

1980

# Joel H. Izatt v. Mary C. Izatt, By and Through Her Guardian and Conservator, Kenneth G. Clark : Appellant'S Brief

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

 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.

GORDON A. MADSEN, ROBERT C. CUMMINGS; Attorneys for Plaintiff, Respondent REX J. HANSON, TIMOTHY R. HANSON; Attorneys for Defendant, Appellant and Cross-Respondent, Mary C. Izatt

---

## Recommended Citation

Brief of Appellant, *Izatt v. Izatt*, No. 16882 (Utah Supreme Court, 1980).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/2144](https://digitalcommons.law.byu.edu/uofu_sc2/2144)

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 (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT OF THE STATE OF UTAH

---

JOEL H. IZATT, :

Plaintiff, Respondent :  
and Cross-Appellant,

vs. : Case No. 16882

MARY C. IZATT, by and through  
her Guardian and Conservator, :  
KENNETH G. CLARK,

Defendant, Appellant :  
and Cross-Respondent.

---

APPELLANT'S BRIEF

---

APPEAL FROM THIRD JUDICIAL  
DISTRICT COURT OF SALT LAKE COUNTY,  
THE HONORABLE HOMER F. WILKINSON, JUDGE

---

HANSON, RUSSON, HANSON & DUNN  
REX J. HANSON  
TIMOTHY R. HANSON  
702 Kearns Building  
Salt Lake City, Utah 84101  
Attorneys for Defendant, Appellant  
and Cross-Respondent Mary C. Izatt

ROMNEY, MADSEN & CUMMINGS  
GORDON A. MADSEN  
ROBERT C. CUMMINGS  
320 South 300 East  
Salt Lake City, Utah 84111  
Attorneys for Plaintiff, Respondent  
and Cross-Appellant Joel H. Izatt

FILED

MAY 5 1980

IN THE SUPREME COURT OF THE STATE OF UTAH

---

JOEL H. IZATT,	:	
Plaintiff, Respondent	:	
and Cross-Appellant,	:	
vs.	:	Case No. 16882
MARY C. IZATT, by and through	:	
her Guardian and Conservator,	:	
KENNETH G. CLARK,	:	
Defendant, Appellant	:	
and Cross-Respondent.	:	

---

APPELLANT'S BRIEF

---

APPEAL FROM THIRD JUDICIAL  
DISTRICT COURT OF SALT LAKE COUNTY,  
THE HONORABLE HOMER F. WILKINSON, JUDGE

---

HANSON, RUSSON, HANSON & DUNN  
REX J. HANSON  
TIMOTHY R. HANSON  
702 Kearns Building  
Salt Lake City, Utah 84101  
Attorneys for Defendant, Appellant  
and Cross-Respondent Mary C. Izatt

ROMNEY, MADSEN & CUMMINGS  
GORDON A. MADSEN  
ROBERT C. CUMMINGS  
320 South 300 East  
Salt Lake City, Utah 84111  
Attorneys for Plaintiff, Respondent  
and Cross-Appellant Joel H. Izatt

# TABLE OF CONTENTS

	Page No.
STATEMENT OF NATURE OF THE CASE . . . . .	1
DISPOSITION IN THE LOWER COURT . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	2
STATEMENT OF FACTS . . . . .	2
ARGUMENT	
POINT I.           THE PLAINTIFF SHOULD NOT HAVE BEEN GRANTED A DIVORCE AGAINST THE DEF- ENDANT BECAUSE THE DEFENDANT DID NOT TREAT THE PLAINTIFF IN A MENTALLY CRUEL MANNER. . . . .	7
POINT II.          THE DEFENDANT SHOULD NOT BE RES- PONSIBLE FOR ANY ALLEGED DEBT TO THE PLAINTIFF'S PARENTS. . . . .	8
POINT III.         THE DEFENDANT SHOULD BE ENTITLED TO A LIEN FOR ONE-HALF OF THE EQUITY IN THE PLAINTIFF'S AND DEFENDANT'S REAL PROPERTY. . . . .	18
CONCLUSION . . . . .	20

## Statutes Cited

Utah Code Ann.   § 30-2-9 . . . . .	9
Utah Code Ann.   § 30-3-1 . . . . .	7
Utah Code Ann.   § 78-12-25(1) . . . . .	14
Utah Code Ann.   § 78-12-26 . . . . .	13

