather made no protests, told no one of the fact that the father had taken the child, and consulted with no authorities as to what he should do (Tr. 31). Subsequently, in an effort to avoid the very obvious import of this testimony Mr. Cook sought to explain that his son hadn't said when he was going out of the State of Utah, Tr. 33), that he didn't know his son was going to take the boy (Tr. 35), and that he thought his son was going home and didn't know he was leaving the place with him (Tr. 36). The circumstances under which the original statements were made and acts done, and the tenor of the examination and answers as revealed at page 36 of the transcript in particular are so evasive as to prompt the court in reviewing this matter to state at page 41:

The Court finds that upon being served with the writ, the defendant Harold Cook did get in touch with the natural father, by telephone and telegram, informed him of the proceedings, and urged him to come home; finds that the natural father did come home the day before the hearing; that he remained only a short while; that in the afternoon of the same day, or late—which may have been evening, the natural father declared to the

defendant Harold Cook in these words: "I ain't going to stay here, I am going to take him and go."

The record does not show that the defendant Harold Cook did anything other than to inform the natural father that he was supposed to have the child in court the next day. He did not call his counsel for advice. He did not call counsel for the petitioner, to notify him of the son's claim. He made no effort to get counsel from any law officer such as the Sheriff who served the writ, who may have given him some advice. But without doing anything at all, and under circumstances where he could not, as shown by the wording, have misunderstood the purpose of the father, he permitted, and the Court feels strongly that he connived with the father, to take the child out of the jurisdiction of the Court. That was a direct violation of the order of the Court. His testimony before the Court establishes the fact of his contemptuous conduct, and the Court does find him guilty of contempt of court."

The Court also found that as between the mother and the paternal grandparents that the mother was entitled to the custody of the child, and that she was a fit and proper person to have the custody of the child, which was the issue directly presented by the habeas corpus proceedings.

STATEMENT OF POINTS

I

The Court correctly ruled that as between plaintiff and the defendants the Plaintiff was entitled to the custody of the child.

II

No affidavit was necessary in order to hold the Defendant Harold Cook in contempt of Court.

III

The evidence sustains the order of the Court committing defendant Harold Cook for contempt of Court.

IV

No prejudicial error appears in the record stemming from the Court's ruling giving the defendant Harold Cook the opportunity to produce the child.

V

The Court acted within its jurisdiction in sentencing the Defendant for contempt. The findings of the Court and its conclusions therefrom as stated in the record were sufficient to authorize the judgment of contempt. Any further findings of the Court were waived.

ARGUMENT

POINT I

The Court correctly ruled that as between plaintiff and the Defendants the Plaintiff was entitled to the custody of the three year old child.

Perhaps at the outset of the argument on this point it would be well to point out that there is no evidence that the child was out of the jurisdiction of the Court at the time of the hearing at 10:00 a.m. December 9, 1952. The only evidence as to this is the statement of Glen Cook that he was taking the child to California. He took the child on the evening of December 8, and left, and his whereabouts thereafter was either not known or not divulged. If he was in the process of taking the child to California, then the likelihood is that the child was still in Utah the following morning. Glen Cook left his automobile at Vernal, and since no railroad services this area, he must have left for California by bus, which would mean that he would cross the entire state of Utah from east to west before leaving Utah.

However, the law is clear that where the court has jurisdiction of the parties to a custody proceeding, the physical absence of the child after institution of the proceedings, or even before, in no wise affects the jurisdiction of the court to make the adjudication of custody. Therefore, it is of little concern from

a legal standpoint whether the child was or was not out of the jurisdiction of the court.

In *Little v. Little*, (Ala.) 30 So. 2d 386, the court held that once jurisdiction had attached in a custody suit that the jurisdiction of the court was not divested by removal of the child from the state by its mother.

In *Maloney v. Maloney*, 67 Cal. App. 2d 278, 154 P. 2d 426, where the father took the children out of the state while a suit for their custody was pending, the court in holding that the court retained jurisdiction to award their custody said: “. . . Jurisdiction once acquired is not defeated by subsequent events which might have prevented jurisdiction had they occurred before personal service of the action was made. . . .”

