

1953

Vera T. Callister v. Alfred Cyril Callister : Brief of Appellant

Utah Supreme Court

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



Part of the [Law Commons](#)

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

James W. Beless, Jr.; Gustin, Richards & Mattsson; Attorneys for Plaintiff and Appellant;

Recommended Citation

Brief of Appellant, *Callister v. Callister*, No. 7967 (Utah Supreme Court, 1953).
https://digitalcommons.law.byu.edu/uofu_sc1/1928

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

7967

Civil No. 7967

IN THE SUPREME COURT
of the
STATE OF UTAH

RECEIVED

SEP 28 1953

LAW LIBRARY
U. of U.

VERA T. CALLISTER,

Plaintiff and Appellant,

VS.

ALFRED CYRIL CALLISTER,

Defendant and Respondent.

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT IN AND FOR THE COUNTY OF SALT LAKE
HONORABLE JOSEPH G. JEPPSON, Judge

FILED

APR 2

JAMES W. BELESS, JR. AND
GUSTIN, RICHARDS & MATTSSON

Attorneys for Plaintiff
and Appellant
Clerk, Supreme Court, Utah

INDEX

	Page
STATEMENT OF FACTS.....	2
STATEMENT OF POINTS.....	7
ARGUMENT	9
1. The monthly payment is not subject to modification.....	9
2. Voluntary impoverishment is not a ground for modification	20
3. There is no health consideration that merits any change	25
4. Plaintiff's income is the result of prudent management of capital assets received at the time of the divorce	26
5. Plaintiff should be awarded her attorneys' fees and costs	27
CONCLUSION	28

TABLE OF CASES

Barraclough v. Barraclough, 100 Utah 196, 111 P. 2d 792.....	17
Buzzo v. Buzzo, 45 Utah 625, 148 P. 362.....	17
Dickey v. Dickey, 141 A. 387, 58 A.L.R. 634 (Md.).....	9, 13, 17, 19
Ettlinger v. Ettlinger, 44 P. 2d 540 (Cal.).....	14
Heuchan v. Heuchan, 228 P. 2d 470 (Wash.).....	23
Jones v. Jones, 104 Utah 275, 139 P. 2d 222.....	19
Lerner v. Superior Court, 242 P. 2d 321 (Cal.).....	27
Murphy v. Moyle, 17 Utah 113, 53 P. 1010.....	17
North v. North, 100 S.W. 2d 582, 109 A.L.R. 1061 (Mo.)	11, 12, 13, 17, 19
Osmus v. Osmus, 114 Utah 216, 198 P. 2d 233.....	20, 23, 28
Puckett v. Puckett, 136 P. 2d 1 (Cal.).....	14
Rich v. Rich, 112 P. 2d 780 (Cal.).....	15
Stuber v. Stuber, Utah, 244 P. 2d 650.....	27
Tuttle v. Tuttle, 240 P. 2d 587 (Cal.).....	16

STATUTE

Section 1212, Compiled Laws, 1907 (Sec. 30-3-5 U.C.A. 1953)..	17
---	----

IN THE SUPREME COURT of the STATE OF UTAH

VERA T. CALLISTER,

Plaintiff and Appellant,

vs.

ALFRED CYRIL CALLISTER,

Defendant and Respondent.

Civil No.
7967

APPELLANT'S BRIEF

This appeal is taken from a judgment entered on December 31, 1952 modifying the interlocutory decree of divorce theretofore and on July 30, 1945 entered herein. The interlocutory decree was based upon a contract between the parties whereby Dr. Callister, the defendant, agreed to pay to plaintiff, his then wife, \$400.00 per month during the life of plaintiff or until she remarries. Mrs. Callister has not remarried. The judgment appealed from reduces the amount adjudged to plaintiff by the interlocutory decree from \$400.00 to \$250.00 per month.

STATEMENT OF FACTS

The grounds of divorce are set forth in paragraph 3 of the Findings of Fact (Tr. 7, 8) by which it is found, among other things, that the defendant has transferred his affections from plaintiff to another woman, avowing his love for the other woman and that his future happiness lies with her. The Doctor's affair of heart is fully outlined in a letter dated March 21, 1945 addressed to the plaintiff and introduced in evidence as Exhibit B.

Consistent with that portion of the Doctor's letter to his wife that she need have no worry about financial security and that one-half of everything belongs to her, the agreement of July 28, 1945 attached to the Findings of Fact in connection with the interlocutory decree (Tr. 12-18) was entered into. Paragraph numbered "THIRD" thereof reads as follows:

"That the second party agrees to pay to first party alimony in the sum of \$400.00 per month during the life of first party or until her re-marriage, and in addition thereto second party agrees to pay to first party \$50.00 per month for the support of the minor child, Vera Taft Callister, until said minor child becomes 18 years of age. The alimony and support money payments herein mentioned shall be paid to first party on or before the 5th day of each and every month beginning August 5, 1945." (Tr. 15).