Cases Cited	Page
<u>Berow v. Shields</u> , 48 Utah 270, 159 Pac. 538 (1916) . . . . .	15
<u>Gilman v. Matthews</u> , 20 Colo. App. 170, 77 Pac. 366 (1904). . . . .	15
<u>Johnson v. Johnson</u> , 107 Utah 147, 152 P.2d 426 (1944). . . . .	7
<u>Mace v. Tingey</u> , 106 Utah 420, 149 P.2d 832 (1944). . . . .	12
<u>Manwill v. Oyler</u> , 11 Utah 2d 433, 361 P.2d 177 (1961). . . . .	9
<u>Walker Brothers Drygoods Co. v. Whithall</u> , 61 Utah 259, 212 Pac. 523 (1923) . . . . .	14

#### Other Authorities Cited

<u>Black's Law Dictionary</u> 1137 (Rev. 4th ed. 1968). . . . .	7
Utah Rules of Civil Procedure, Rule 8(c) . . . . .	14

IN THE SUPREME COURT OF THE STATE OF UTAH

---

JOEL H. IZATT,	:	
Plaintiff, Respondent	:	
and Cross-Appellant,	:	
vs.	:	Case No. 16882
MARY C. IZATT, by and through	:	
her Guardian and Conservator,	:	
KENNETH G. CLARK,	:	
Defendant, Appellant	:	
and Cross-Respondent.	:	

---

APPELLANT'S BRIEF

---

STATEMENT OF NATURE OF CASE

This is a divorce action wherein the plaintiff, respondent and cross-appellant (hereinafter referred to as "plaintiff") sought a divorce from the defendant, appellant and cross-respondent (hereinafter referred to as "defendant") who also sought a divorce by way of counterclaim. The parties sought a dissolution of their marriage and a distribution of the marital estate.

DISPOSITION IN THE LOWER COURT

This case was tried without a jury to the Honorable Homer F. Wilkinson, District Judge of the Third Judicial District, on the Amended Complaint of the plaintiff and the Answer and Counterclaim of the defendant. The Court heard testimony of the parties and various other witnesses and received memoranda and proposals for

the distribution of the marital estate on behalf of both parties. The Court entered a Decree of Divorce granting both parties a divorce as against the other, granted custody of the parties' four minor children to the plaintiff pursuant to a stipulation of the parties and provided for alimony of \$1.00 per year for the defendant. By way of a Supplemental Decree of Divorce, the Court entered a distribution of property. This distribution also awarded to the defendant the net proceeds of the settlement of a malpractice case brought against several physicians and Intermountain Health Care, Inc. This malpractice case arose out of personal injuries suffered by the defendant.

#### RELIEF SOUGHT ON APPEAL

The defendant seeks to have the portion of the Decree of Divorce of the District Court which granted the plaintiff a divorce against the defendant on the grounds of mental cruelty reversed. The defendant further requests a modification of the property distribution so as to grant the defendant a lien on real property owned by the parties to the extent of 1/2 of the equity in the real property and to relieve the defendant from any payments ordered to be made to the parents of the plaintiff.

#### STATEMENT OF FACTS

The defendant, Mary C. Izatt, is the mother of four children and, prior to this action, was the wife of the plaintiff for 16 years. (T 296-297) The defendant suffers from organic brain damage and possible psychosis resulting from two cardiac

arrests suffered during surgery which the defendant underwent on May 3, 1973. (T 413-414, 450) The defendant, without being informed of the nature or permanency of her admission, resided at the Plantation Convalescent Center from August 28, 1978, until following the time of trial. (T 297, 482-483, 505)

The plaintiff resides at 474 K Street, Salt Lake City, Utah, along with the four children of the marriage. (T 296-297) The plaintiff remarried sometime prior to the hearing held in this case on October 29, 1979. (T 270)

The plaintiff testified that the parties' marriage, prior to the defendant's surgery, was "ideal". (T 301) The defendant had an ideal relationship with her children. (T 302) Following the surgery and the cardiac arrests, the defendant experienced some difficulty performing household chores on behalf of the family. (T 441)

The plaintiff's parents moved into the parties' home shortly after the time of the defendant's surgery. (T 399) They lived in the home for approximately 18 months and periodically thereafter during the next four or five years. These periodic stays would amount to approximately six months. (T 400-401)