In *Roberts v. Roberts*, 300 Ky. 454, 189 S.W. 2d 691, the court, in reiterating this same rule points out that to hold otherwise would make it virtually impossible to arrive at a final determination of the custody of a child because all that would be necessary would be to remove the child from the jurisdiction before the judgment was entered.

To like effect is *Cole v. Cole*, 194 Miss. 292, 12 So. 2d 425; *McMillan v. McMillan*, 114 Colo., 247 158 P. 2d 444; *State v. Porterfield*, 221 Mo. App. 874, 285 S.W. 786; *Burckhalter v. Conyer*, 285 S.W. 606 and *Peacock v. Bradshaw*, 194 S.W. 2d 551.

In the instant case, the Court had jurisdiction at the time the writ was served and the complaint and petition filed, and the fact that the child was taken from the state thereafter would in no wise defeat the right of the Court to adjudicate custody as between the mother and the paternal grandparents. An examination of the cases cited by Appellant under this point reveals nothing to the contrary.

It is to be noted that nowhere does appellant raise the contention that factually the mother was not entitled to the award of custody, but only that the Court had no jurisdiction to make the award.

POINT II

No affidavit was necessary in order to hold the Defendant Harold Cook in contempt of Court.

Appellant's argument at point 2 of his brief proceeds upon the assumption that the contempt involved was committed out of the presence of the Court, and he relies among others upon the case of Robinson vs. City Council for Ogden, 112 Utah 36, 185 P. 2d 256, which involved contemptuous conduct and speech in the presence of the judge as an individual, but not in the presence of the Court in the legal sense. The law is clear, that indirect or constructive contempts should be prosecuted by affidavit. However, the case before the court is not such a case.

While it is true that the acts which rendered it impossible for the defendant Harold Cook to comply with the order of the Court were not concluded in the presence of the Court, this does not control the question of whether the contempt was in fact committed in the presence of the Court. As the Court points out at pages 40 and 41 of the transcript:

“The record should show, that the writ of habeas corpus in this matter is in due form, that it commanded the defendants, Harold Cook and Cora Cook, 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 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 record in this case already shows that at the time commanded in the writ, the respondents to the writ failed to have the person of Ronald Glen Cook before the Court as commanded by the writ.”

Therein lies the essence of the contempt of Court in the instant case. The order of the Court which was violated was an order requiring the defendants to bring the boy before the court at a time certain, and the contempt consisted of failing to produce the boy at that time before the court.

The concept of “presence of the court” is perhaps

best illustrated by the situation of an affirmative act, as where the court calls for order, and someone physically present disobeys that order by continuing boistrous. However, the negative act of disobedience is nonetheless committed in the presence of the Court, where, as here, upon order the defendant failed to do in the presence of the court that which he was instructed to do. The negative act in this case. consisted of failure to bring the child into court.

As recognized in the case of *State vs. Morris*, 120 Wash. 146, 207 P. 18, where a receiver failed to report receipts to the court as ordered by the court, negative acts may constitute direct contempt.

In *Smythe vs. Smythe*, 28 Okl. 2826, 114 P. 257, the Court had before it facts very similar to those here involved, except that the writ of habeas corpus was directed against the father of a minor child rather than against the grandparent.

The court reviewed the general law, which is to the effect that contempts are divided into two classes (1) Direct contempts committed in the presence of the Court, and (2) Constructive contempts which arise out of matters not transpiring in the presence of the Court. The Court reviewed numerous authorities and holds that violation of an order to produce the person of a minor child constitutes a direct contempt of the court in its presence.

As indicated in 12 Am. Jur. 391, Contempt Sec. 4: "Negative acts may also constitute direct contempt, as for instance, failure to produce a prisoner at a trial or hearing" . . . At page 390 of the same work the classification is noted, that direct or indirect contempt depends upon whether the contempt is committed within or outside the presence of the court.

The reason, of course, for an affidavit where the contempt is committed out of the presence of the court is to apprise the court of the facts claimed to constitute contempt. The theory is that the court is unaware of the disparagement of its dignity or authority in such case, and it is necessary therefore that the court in some way be advised of the violation. This is illustrated in the ordinary situation of an alimony or support money order which is not complied with. The proper vehicle to bring to the court's attention the failure to comply with the court's order would be by affidavit.