The interlocutory decree, paragraph 5 (Tr. 21, 22) awards plaintiff judgment against the defendant "for alimony" in the sum of \$400.00 per month "during the

life of plaintiff or until her remarriage," thus following the language of the agreement. The decree, while characterizing the judgment as alimony, does not contain the somewhat usual provision "or until the court otherwise orders" nor does the judgment terminate upon the death of Dr. Callister. The decree expressly approves the agreement of July 28, 1945 and orders the same to be binding upon both parties. The agreement makes provision in favor of plaintiff for insurance carried on the life of defendant and for present and prospective attorneys' fees and costs. With regard to the latter the agreement at paragraph numbered "SEVENTH" provides:

"Second party hereby agrees to pay all attorneys' fees, costs, and expenses in any manner incurred by first party in the enforcement of this contract, or by reason of any controversy arising therefrom." (Tr. 16).

By the agreement certain corporate stocks listed in Exhibit A attached thereto and of the then approximate value of \$96,000.00 (Tr. 62) were divided equally between the parties and each received certain cash, personal property and real estate. Defendant received, among other things, real property now known as the Callister Hospital Clinic at 559 East South Temple, Salt Lake City, in which he subsequently invested \$30,000.00 by way of capital improvements, and presently carried on his books as a capital asset valued at \$50,000.00 (Tr. 67).

Shortly after the divorce Dr. Callister purchased a corner piece of property located at 23rd East and 39th South from his mother for \$1,350.00 (Tr. 69), upon which he has constructed a home for his present family consisting of his new wife and one child at a cost of another \$30,000.00 (Tr. 68). Since the divorce the defendant has sold stocks of the approximate value of \$19,500.00 (Tr. 62, 116), retaining the securities listed in Exhibit C (Tr. 63).

By reference to Exhibit E, the Pacific Coast Edition of the Wall Street Journal for November 25, 1952 and received in evidence for the purpose of determining the then market value of such of the securities that are listed on Exhibit C as may be listed in the Journal (Tr. 64), the securities so listed have a market value of \$50,512.50. By reference to Exhibit J, received in evidence to determine the value of Utah Oil Refining stock (Tr. 116, 117), the 33 shares of such stock held by defendant have a value of approximately \$990.00. The 1,875 shares of Medical Arts stock held by the Doctor have a value of \$1.10 per share (Tr. 64) or a total of \$2,062.50, and the Zions Benefit Building Society stock of which the Doctor has 144.86 shares (Tr. 65) valued at \$50.00 per share (Tr. 102) amounts to \$7,243.00. In all the Doctor at the time of the hearing on his petition for modification had stock and securities of a value of approximately \$60,808.00, and real estate of the value of at least \$60,000.00 with a mortgage indebtedness on the clinic property of \$8,900.00 (Tr. 67).

The defendant had a total gross income for the year 1950 of \$25,968.59 (Tr. 73), which did not include dividends in the amount of some \$3,250.00 (Tr. 70). In 1950 the defendant had a total income of some \$22,700.00 from personal service in connection with his profession and which did not include any income from his hospital venture (Tr. 84, 85). In 1951 he had a total income of some \$40,400.00 which includes dividends in the amount of \$3,200.00 and income from the hospital of \$10,800.00, or an income from professional services in the amount of \$26,400.00 (Tr. 85, 86). For the first six months of the year 1952 the Doctor's gross collections were \$14,850.00 (Tr. 91). In 1944 the Doctor had a net income from his professional practice of \$12,686.91 (Tr. 92). He persists in operating the hospital clinic at a loss.

Plaintiff, after the interlocutory decree, sold some \$45,000.00 of her securities (Tr. 122) and invested in real property. She now owns the Nira Apartments in Salt Lake City which she purchased for \$55,000.00 and on which she owes \$21,340.00 payable at the rate of \$279.84 per month, and upon which she has made capital improvements in the sum of \$16,000.00. She has also purchased a parking lot for \$13,500.00 upon which she owes \$8,432.62 (Tr. 124); a vacant lot on 21st East and 13th South for which she paid \$6,800.00 (Tr. 125) and a vacant lot on South State Street for which she paid \$5,250.00 which is being sold under a contract of sale for \$9,500.00 (Tr. 124, 125). Werner Kiepe, called as a

witness for Dr. Callister, testified that the Nira Apartments had a present market value of \$75,000.00 (Tr. 78, 79); the parking lot \$14,000.00 and the South 21st East property \$10,000.00 (Tr. 79, 80). Mrs. Callister retains five types of securities which she has held since the divorce (Tr. 123). Computing the value of these securities by reference to the Exhibits E and F we find that the present value of the same is \$18,581.25. Mrs. Callister's net rental income for the year 1951, as shown by Exhibit 2, was \$4,255.85; for 1950, as shown by Exhibit 1, the rental income was \$4,568.45; the only income shown by the record as going to Mrs. Callister except for the so-called alimony payments.