The defendant required additional hospital care and was rehospitalized in January, 1974 at the University of Utah Hospital because of psychotic behavior (unusual, stressful behavior). (T 305) Throughout the time since the defendant's surgery, she has been treated with various medications. These medications have included Prolixin and Mellaril. (T 307, 415)



The plaintiff is employed by David W. Evans Advertising as a commercial artist. He earns \$1,700 per month before taxes and approximately \$1,300 per month take home. (T 333) The Court ordered that alimony of \$1.00 per year be paid by the plaintiff to the defendant. (T 98, 156, 227)

During the marriage, the parties accumulated assets of a significant value. The parties' home at 474 K Street, owned in the name of the plaintiff and the defendant is worth approximately \$70,000. (T 367) At the time of trial, the first mortgage on the home was approximately \$16,000. (Exhibit 12-P; T 42) The net equity in the home is \$54,000. (T 333) The parties also have accumulated approximately \$10,064 cash value from life insurance policies on the lives of the plaintiff and the defendant. (Exhibit 12-P, Exhibit 6-P) The distribution of the cash value of these insurance policies is not an issue on appeal. The parties also accumulated various assets individually or jointly, such as an automobile, household furnishings, savings and checking accounts, jewelry, clothing and personal effects, and employee benefit plans provided by the plaintiff's employer. The distribution of these assets is not an issue on appeal.

A medical malpractice action arose out of the defendant's surgery. This action has been fully compromised and settled with the defendant receiving the net proceeds (after attorney's fees and costs) of \$97,320.22. (T 222, 228) The defendant was also granted a lien in the amount of \$13,500 in the parties' real property.

at 474 K Street. This lien is interest free and due and owing upon the sale of the property, upon the non-use of the property as a residence for the plaintiff and the children and upon the youngest child reaching majority. (T 228) This lien in favor of the defendant is for approximately 25 percent of the net equity in the real property.

Mr. Wilford Izatt, the father of the plaintiff, testified that during the time when he and his wife lived in the Izatt home that they purchased all of the groceries used in the home. (T 401-402) This testimony came from Mr. Izatt's memory and was without any documentation by way of receipts or other records. (T 403) During the initial 18 month period, according to Wilford Izatt's testimony, the cost of groceries would have been \$200, sometimes \$250 per month. (T 401) During the other periodic visits, this cost was estimated to be approximately \$50 to \$75 per month. (T 403) The plaintiff's parents lived rent free in the parties' home and consumed part of the food they purchased. (T 436)

The plaintiff offered Exhibit 1-P which consisted of 15 checks from Wilford L. or Wilda H. Izatt to Joel H. Izatt. This exhibit was received over the objection of the defendant. (T 309-314) The plaintiff testified that these checks were given to him to pay bills which were incurred because of the defendant's medical expenses or on behalf of the defendant. (T 312-313) The dates of the checks begin on December 15, 1974 and continue periodically

until April 16, 1979. (Exhibit 1-P) The plaintiff's father testified that the defendant did not receive the benefit of all of the money advanced. (T 438)

On cross-examination, the plaintiff admitted that checks dated November 6, 1978, December 7, 1978, December 22, 1978 and April 16, 1979, and totalling \$3,275 were given to the plaintiff following the defendant's move to the Plantation Convalescent Center. (T 365) During this period of time, the defendant's expenses were being paid for by the L.D.S. Church. (T 323) The plaintiff further admitted that the plaintiff's parents had provided him financial assistance prior to the illness of the defendant. Checks dated August 2 (or 7), 1971 and January 1, 1971 were shown to the plaintiff who admitted that they had been given to him prior to the defendant's illness. (T 366)

Check No. 4141 dated December 15, 1974 states that the check was a gift. Check No. 4303 dated December 24, 1974, states that it was for Xmas (sic). (Exhibit 1-P)

The checks in Exhibit 1-P were deposited in account number 00513580 at Tracy Collins Bank and Trust Company in Salt Lake City. (Exhibit 1-P) While these checks were asserted to have been given to the plaintiff in order to pay medical and other expenses of the defendant, the checks produced for defendant's counsel and admitted into evidence as Exhibit 13-D, written on the same account, indicate no payment of medical expenses or other expenses relating to the defendant's illness. (Exhibit 13-D)

While the plaintiff testified that he had records to show these expenses, no such records were produced. (T 313) The plaintiff further agreed to determine how much of the medical expenses of the defendant were covered by insurance. (T 369) No such determination was ever presented. (T 396-397)

## ARGUMENT

### POINT I.

THE PLAINTIFF SHOULD NOT HAVE BEEN GRANTED A DIVORCE AGAINST THE DEFENDANT BECAUSE THE DEFENDANT DID NOT TREAT THE PLAINTIFF IN A MENTALLY CRUEL MANNER.