Examine for a moment the facts of this case. Did not the Court have the full and complete knowledge of the failure of the defendant Harold Cook to produce the boy before him? How would an affidavit have provided the court with any more or additional information than it then had? As to the defendant Harold Cook's opportunity to defend against the contempt charged — his own counsel put him on the stand, and he was examined and cross-

examined at length. He can scarcely claim at this point that he was not given adequate notice of the contempt proceeding or that he lacked opportunity to defend against the charge.

Tested then, by the standard of whether the court knew of his own knowledge of the failure to comply with its order, it is apparent that this is not the situation contemplated by the statute where an affidavit would be required. Had counsel in this case prepared an affidavit, it would have recited exactly the facts which the court had first hand knowledge of, that is, that the defendant failed to bring the boy into court as ordered.

The contempt here committed and punished was a direct contempt committed in the presence of the Court. This also provides a full and complete answer to points No. 8 and 9 of Appellant's brief.

To amplify, however, in rebuttal of point 7 of appellant's brief, and to illustrate the lack of merit thereof, the record utterly fails to sustain the contention of the appellant that he was not given an opportunity to answer and present evidence as provided by law.

At page 2 of the transcript of testimony, as an introductory preface to the proceedings before the court, Counsel for petitioner stated:

MR. HAMMOND: In this matter your honor, the plaintiff and petitioner is ready to proceed. Mr. Nash has brought a matter to my attention in this. Perhaps we should inform the Court. Mr. Nash informs me that last night the father of the minor child came into Vernal and took him out of the state of Utah, as far as you know; is that right? Whereupon, the following colloquy took place:

MR. NASH: As far as the folks know. I was retained Saturday night, or Sunday, I should say, to go over this matter and to attempt a defense, and I was preparing it. And this morning I was advised that the father had taken the child. The parents are here, the grandparents, and the persons whom the writ was issued against, they are here in court.

THE COURT: Do you have any question about whether the grandparents may be guilty of contempt in allowing the child to go out, after service of the Order?

MR. HAMMOND: 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.

MR. NASH: The grandparents — I explored that possibility, your Honor, and I don't see how they could be guilty of contempt, because the custody of that child was not awarded to the grandparents.

THE COURT: It doesn't make any difference. They had it when the order was served.

It is apparent therefore, that the matter of contempt of court was raised at the very outset of the hearing. Not only that, but Mr. Harold Cook was called as a witness by his counsel, and the gist of his examination was an abortive attempt to justify his failure to comply with the order of the court rather than being directed to the question of right of custody as between the mother and the paternal grandparents (Tr. 30, 31, 32).

At page 32 of the transcript of evidence the court said:

“The questions that are before the court i. e., whether or not this Court could decree her right to the child as against the defendants, and the question of the contempt of the defendant Harold Cook, are matters which the Court doesn’t want to decide hastily, and the Court will therefore take those two matters under advisement.”

* * *

“Of course as to Mr. Cook, it must be understood that if the Court calls him back for entry of any order in respect to the contempt motion that is made, that he will respond. Otherwise the Court will issue a bench warrant for him. You will also advise him of that fact, will you not?”

Thereupon, the court took the matter under advisement and did not rule thereon until the after-

noon of December 11, 1952, at which time the Court reviewed for counsel at some length the evidence and the law before making his findings as to contempt.

Thus, to this point there can be no question but that appellant and his counsel were well aware of the contempt proceeding in progress and had done what they could to rebut it. If appellant felt that he had not been given an adequate hearing (since quite obviously he had been given a hearing and had attempted a defense) then it was incumbent upon him to raise this matter with the court in order that a fuller hearing could be had if he so desired. This he did not do, and in fact, in answer to the question asked by the Court as set out by appellant in his brief at page 20, as to whether defendant was prepared to receive judgment of the court, counsel for defendant answered: (Tr. 42) "He is, your honor." In response to the query of the court as to whether any reason existed why judgment should not be pronounced at that time, the defendant answered: (Tr. 42) "No."

At all stages of the proceeding the defendant Harold Cook was apprised of the fact that the court was reviewing the question of contempt of court for failure to comply with the writ of habeas corpus; and therefore no merit exists in point 7 of appellant's brief.

POINT III

The evidence sustains the order of the Court committing defendant Harold Cook for contempt of Court.