The property settlement agreement recites the marriage of the parties on July 13, 1916; that five children have been born as the issue of the marriage, and Dr. Callister testified that he is presently of the age of 58 years (Tr. 54). The findings of the trial court on the motion to modify (Tr. 151) are to the effect that the Doctor's income from his practice has decreased from \$1000.00 to \$600.00 per month; that heart trouble consistent with coronary artery disease, progressive in its nature, requires the Doctor to abstain from activities producing physical and mental strain, thereby reducing his ability to earn income from his profession; that since the original decree the Doctor has been required to sell many of the stocks distributed to him in the property settlement for the purpose of providing facilities and equipment for carrying on his practice and profession and

providing a home for himself and family; that since the entry of the interlocutory decree the Doctor has remarried and has a child of the age of 4 years depending upon him for support and maintenance.

After finding that the plaintiff, the appellant herein, has a net rental income in excess of \$4,500.00 per year with income from interest and investments in stocks it is concluded that the original decree should be amended as aforesaid, and that each party should pay his or her own costs in connection with the proceeding. The Court specifically finds that the plaintiff has adequate income from which to pay her own costs and attorneys' fees in defending the attack made upon the decree and property settlement agreement.

STATEMENT OF POINTS

This appeal challenges the findings of the trial court, its conclusions of law and its decree of modification, each and every part thereof being contrary to the evidence and to law and in connection therewith we assert the following:

1. The division of property, both present and prospective, was by contract confirmed by the interlocutory decree without consideration of the needs of the wife or the ability of the husband to continue to pay and, therefore, not subject to modification.

2. The so-called alimony provision is not subject to modification but only to termination as in the property settlement agreement expressly provided and which conditions have not occurred.

3. The Doctor husband cannot indulge himself the luxury of a costly home for his new family and a clinic, which he persists in operating at a loss, and thus claim impoverishment to the extent that he cannot respond to his contractual commitment and the decree of the court confirming the same.

4. No change of financial circumstance not voluntarily assumed by defendant is shown by the record warranting a decrease in the monthly payment to the plaintiff, nor is there any health consideration that merits such change.

5. The present income of the plaintiff is the normal consequence of prudent investment from capital assets received by virtue of the interlocutory decree of divorce and property settlement agreement.

6. The plaintiff should be awarded attorneys' fees and costs in the defense of defendant's motion.

The foregoing arise on the face of the record without any conflict in the evidence. There is no burden upon the appellant to show that the findings of the trial court are manifestly or clearly against the weight of the evidence as there is no substantial or any conflict with respect thereto.

ARGUMENT

I.

THE MONTHLY PAYMENT IS NOT SUBJECT TO MODIFICATION.

The rule that we are contending for here is set out in the case of *Dickey v. Dickey*, 141 A. 387, 58 A.L.R. 634 (Md.), which holds that if the allowance to the wife in the decree is the result of a previous agreement between the spouses and does not fall within the accepted definition of alimony, so that it would have been impossible for the chancellor to have allowed permanent alimony as the decree provides, then, notwithstanding that even the parties and the court called it "alimony," the allowance for the wife in the decree was not alimony and a court of equity has no power to modify the decree as in the case of an award of alimony. The Court points out that the agreement by the husband to pay the wife a weekly sum of money until her death or remarriage did not limit his payment to the joint lives of the spouses, and hence was not what the court could have decreed as alimony.

In the instant case we have the same situation as in the *Dickey* case, that is, that the agreement provides the wife with a periodic payment without reference to whether or not the husband survived her and where the monthly payment is referred to as "alimony." The Court in *Dickey v. Dickey*, *supra*, rejected as surplusage and as ill-advised the clause "or until the further order

of this court," thus bringing the decree in conformity with the agreement of the parties and giving to the decree its true import and intended effect by recognizing it as having been founded on contract. So, in the instant case, the term "alimony" as used both in the contract and interlocutory decree should not cause the Court to lose sight of the contract itself.

The Doctor and his wife had been married for 29 years. The divorce came at the threshold of the Doctor's career. By his letter, Exhibit B, he stated his intent to assure the plaintiff financial security and freedom from financial worry. The property settlement agreement approved by the Court as being just, fair and reasonable effectively binds the defendant to the payment of \$400.00 per month during the life of plaintiff or until her remarriage. The parties by contract divided their accumulated property and assets "of actual and contingent value" and has the effect of allocating to the wife the monthly payment aforesaid out of the estate of the defendant irrespective of his future earnings. The monthly payment to the plaintiff was but a part of a well conceived and carefully prepared contract to effectuate a just, fair and reasonable division of property. It was not contemplated by the parties that either of them could change or modify the provisions thereof nor did the interlocutory decree so provide. It is difficult to conceive of a more comprehensive statement of pur-

pose and intent. It is difficult to understand how the trial court could have been so unmindful of the integrity of contract.