Utah Code Annotated 30-3-1 states that one of the grounds for a divorce is "cruel treatment of the plaintiff by the defendant to the extent of causing bodily injury or great mental distress to the plaintiff." In Johnson vs. Johnson, 107 Utah 147, 152 P.2d 426 (1944) a divorce was granted, in part, because the defendant suffered from diabetes and liver trouble. This condition was alleged to have caused the plaintiff great mental distress, anguish and great mental suffering. The Court disallowed the granting of a divorce because of the illness. The Court stated:

The 'condition' referred to above is defendant's physical condition, diabetes, and liver trouble, and the fact that such condition caused respondent distress is clearly no ground for divorce. . . .  
152 P.2d at 428.

Black's Law Dictionary 1137 (Rev. 4th ed. 1968), defines mental cruelty as follows:

A course of conduct on the part of one spouse toward the other spouse which can endanger the mental and physical health and efficiency of the other spouse to such an extent as to render continuance of the marital relation intolerable.

The evidence presented to the Court during the trial shows that the plaintiff and defendant had an "ideal" marriage prior to the defendant's surgery in May, 1973. The cardiac arrests suffered by the defendant resulted in organic brain damage, a physical condition, which required that the defendant receive additional care, assistance and medication. However, the defendant did not embark upon a course of conduct designed to cause great mental or physical distress to the plaintiff. To the contrary, the defendant attempted to improve her ability to function both in the home and while institutionalized at the Plantation Convalescent Center. (T 321, 445-446, 485-486) The defendant, rather than acting in a way so as to cause harm to the plaintiff, continued to attempt to regain, to the extent possible, her prior abilities to deal with her husband, her family and others. These actions on behalf of the defendant do not entitle the plaintiff to a divorce on the grounds of mental cruelty.

#### POINT II.

THE DEFENDANT SHOULD NOT BE RESPONSIBLE  
FOR ANY ALLEGED DEBT TO THE PLAINTIFF'S  
PARENTS.

In the supplemental decree of the Court dated January 15, 1980, each party is required to assume and pay one-half of a



\$10,205 liability to the plaintiff's parents. (T 228) The defendant should not be required to repay any of this amount because: (1) the liability, is supported at best by a moral obligation to repay which is not consideration for an obligation; (2) the obligation is a gift; (3) significant portions of the claim are not legally enforceable because they are barred by the statute of limitations and/or they are not obligations contemplated to be obligations imposed upon a party under the Utah Necessity Statute (U.C.A. 30-2-9); and/or, (4) the evidence is insufficient to establish the amount of the debt, the terms of payment or the defendant's responsibility for the debt.

In Manwill vs. Oyler, 11 Utah 2d 433, 361 P.2d 177 (1961), the plaintiff alleged he made payments on behalf of the defendants and transferred other valuable assets to the defendants. These claims were asserted to be enforceable because of the defendants' oral agreement to repay. The Court held that the action against the defendants could not be maintained since the obligation was based only upon a moral obligation to repay. The Court stated:

The position the plaintiff essays is that the earlier payments he claims to have made for the defendants' benefit placed them under moral obligation to repay him, and that this constitutes valid consideration to make their 1957 oral promise a binding contract. The rule quite generally recognized is that a moral obligation by itself will not do so. Although some authorities appear to be otherwise, it will usually be found that there are special circumstances bolstering what is termed the moral obligation.

The difficulty we see with the doctrine is that if a mere moral, as distinguished from a legal, obligation were recognized as valid consideration for a contract, that would practically erode to the vanishing point the necessity for finding a consideration. This is so, first because in nearly all circumstances where a promise is made there is some moral aspect of the situation which provides the motivation for making the promise even if it is to make an outright gift. And second, if we are dealing with moral concepts, the making of a promise itself creates a moral obligation to perform it. It seems obvious that if a contract to be legally enforceable need be anything other than a naked promise, something more than mere moral consideration is necessary. The principle that in order for a contract to be valid and binding, each party must be bound to give some legal consideration to the other by conferring a benefit upon him or suffering a legal detriment at his request is firmly implanted in the roots of our law.