In point 3, 4 and 5 of appellants brief they attack the sufficiency of the evidence to sustain the findings as made by the Court with respect to the contempt proceeding arising out of the habeas corpus proceeding and the failure of Harold Cook to produce the boy as ordered by the Court.

We have heretofore reviewed the facts which prompted the court to hold the appellant Harold Cook in contempt. To recapitulate however, the writ commanding the defendants to produce the boy was served upon them at a time when they held physical custody of the child, and could comply with the order. Defendant immediately set about to render the order of the court impossible of performance by telephoning and telegraphing his son to the effect that he better come home. Upon the son arriving the evening before the morning upon which the child was to be produced, despite the fact that the son quite clearly and distinctly, and under circumstances which could scarcely have been misunderstood, indicated to the defendant Harold Cook, that he proposed to take the child out of the State (Tr. 31), the defendant Harold Cook did absolutely nothing to alter this course of events. To the contrary, the evasive attitude of the defendant in court, his very apparent

effort to avoid the effect of his own testimony when it became apparent to him that he had already said too much, make it amply clear that the whole course of events was intended for the sole purpose of getting the child out of the reach of the petitioner in violation of the order of the court. In so doing, he not only made no reasonable effort to insure that he could comply with the order of the Court, but actively sought to thwart that order.

The chain of events is such that only one conclusion logically follows; that the defendant Harold Cook made every effort to thwart the order of the Court, made every effort to place it out of his power to comply with the order of the Court, and went to all lengths to prevent the court from discovering the truth of the matter at the hearing. As the court expressed it: "The court feels strongly that he connived with the father to take the child out of the jurisdiction of the Court. That was a direct violation of the order of the court. His testimony before the court establishes the fact of his contemptuous conduct and the court does find him guilty of contempt." (Tr. 42).

The law is clear that where a person has rendered himself unable to comply with an order of the court he stands on the same footing as one having the ability who nonetheless refuses. 12 Am. Jur. Contempt p. 406, Sec. 24. At 12 Am. Jur. p. 439, Contempt Sec. 72, the statement is made:

“ . . . Where an alleged contemner, however has voluntarily and contumaciously brought on himself disability to obey an order or decree, he cannot avail himself of a plea of inability to obey as a defense to a charge of contempt. A person who seeks to satisfy the court that his failure to obey an order or decree was due entirely to his inability to render obedience without fault on his part, must prove such inability. . . ”

and see also to like effect *Mary Jane Stevens Company vs. Foley*, 67 Utah 578, 248 p. 815.

The court in determining that appellant Harold Cook was guilty of contempt of court found that the defendant failed to notify the sheriff or other official, his own counsel, or counsel for the plaintiff that Glen Cook was in the act of taking or had taken the child away. The court did not, as appellant suggests, base the entire contempt upon failure to perform any one of these acts, but to the contrary found these facts along with the facts heretofore enumerated were sufficient to indicate a contempt of court and that in other words, the defense asserted was insufficient. The court's judgment need not stand on any individual single finding with respect to the asserted defense of inability to comply, but all must be looked to in establishing the contempt.

When all of the facts are put together, that is, prior refusal to let the mother take the child; informing the father he better come home immediately,

defendants actions and knowledge with respect thereto and with respect to his son having taken the boy ostensibly to California the same evening, without any remonstrance or other attempt to stop him; his deliberate and calculated failure to notify anyone of these facts while opportunity existed to insure that the order of the court could and would be complied with, and his patent efforts at covering up the details of the transaction and evading direct answer to questions to the extent that the court concluded therefrom that he had connived with his son to defeat the order of the court, are sufficient in every respect to sustain the judgment of the court.

Appellant asserts that under the case of Sherry vs. Doyle, 68 Utah 74, 249 P. 250, this court has announced the rule that the father has the paramount right to care and custody of his children. Of course, this is a relative matter, and it is well established in this state that the mother has paramount right to the care and custody of children of tender years. Sec. 30-1-10, U.C.A. 1953; Briggs vs. Briggs, 111 Utah 418, 121 p. 2d 223; Baker vs. Baker, 110 Utah 462, 175 p. 2d 213.

Factually, the appellant can get no comfort from the Sherry vs. Doyle case, since the court merely held in a habeas corpus proceeding that as between the father and third persons that the father was entitled to custody.