In *North v. North*, 100 S.W. 2d 582, 109 A.L.R. 1061 (Mo.), the lower court modified a divorce decree as to the allowance made to the wife which the divorce decree denominates "alimony." In the original decree a judgment was entered in favor of the wife against the husband for the payment of alimony at the rate of \$500.00 per month so long as she remains single and unmarried. Some seven years after the decree the defendant filed a motion asking that the divorce decree be modified as to the amount of alimony on the alleged ground that the changed financial condition of the defendant warranted such action. After a hearing the lower court sustained defendant's motion and reduced the allowance made to plaintiff in the decree from \$500.00 to \$300.00 per month. Plaintiff appealed. Defendant died pending the appeal and the cause was revived in the name of the executrix of the defendant's estate.

The Missouri Supreme Court reversed the order of the trial court modifying the decree, holding (1) a husband and wife in contemplation of a separation and divorce may, by valid contract between them, settle and adjust all property rights growing out of the marital relation, including the wife's right of dower and claim for alimony, support and maintenance; (2) postnuptial contracts of separation are not unlawful, and such contracts when lawfully made, are sufficient to bar alimony

and dower; (3) the statute which authorizes the court to modify an award of alimony does not authorize the modification of legal contractual obligation which the husband assumes and agrees to pay his wife; (4) the parties had a lawful right to settle all their property rights by contract between themselves which they did do; (5) the contract is supported by a valid consideration; (6) the legal duty of the husband to support his wife when she lived with him, and his duty to provide support and maintenance for her in case of a separation and divorce furnished a sufficient consideration for the contract; (7) as an additional consideration for the contract of settlement the wife agreed to release her dower right in the husband's property.

We point to the similarity of the contract in the instant case with the principles announced by the court in the *North* case, even to the recital that the parties are desirous of settling any and all differences and claims with reference to division of property, alimony, support money, attorneys' fees and court costs, and to paragraph numbered "SIXTH" which reads as follows:

"This agreement and conveyance is mutually intended to be, and the same is hereby expressly made and intended by each of the parties hereto as a mutual release, relinquishment and conveyance of all the right, title and interest that may now be *or shall hereafter be, during the lifetime or at the death of either of the parties hereto,* acquired by the other by virtue of said marriage that now subsists between the parties hereto under the laws of the State of Utah, in and to

all of the property, both personal and real, of the other party, except to the extent of the moneys to be paid by the second party to the first party as alimony and support money; and it is the intention of the parties hereto to mutually release and waive all provisions of the laws of the State of Utah relating to husband and wife as to dower or the interests of the wife in the real property, homestead rights, etc., *and forever bar each other respectively from rights of succession or inheritance by reason of the marriage relation existing between them.*" (Italics ours).

In *North v. North* the *Dickey* case was quoted from at length and the court held the provision in the decree awarding the wife \$500.00 per month to continue so long as she remains single and unmarried (the same as that provided in the contract between the parties) justifies the conclusions that the decree was an approval of the contract, and not an award of alimony, because the court had no authority to make an award of alimony to continue so long as the wife remains single and unmarried but did have authority to approve a contract between the parties containing that provision, and concluded:

"Our conclusion in the instant case is that the allowance made to the wife in the decree was, in effect, an approval of the contractual obligation of the husband to the wife, and not an award of alimony, and for that reason is not subject to modification. A modification of the decree would amount to a modification of the

contract itself, which is not subject to revocation or modification except by consent of the parties thereto."

The authorities cited above go to the marrow of contract law and treat as ill-advised and misleading those decisions that say without explanation that an agreement between husband and wife settling their property rights is not binding on the courts in a divorce action. Where such contracts are free from fraud, collusion, or compulsion, and are fair to the wife, the courts have no right to disregard them.

In *Ettlinger v. Ettlinger*, 44 P. 2d 540 (Cal.), the court held: (1) that the parties may contract with regard to their properties and their respective interests therein; and (2) though not binding in the first instance on the court in which the divorce action is pending such contract may be approved and confirmed by the court and if appropriately referred to and adopted in its decree, such decree, as to matters covered by the agreement, becomes immune from subsequent modification. In *Puckett v. Puckett*, 136 P. 2d 1 (Cal.), the property settlement agreement was approved by the court and payments ordered by the decree to be paid pursuant to the agreement, thus making the decree immune from modification except by the consent of the parties. The court held that the periodic payments were not alimony; they were a part of a property settlement. The court stated that the agreement there under consideration leads to the conclusion that the monthly payments

ordered were an inseparable part of a property settlement agreement and therefore they may not be modified. This was on the theory that the monthly payments ordered by the decree were in effect and essence, a phase of the property settlement rather than mere alimony.