In urging that the moral consideration here present makes a binding contract, plaintiff places reliance on what is termed the 'material benefit rule' as reflecting the trend of modern authority. The substance of that rule is that where the promisors have received something from the promisee of value in the form of money or other material benefits under such circumstances as to create a moral obligation to pay for what they received, and later promise to do so there is consideration for such promise. But even the authorities standing for that rule affirm that there must be something beyond a bare promise, as of an offered gift or gratuity. The circumstances must be such that it is reasonably to be supposed that the promisee expected to be compensated in some way therefor. (Designation of promisee and promisor as plaintiff or defendant omitted.) Citations omitted)  
361 P.2d at 178-179

This alleged debt to the plaintiff's parents is based solely upon a moral obligation to repay. The plaintiff's father, Wilford Izatt, testified that he advanced money to the plaintiff and performed painting and other services for the plaintiff with the plaintiff only being obligated to repay if he were able. Mr. Izatt further testified that he advanced the money or performed the services for his son because he was a father and not because he expected repayment. (T 433) Even the plaintiff's promise to repay if he were able, is not sufficient to create a contractual obligation under Utah law. According to Manwill, it is required that the promisee (Mr. Wilford Izatt) expected to be compensated in some way.

The plaintiff's father testified that he fully intended to assist the plaintiff because of the father-son relationship. (T 433) The agreement to repay the advances never had a specific due date. (T 405) The times for and substance of the discussions regarding repayment could only be testified to as to memory. In discussions regarding the painting of the house, no amount as to the amount to be paid was ever determined nor was a time for repayment established. (T 407) The indefinite nature of this testimony points out the actual substance of the agreement between the plaintiff and the plaintiff's father, i.e. the plaintiff's father intended to and did make gifts to the plaintiff at various times.



These advances of money were not related to expenses incident to the defendant's illness. Had this been the case, no such payments would have been required such as those received in 1971 and those in 1979. Further, these obligations were not related to the defendant's illness since during much of the time after the original 18 months when the plaintiff's parents were living in the family home, the medical and nursing care for the defendant was being paid for by the L.D.S. Church or by insurance.

In Mace vs. Tingey, 106 Utah 420, 149 P.2d 832 (1944), the plaintiff desired to recover a debt allegedly owed by defendant to the plaintiff as executor of the estate of a decedent. The defendant claimed that the decedent had made a gift of the amount in question. The Court explained the factors to be considered in determining whether a transaction is a gift or a loan as follows:

. . . Where, as here, the question is as to whether the transaction was a loan or a gift, and neither party can testify thereto, the circumstances under which the transaction took place are certainly material in determining the intent of the donor and the purpose for which the property was turned over. . . . The relation of the parties, the situation then existing, and the circumstances under which the gift was made, including the donor's previous life, habits and relations to others, as well as the condition of the donor at the time of the gift may be considered by the court; so too evidence of friendly or affectionate relations between the parties; that the parties had resided together; and that the donee had rendered service to the donor is admissible on the question of motive and intent. 149 P.2d at 833-834.

In the present case, the testimony showed that the plaintiff's parents advanced money to the plaintiff before, during and after the time of the defendant's illness and residence with the family. The advances were made out of the plaintiff's father's belief that he had an obligation to help his son. This relationship had existed from the time the plaintiff was a boy. The plaintiff's father would also have helped his other children in similar ways. These facts show that the advances made by the plaintiff's father were intended to be gifts. The persons making the advances were not even asserting the claims on their own behalf.

The plaintiff's parents are not parties to this action. Therefore, no award should have been made to them as a part of the Supplemental Decree of Divorce. At best, the decree should only have made the parties liable for one-half of any claim to be asserted by the plaintiff's parents.

Assuming, arguendo, that the plaintiff can assert a liability on behalf of his parents, this claim is unenforceable. In large part, the claim is unenforceable because it is barred by the statute of limitations. Further, the claim does not come within the requirements of the Utah Necessity Statute.

Utah Code Annotated Section 78-12-26 requires that an action for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed

by the statutes of this state be brought within three years. This three year statute of limitations applies to actions brought under the Utah Necessity Statute (Utah Code Annotated Section 30-2-9). Walker Brothers Drygoods Co., vs. Whithall, 61 Utah 259, 212 Pac. 523 (1923).