The problem here involved is not one of paramount rights to custody of the child, but rather, can one having the ability to comply with an order stand by or even assist in rendering it impossible to comply with the order of the court, then come before the court and say "I can't now comply because I let someone having a paramount right take the child." In this instance the important thing was an order of the court, which was paramount and prior to any custodial rights of any of the parties involved in this unfortunate situation. The books are replete with cases where property, articles and things, are ordered held or produced before the court without regard to the ultimate rights which may be affected thereby. The very purpose of this order was to review the custody question as between the parties to the habeas corpus proceeding. The paramount right in this instance was the order of the court that the child be produced. The ultimate rights of the parties involved could in no way affect the validity of the temporary charge placed upon the defendants that they should see to it that the child was produced on the day and at the time ordered. The situation would not be altered by the fact that an infant was involved rather than an inanimate object or a sum of money or some other article or thing which the court might have ordered produced at a given time. Clearly, had the court ordered the defendant Harold Cook to bring money in his possession before the court on a day certain, he would not have felt that

he had the right to turn it over to one of the persons who asserted that he had some right therein. Particularly where he knew that another was asserting rights therein which were to be the subject of the proceeding before the court.

POINT IV

No prejudicial error appears in the record stemming from the Court's ruling giving the defendant Harold Cook an opportunity to produce the child.

The fact that the Court after having pronounced judgment upon defendant for contempt of court felt constrained to give him an opportunity of securing forgiveness of a portion of that judgment can in no way be advanced as prejudicial error by the defendant. This is a matter favorable to the defendant, of which he has no cause to complain. The judgment of the Court was not conditional, but the court announced the following pronouncement of judgment that under certain circumstances he would remit a portion of that judgment. So long as the judgment of contempt is itself sustainable, which it clearly is, the fact that the court was willing to lessen the stringency of that judgment regardless of the terms, is not prejudicial to the defendant.

The fact that the court sought to rectify an otherwise unsatisfactory situation of the father in

the service having taken physical custody of the child under circumstances where he obviously could not take care of the child and adequately supervise the child, an infant of three years, and would be wholly unable to attend to the child's needs, and to bring about a condition where the child could be properly attended by his mother as it should under Utah Law, is a laudable thing, rather than a matter of censure as defendant would seem by his argument to indicate.

The facts as they exist with reference to the status of the father of the child and the obvious inability to make him a party or even suspect or anticipate the need for such action, are such as to eliminate any force or effect of defendant's argument based upon failure to include the father of the child in the habeas corpus proceeding; and the argument, apparently designed to indicate her general unfitness to have custody of the child, is completely eliminated by the finding of the court in the habeas corpus proceeding that the mother is a fit and proper person to have custody of the child, from which finding the defendant has not appealed. The mother quite obviously had not forfeited any custodial rights, and there is no merit to the argument along these lines.

POINT V

The Court acted within its jurisdiction in sentencing the Defendant for contempt. The findings of the Court and its conclusions therefrom as stated in the record were sufficient to authorize the judgment of contempt. Any further findings of the Court were waived.

Appellant in his brief suggests that there were no findings and that findings were not waived, and that therefore the court lacked jurisdiction to sentence the defendant for contempt. Appellant however, has set up as points 3, 4 and 5 of his brief what amounts to an attack upon the findings of the court, as to the sufficiency of the evidence to sustain those findings. Thus, apparently he has no trouble in determining precisely what the trial court found, from the record as it now stands.

On December 11, 1952, at the subsequent hearing of the matters here involved, the court, in considerable detail, as indicated by the transcript beginning at page 40, set forth his findings with respect to the contempt proceeding. He stated in detail his findings with respect to what the defendant Harold Cook had done and had failed to do, and his conclusion that the defendant Harold Cook was guilty of contempt, and based thereon pronounced judgment committing and fining defendant for that contempt.

In the case of Hillyard v. District Court of Cache County, 68 Utah 220, 249 p. 806, the court affirmed the rule that in contempt cases findings and conclusions are necessary. The court stated, however:

“ . . . We are not to be understood as holding that formal findings are absolutely requisite to support a judgment, but it must appear from the judgment or elsewhere in the record that the court has found facts necessary to support its judgment . . . ”

Admitting that more formal written findings and conclusions would have been desirable in the case, however, it cannot be successfully argued that no findings were made, nor that no conclusion was drawn therefrom, since the record, certified as a true report of the proceedings, recites the findings in ample detail to sustain the judgment. The argument by the appellant is that there were no findings or conclusions. The record reveals that there were findings and conclusions which lays this point at rest.