In *Rich v. Rich*, 112 P. 2d 780 (Cal.), the property settlement agreement referred to monthly installments as "alimony." The decree likewise referred to the payments as "alimony." The payments were required both by the agreement and the decree to continue even though plaintiff remarries. The plaintiff remarried after the divorce and the appellant moved to modify the decree by eliminating therefrom all payments accruing after the remarriage of his former wife. The court below denied the motion and on appeal the order was affirmed. The Court stated:

"Appellant's contention cannot be sustained. The payment of \$2,400.00 to respondent was an integral part of the property settlement agreement, and the fact that it was stated to be 'alimony for her support and maintenance,' and was to be paid in monthly installments instead of in a lump sum, does not alter the fact that the payments were made pursuant to the agreement approved and adopted by the court in the interlocutory decree, and not merely as alimony awarded by the court. A careful reading of the agreement indicates clearly that it was the intention of the parties to definitely, fully and permanently adjust all of their property rights, and the title to the paragraph providing for the payment of the \$2,400.00, 'Payment of Money to

First Party by Second Party,' clearly shows it to be an integral part of the agreement. The further clause that 'said (monthly) payments to continue even in the event of remarriage' indicates also that it was the intention of the parties that respondent should receive the full \$2,400.00. To sustain appellant's contention would in our opinion deprive respondent of what may well have been an important part of the consideration which induced her to execute the agreement. The property settlement agreement having been approved by the court and incorporated in the interlocutory decree, is now binding upon the parties, and cannot now be avoided."

A recent expression from the California Court is found in *Tuttle v. Tuttle*, 240 P. 2d 587. In that case the situation was turned around. The wife attempted to increase the amount specified in the decree for her support and maintenance upon the ground of a change of circumstances justifying an increase in the amounts payable to her. The husband alleged that the provisions of the decree for the payment of the stated amounts was not an award of alimony but an integral part of a property settlement agreement independent of the divorce decree. The decree was silent as to the property settlement agreement. The Court, after a review of previous California decisions, held: (1) the trial court has jurisdiction to determine whether the decree was based upon a property settlement agreement with payments provided as a phase of property adjustment and therefore not subject to modification; and (2) there was

ample evidence to support the trial court's finding that the provision for payments to the wife was a disposition of property rights and not alimony.

So far as we are able to determine this Court has not heretofore passed upon this precise question. In *Murphy v. Moyle*, 17 Utah 113, 53 P. 1010, there was no contract involved and the divorced husband was deceased. The Court held that minor children were entitled to be supported out of the estate of the decedent pursuant to the divorce decree providing for support. While the question of following the claim for alimony into the estate of the deceased husband was apparently not before the Court, the Court, nevertheless, stated:

“In such case, whether or not the divorced wife and minor children, or any of them, are entitled to have the payment of alimony or money for their support continue after the death of the deceased, depends upon the nature and terms of the decree allowing same.”

In *Buzzo v. Buzzo*, 45 Utah 625, 148 P. 362, it was contended that the award of \$40.00 per month as alimony was fixed by the consent of the parties (apparently an understanding). The Court held that every decree of divorce and alimony must be deemed to have been entered subject to the provisions of Section 1212, Compiled Laws, 1907 (Sec. 30-3-5, U.C.A. 1953). This type of situation is analyzed and distinguished in the *Dickey v. Dickey* and *North v. North* cases, *supra*. In *Barraclough v. Barraclough*, 100 Utah 196, 111 P. 2d 792, the order denying a motion to modify the decree was

affirmed. The appellant contended that the trial court was in error in ruling that a stipulation fixing alimony payments was a complete and final settlement so as to preclude the Court from modifying the order based on such stipulation. The Court did not pass on the proposition as to whether there was an agreement for a complete settlement of all property rights, holding that the agreement was just what it said it was, to-wit: a "stipulation" as to what the Court was willing to award her as alimony and therefore that the trial court erred in determining that the agreement constituted a complete and final settlement between the parties, and on other grounds held that the trial court properly denied the motion to modify. The Court, however, recognized the rule that we are contending for here by the following statement:

"The general rule in many jurisdictions is that where the parties enter into an agreement for a complete settlement of all property rights in case a divorce is granted, which agreement is approved by the court, neither party can thereafter come into court to have the agreement modified. For cases holding to this effect, as well as contra, see annotations in 58 A.L.R. 639 and 109 A.L.R. 1068. However, the law with respect to property settlements not being applicable to situations where alimony is involved, we need not enter into a discussion of the above rule, since we conclude that the 'stipulation' the substance of which was incorporated by the court in its decree, was not a property settlement but an agreement as to what 'alimony' the court might award appellant in case a divorce was granted."