Utah Code Annotated Section 78-12-25(1) states that "an action upon a contract, obligation or liability not founded upon an instrument in writing; . . ." shall be brought within four years. No action has actually been filed by the parents in order to determine the timeliness of the assertion of the claim. Assuming, arguendo, that the filing of the divorce complaint on December 8, 1978 began the action for recovery, any advances of money or performance of services prior to December 8, 1975, would be barred by the three year statute of limitations applicable to actions under the Utah Necessity Statute. The liability on the basis of an oral contract would be barred for any claims arising prior to December 8, 1974.

The plaintiff, during argument in this matter, argued that the statute of limitations could not be raised as an issue because Rule 8(c) of the Utah Rules of Civil Procedure makes a statute of limitations defense an affirmative defense which must be specifically pleaded. This argument is fallacious because the collection of the alleged debt by the plaintiff's parents is not the nature of this action. The claim for the parents is made by way of a liability asserted by the plaintiff in establishing the

size and nature of the marital estate. Therefore, the statute of limitations is not an affirmative defense to the allegations in the divorce complaint but rather is a matter of substantive law which can be asserted to challenge the sufficiency of a liability claim.

From the checks in Exhibit P-1, only \$4,870 of these amounts were advanced following December 8, 1975, the date for the running of the statute of limitations for claims under the necessity statute. The amount of the liability is further limited by the fact that the family only lived together until August 28, 1978.

Utah Code Annotated Section 30-2-9 states:

The expenses of the family and the education of the children are chargeable upon the property of both husband and wife or of either of them, and in relation thereto, they may be sued jointly or separately.

In Berow vs. Shields, 48 Utah 270, 159 Pac. 538 (1916), the plaintiff merchant extended credit to the defendant wife for certain purchases of clothing. The trial court held the defendant husband not liable for the debts incurred by the wife for the goods and merchandise supplied to the defendant wife following the termination of the family relationship. The court stated two prerequisites for recovery under the necessity statute, namely (1) the relation of husband and wife must exist and (2) the expenses for which either or both spouses are liable must be "family expenses".

As to whether a family relationship existed, the court cited with approval Gilman vs. Matthews, 20 Colo. App. 170, 77 Pac. 366 (1904) as follows:

In an action against a wife for wearing apparel purchased and worn by the husband, it is not sufficient to show that they are husband and wife, but it must also be shown that they are living together, so as to constitute a family. 48 Utah at 275.

As of August 28, 1978, the plaintiff intentionally and permanently placed the defendant in the Plantation Convalescent Center. This severed the family relationship between the plaintiff and defendant so as to disallow any claims against the defendant for "family expenses" incurred after this date. The amount of the money advanced to Joel Izatt following December 8, 1975 and before August 28, 1978 is \$1,595.

The purpose of the necessity statute as set forth in Berow vs. Shields, supra. at 277, is to protect merchants and traders as well as husband and wife. A merchant or trader is not in a position to know of the financial or marital status of those with whom he deals. Consequently, protection for these persons providing necessities is proper and is provided by the statute. The plaintiff's parents are not merchants or traders and were fully able to protect themselves against any potential losses for advances made to the plaintiff had such been their intention. They were in a position to determine the financial position of the plaintiff and the need for the money, but chose to rely upon the plaintiff's representations. Consequently, the necessity statute does not validate claims such as the one made by the plaintiff.

The testimony of the plaintiff and the plaintiff's father indicates that they enjoyed a close father-son relationship.



However, the testimony does not substantiate the amount of the debts, the terms of the payment or the binding nature of the obligation. For example, upon direct examination by Mr. Madsen as to the amount agreed upon to be paid for the painting, the plaintiff's father testified that a meeting took place which involved the plaintiff, the defendant, the plaintiff's mother and the plaintiff's father. The painting was discussed at this meeting, but no price for the painting was set. The testimony continued and it was stated that at another time a value of \$1,500 was set. While the plaintiff did establish some foundation for the testimony regarding the original meeting involving the plaintiff, defendant, plaintiff's mother and plaintiff's father, no foundation was established as to the meeting when the agreement as to the \$1,500 was established. Consequently, this testimony should not have been received. (T 407-410)

On cross-examination, the plaintiff's father testified that he would help the plaintiff without regard to the plaintiff's ability to repay the debt. While the plaintiff's father testified that he discussed the necessity of the requests made by the plaintiff, he did not, at any time, know or inquire about the income of the plaintiff. The plaintiff's father testified that if he (the plaintiff) had been able to do it himself he would not have asked me (the plaintiff's father). (T 433-435) This testimony is contradictory to the plaintiff's father's testimony on direct examination where he stated that they would talk about the request to determine if

they were really necessary. Further, there is no indication, except for the plaintiff's testimony that the amounts were expended for medical care or other costs relating to the defendant's illness. This evidence does not meet with the test of Berow which clearly requires that it be shown that the expenses be for "family expenses".