The real problem thus is not the absence of findings and conclusions, but whether or not the findings in the form in which they appear in the record satisfy the requirement of Rule 52(a) U.R.C.P., which point however, appellant does not raise.

All that Rule 52(a) requires is that the court shall find the facts specially and state separately its

conclusions of law thereon. No requirement as to form of findings is in anywise set forth in the rule nor is it specified with what formality they must be drafted. We do have a guide, however, in the Hill-yard case which says that formal findings are not necessary, but only that it must appear from the record that the court has found facts necessary to support its judgment.

In the present instance, the findings, although announced orally by the court, were recorded as a part of the record just as fully as had the court in chambers dictated the same to his reporter. The ultimate responsibility for preparing findings of fact rests with the court rather than counsel, and if the court in a given case should see fit to alter, limit, expand or reword proposed findings submitted by counsel, he would, of course, be entitled to do so, and he would then dictate the changes or new findings to the reporter. Whether that dictation is effected with the formality which surrounds a separately prepared document, or whether it merely partakes of findings by the court in open court written down by the reporter, would appear to make little, if any, difference. That these were the only findings which the court proposed to make or proposed should be made in the contempt proceeding is indicated in the record quite clearly at the bottom of page 45 of the transcript. Thus, we do not have the problem of these being merely an oral pro-

nouncement of the things which he proposed to include in later written findings. Rather, they constituted the only written findings which he proposed to make in the case.

It is earnestly asserted and respectfully submitted that the findings of the court in the present instance satisfy the requirements of Rule 52 (a), and that the problem is not absence of findings as appellant raises the issue, but rather sufficiency as to form and formality.

In the event, however, that it should be concluded that there is an absence of findings in this case, we believe that the record amply sustains the proposition that there has been a waiver of the need for such findings.

Counsel for the defendant stated to the court that defendant was ready to receive the judgment of the court, and defendant state that no legal reason existed why judgment should not be pronounced (Tr. 42).

The following discussion occurred during the proceedings held on December 11, 1952, at the time the court announced his findings, conclusions and judgment.

MR. NASH: Your Honor, defendants now make a motion for a re-hearing of this matter.

THE COURT: Can you make a motion for a re-hearing that way, Mr. Nash?

* * *

MR. NASH: I would like to make that as a motion your Honor.

* * *

THE COURT: There must be findings and conclusions. Our Supreme Court has held that there must be on habeas corpus matters. That is what made me ask. Until the judgment of the Court on the writ is made— now of course on your contempt, the judgment is made, isn't it?

MR. NASH: Yes.

It would appear that defendant waived any further findings and conclusions other than those theretofore made and entered, and any informality existing therein was approved by the defendant to the extent, at least, that he cannot now avoid the judgment on this ground.

It should perhaps be pointed out that a supersedeas bond has been filed in this matter, with relation to the contempt judgment, and that said judgment has not been executed. Accordingly, if the court were to conclude that no findings and conclusions of law are present, and if the court concludes that there has not been a waiver of findings in a more formal form, then it would seem that under the record before the Court and the law cited

by appellant to the effect that a party cannot be committed for contempt in the absence of findings and conclusions (Ex parte Gerber, 84 Utah 441, 29 P. 2d 932) that the proper disposition of this segment of the case would be to remand the matter to the district court for written findings prior to any commitment being issued based thereon, and that otherwise the judgment could and should be affirmed.

CONCLUSION

In conclusion it is respectfully submitted that so far as the habeas corpus proceedings is concerned, that the record amply sustains the decision of the lower court.

It is further respectfully submitted that as to the contempt proceeding arising out of the failure of the appellant to produce the child before the court as ordered, that the court was clearly justified under the circumstances in holding the defendant in contempt of court for his obvious failure to comply with the order of the court or make any effort whatsoever to comply with that order, that it is incumbent upon the court under similar circumstances to vindicate its authority and preserve its sanctity and the sanctity of its order and judgments, that no prejudicial

error was committed therein, and that the court had jurisdiction and authority to act as it did.

Respectfully submitted,

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