In *Jones v. Jones*, 104 Utah 275, 139 P. 2d 222, the Court held that it could no longer be considered as an open question in this State but that the Court has jurisdiction to modify the provisions of the alimony decree which was originally based upon a stipulation of the parties. We submit that in the instant case a solemn agreement of the parties adjusting between themselves all of their property rights, including the rights of the wife to so-called alimony, cannot later be repudiated by either party as to payments denominated alimony or as to any other feature of the contract, particularly when the contract has received the approval of the Court as such. Again we point to the reasoning of the *Dickey* and *North* cases and to the provision that Mrs. Callister was to receive the monthly payment so long as she lives or until she remarries, strengthened perhaps by the provision for attorneys' fees and costs in favor of Mrs. Callister and against the Doctor in any manner incurred "in the enforcement of this contract, or by reason of any controversy arising therefrom," and also to the express provision that it is the intention of the parties "to mutually release and waive all provisions of the laws of the State of Utah relating to husband and wife as to dower or the interests of the wife in the real property, homestead rights, etc., and forever bar each other respectively from rights of succession or inheritance by reason of the marriage relation existing between them."

There are certain tax implications involved in the use of the term "alimony" but those implications and the benefit that the Doctor derives from the payment of the money as "alimony" should not preclude the Court to look upon the present contract as being subject to change or modification except by the consent of the parties. It is obvious from the contract itself that the parties intended their rights to be contractual and not the subject of modification. An added consideration for the rights in favor of Mrs. Callister was her immediate relinquishment of dower interests and the rights of inheritance.

II.

VOLUNTARY IMPOVERISHMENT IS NOT A GROUND FOR MODIFICATION.

Osmus v. Osmus, 114 Utah 216, 198 P. 2d 233, involved a situation where a husband, capable of earning a steady wage sufficient according to the trial court to entitle his wife to \$250.00 a month alimony, gave up his employment and entered into a business arrangement whereby he received his keep and \$1.00 a day as a fry cook, with the hope of obtaining an interest in the business, if it proved successful. The Court held that by his self-improvement the husband could not avoid his responsibility to his former wife.

In the *Osmus* case the Court said:

"Nor does a man have a right to sacrifice the present needs and welfare of his family, and

particularly of his infant children, to the end that at some indefinite future time he may better his own financial status. His first duty is to provide for those whom he is legally and morally obligated to support, and if it becomes necessary for him to forego business opportunities with bright future prospects but with no present realization, in order to perform his obligations, the law, in the absence of exceptional circumstances, will require him so to do. From all the evidence and all the fair inferences therefrom, the court could reasonably find that defendant entered into his business relationship as much for the purpose of depriving his wife of the alimony and support money to which she was lawfully entitled, as for the purpose of bettering his future from a financial point of view. But if the defendant be given the benefit of all doubts, and his explanation that he expected eventually to receive profits from the business which would considerably exceed what he would earn as wages, be accepted as true, defendant's legal position would not be improved. He has neither the right nor the privilege, to ignore, for a protracted period of time, his legal obligations to his family for the selfish purpose of advancing his own financial benefit."

Dr. Callister in Exhibit G, his 1951 State Income Tax Return (under Schedule B-7), takes a deduction of \$27,525.93 for wages, bonuses and salaries paid. He then takes (under Schedule B-12) depreciation of \$4,529.60, which depreciation is taken on the clinic at 559 East South Temple (under Schedule H of Exhibit G). The total of the Doctor's 1951 business expense plus claimed depreciation for that year is \$32,055.53. In

1944 the Doctor's gross professional income was \$26,069.08, at which time he was not operating a clinic. In 1944 the Doctor had a net income from his practice of \$12,686.91 (Tr. 92).

In 1951 according to Exhibit G the Doctor had a gross income of \$40,484.57 of which \$26,421.46 was from his practice and \$10,800.00 from his hospital and \$3,243.11 from dividends (Tr. 85, 86). In 1951 the Doctor ends up with a net taxable income of \$6,699.64. His gross professional income in 1951 was \$352.38 more than his gross professional income in 1944, in which year he had a net income from his practice of \$12,686.91. The Doctor is on the Staff of the L.D.S. Hospital yet he claims it is necessary to maintain his own clinic (Tr. 93). At the time of the hearing on the motion to modify the clinic was not open (Tr. 95). The clinic was formed not so much to help out the Doctor financially but as a help to his patients and upon which he is taking a financial loss (Tr. 108). The Doctor is a self-styled idealist and maintains the clinic for the convenience of himself and to assist his clients (Tr. 109).

The Doctor's claimed loss of income is directly attributable to the luxury of a clinic that he persists in maintaining. The record shows that his professional earnings from personal services have not decreased since the entering of the interlocutory decree. On the other hand the Doctor has capital assets of more than \$110,000.00 which include a new home valued by the witness Solomon at \$37,800.00 (Tr. 120). The predica-

ment that the Doctor now finds himself in, if it can be called such, is of his own choosing and this is not sufficient ground for modification. The expression of the Court in *Osmus v. Osmus*, supra, seems peculiarly appropriate.

Dr. Callister has used a tax concept in determining his income available for payment of his obligation under the divorce decree. In stating his 1951 net income he has referred to income after depreciation taken of \$4,529.60 (Exhibit H, Tr. 51-52). In arriving at his income for 1950 he has further deducted a \$2,350.00 capital loss (Tr. 100). Neither of these items affected the Doctor's cash position, but were bookkeeping entries only. In *Heuchan v. Heuchan*, 228 P. 2d 470 (Wash.), the Court considered an accounting problem identical with that before us here, and it held that a tax concept of accounting should not be used in determining ability to comply with a divorce decree. The Washington Court used the following language:

"No doubt the Heuchans are entitled to the claimed deduction of \$99.96 a month for depreciation when computing their taxable income, but we are not limited to their taxable income in determining appellant's ability to make alimony payments. It is conceded that this \$99.96 is not paid into any fund for depreciation but is merely a bookkeeping entry; it is available to and is used by the Heuchans for their own purposes. The trial court was fully justified in taking that fact into consideration when determining the amount which appellant is able to pay respondent as alimony."

The trial court found that the Doctor had been required to sell many stocks for the purpose of continuing his practice and for providing a home for his family. As to the necessity for such sales and what effect such sales should have in this matter, the record speaks for itself. The Doctor testified that three sales of stocks were made since 1945. He sold Union Pacific stock for \$10,800.00 in about 1947 (Tr. 62), when he was constructing his new home and his clinic (Tr. 67-68). He sold various stocks in 1950 for \$8,346.70 and paid the proceeds on the mortgage on his clinic (Tr. 66). He sold all of his Mono-Kearsarge Mining stock for \$528.49 in June 1950, and this money was applied on the clinic mortgage (Tr. 116). All three sales of stocks were conversions into other assets at the Doctor's choosing. No sales were made after June, 1950 (Tr. 74).

The trial court found that the Doctor remarried and now has a minor child four years of age dependent on him. No other moral conclusion can be drawn from the Doctor's letter of March 21, 1945 (Exhibit B) than that the Doctor contemplated remarriage as soon as possible. The letter was before the trial court in 1945 when provisions of the property settlement agreement were approved with the sure anticipation that in giving him his freedom the Doctor would acquire a new family and new responsibilities.

III.

THERE IS NO HEALTH CONSIDERATION THAT MERITS ANY CHANGE.

The letter written by the Doctor to Mrs. Callister on March 21, 1945 portrays the Doctor lying in bed "fighting with this problem and having anginal pain," and "fervently wishing that a final coronary attack would come and solve the problem" for him. The Doctor testified that his written expressions were interpretative of the actual pain that he was suffering, medically speaking, prior to the divorce. The pain was real and not imaginary and thought by the Doctor to be extremely significant (Tr. 56, 57). Dr. Viko, testifying for the defendant, stated that Dr. Callister specializes in surgery and that the witness as the examining physician did not suggest that his patient retard his work as a surgeon, nor did he advise him to retire from practice (Tr. 41, 42). The witness' findings would indicate the same type of heart disease in his present examination of Dr. Callister as that described by Dr. Callister in March, 1945 (Tr. 42). Dr. Callister was advised to reduce the use of tobacco and to refrain from such things as political campaigns (Tr. 41) and to adhere to a diet due to over-weight (Tr. 40). Dr. Callister testified that he did not think that over the period of the last 7 years he had lost any of his skill or deteriorated at all in his ability to perform services as a surgeon and doctor in this community (Tr. 97). The claimed physical impairment is dissipated by the record and, in any event,

the Doctor entered into the contract with his wife with full knowledge of the heart condition. There is nothing in the record to show a loss of earnings on account of any claimed physical condition.

IV.

PLAINTIFF'S INCOME IS THE RESULT OF PRUDENT MANAGEMENT OF CAPITAL ASSETS RECEIVED AT THE TIME OF THE DIVORCE.

Dr. Callister, after selling \$19,500.00 worth of securities, had dividends in 1951 from the remainder of \$3,243.11. Mrs. Callister's dividend record by way of her tax returns was excluded by the trial court (Tr. 130, 131) so the only evidence as to her income other than the payments from the Doctor is reflected by Exhibits 1 and 2. By Exhibit 2 Mrs. Callister's net return from rentals for the year 1951 was \$4,255.85 but against this she is paying \$279.84 per month on the indebtedness against the Nira Apartments. She is also required to pay income tax on the \$4,800.00 paid to her each year by the Doctor. The comparison of income investment between the Doctor and Mrs. Callister predominates on the side of the Doctor. It is Mrs. Callister that could claim, in the absence of the contract, a change of circumstances calling for an increase in the payments to her. Mrs. Callister has maintained the family unit since her husband abandoned her for another woman. The comparisons that the Doctor now attempts to make are odious. We doubt if this Court will place a premium upon frugality and competent management

of one's own affairs. Mrs. Callister has not realized upon the claimed enhancement in values of her properties and the assertion by the Doctor in that regard should be ignored. What Mrs. Callister has by way of income is the normal consequence of prudent investment from the capital assets received by her through the property settlement agreement and the interlocutory decree of divorce approving the same.

V.

PLAINTIFF SHOULD BE AWARDED HER ATTORNEYS' FEES AND COSTS.

The property settlement agreement was introduced in evidence as Exhibit A on the modification proceedings (Tr. 55, 56). The last paragraph thereof contains an express provision for attorneys' fees, costs and expenses in any manner incurred by plaintiff in the enforcement of the contract or by reason of any controversy arising therefrom. This should be sufficient answer to the proposition. The trial court, however, found that Mrs. Callister had sufficient funds with which to pay her own attorneys' fees and costs and therefore awarded none. We submit that even in the absence of a contract Mrs. Callister should be entitled to attorneys' fees in resisting the action of her former husband. To this effect is *Stuber v. Stuber*, Utah, 244 P. 2d 650, and the cases therein cited, and also *Lerner v. Superior Court*, 242 P. 2d 321 (Cal.).

CONCLUSION

As was said in *Osmus v. Osmus*, supra, "Courts are not to be trifled with by litigants." In that case attention is called to divorce cases, which, although not ordinarily involving problems of great legal magnitude, quite frequently involve social problems of the utmost delicacy and importance—problems of such nature that the state, as well as the litigants, has an interest in their solution.

"A freedom-seeking spouse may not, in his eagerness to be speedily released from his matrimonial bonds, make rash and reckless agreements and promises, upon which the court may rely in fixing the amount of alimony, and then return a few months later and complain that the award for alimony is excessive or unfair. Such is apparently what was attempted in this case."

Of equal importance is the sanctity of contract—the premise of man's relationship to man under our form of economy. Property settlements in divorce actions by way of contract approved by the court should be treated no differently than any other contract where the contracting parties have come to an agreement fairly and without fraud, collusion or overreaching. The monthly payment to the wife, an integral part of the contract, should be treated as such no matter what it is called and should not be confused with the situation involving necessity or need on the one hand and the ability to pay on the other—the type of situation ordinarily found in the absence of contract.

The rule we are contending for is not without its logical and reasonable exceptions. As pointed out in the separate concurring opinion in *Dickey v. Dickey*, supra, any decree for performance under future as well as under present conditions is subject to modification to adapt it to the future conditions.

“Conditions will change and sometimes render enforcement impracticable; the court will not insist upon an impractical performance, of course, but will act according to conditions as they may be, and thus, whether we avow it or not, the decree will be modified or suspended; and it seems to me this limitation should be recognized in the rule.”

But here we have a man who is more than moderately wealthy, with more than the normal earning capacity and where his earnings have actually increased rather than decreased since the time of the divorce. It is not impractical for him to perform nor is there any other conceivable consideration which, as to him, should cause the intervention of equity. The words used in the contract and in the decree to the effect that Mrs. Callister will be paid \$400.00 per month as long as she lives or until she remarried were carefully expressed, judiciously weighed and were written in the light of the circumstances and conditions as they then and now exist.

There is no change in the Doctor's circumstances that warrants a modification even in the absence of the contract, but we trust that in so holding the Court will

not avoid settling for this jurisdiction the contractual and binding nature of a comprehensive and approved property settlement and alimony agreement.

It is prayed that the judgment appealed from be reversed and the cause remanded to the lower court to reinstate the monthly payments in the full sum of \$400.00 per month as of January 5, 1953, coupled also with an order for the lower court to determine the amount of attorneys' fees that the Doctor should be required to pay to the plaintiff for the use and benefit of her attorneys in defending the attack upon the decree both in the trial court and in this Court by reason of the contract and the propriety of the situation, with an award in the plaintiff's favor for her costs herein incurred.

Respectfully submitted,

JAMES W. BELESS, JR. AND
GUSTIN, RICHARDS & MATTSSON

By JAMES W. BELESS, JR.
HARLEY W. GUSTIN

*Attorneys for Plaintiff
and Appellant*