### POINT III.

THE DEFENDANT SHOULD BE ENTITLED TO A  
LIEN FOR ONE-HALF OF THE EQUITY IN THE  
PLAINTIFF'S AND DEFNDANT'S REAL PROPERTY.

The Court awarded the defendant a lien of \$13,500 in the real property owned by the parties. This lien is for twenty-five percent of the estimated equity of the parties in the real property. The lien is without interest and is payable only upon (1) the resale of the home; (2) the plaintiff no longer using the home as a residence for himself and the family; and (3) the youngest child reaching majority. Originally, the Court ordered a fourth limitation which required payment of the lien upon the plaintiff's remarriage. The defendant stipulated to allow this restriction to be removed because the plaintiff had already remarried. The defendant did so because of the defendant's desire to assist in the raising of her children and to allow them to grow up in the home they were already living in. However, the defendant did not stipulate to any reduction of the original lien which was established for one-half of the equity in the real property.

By allowing the plaintiff to retain possession of the real property, the defendant has contributed to the plaintiff

and the family, in effect, a term for years for approximately twelve years until the time the last child reaches majority. The defendant is foregoing any return on investment on her interest in the real property during this period of time; will not be compensated for any loss in purchasing power which results because of inflation or otherwise during this period of time; will not share in any future increases in the value of the real property; and is providing a place to live for the plaintiff, the plaintiff's new wife and the children of the plaintiff and the defendant. This means that the defendant has bestowed a substantial economic benefit on the plaintiff and the family and should be entitled to a lien equivalent to at least one-half of the equity in the real property.

The major portion of the marital assets consisted of the real property. The distribution of the other marital assets and liabilities (except the debt to the plaintiff's parents) are not issues on appeal.

The trial court, in Supplemental Findings of Fact 19 stated: "The Court finds that the plaintiff has sustained trauma and medical problems resulting from the defendant's injuries and condition as a result thereof; the Court has taken this into consideration, together with the responsibility and the expense which plaintiff will have in raising the minor children in determining what is fair and equitable between the parties." (T 223)



As stated in Johnson vs. Johnson, supra., a party's injuries and condition do not substantiate the right of another party to a divorce on the grounds of mental cruelty. Likewise, the injuries and physical condition of a party do not entitle another party to compensation. In short, a divorce action is not a personal injury action.

It is unfair and inequitable for the defendant to receive a lien for only one-fourth of the equity in the real property in light of the contributions and sacrifices made by the defendant. The defendant is no longer able to live in her home; she is separated from her children; the plaintiff and his new wife are making use of the property without compensation to the defendant; she is directly subsidizing the housing costs of the plaintiff, his new wife and the children for the next twelve years; and she is not receiving any support from the plaintiff (except for alimony of \$1.00 per year). The defendant served faithfully and well for 16 years as the plaintiff's wife and the mother of their four children.

#### CONCLUSION

The circumstances which the parties have faced since May, 1973, have been unfortunate. Following an "ideal" marriage, the defendant has been separated permanently from her husband and her children. It is unlikely that she will remarry. The tragedy of the situation should be minimized by correctly applying the law as follows:

The plaintiff should not be granted a divorce against the defendant on the grounds of mental cruelty. Suffering from a physical injury or condition does not constitute mental cruelty.


The liability to the plaintiff's parents should not be allowed because: (1) the liability is supported only by moral consideration; (2) the advances made were gifts; (3) the liability is legally unenforceable under the necessity statute and/or the statute of limitations, and/or (4) the evidence is insufficient to establish the claim. The plaintiff's parents are not parties to this action nor does the Court have any jurisdiction over them. Consequently, no award by way of the Supplemental Decree should have been made to them. At most, the plaintiff and defendant should be made liable for one-half of the claim of the plaintiff's parents. The plaintiff's parents would then be in the proper position of being required to assert their claim on their own behalf.

During the parties' marriage, they accumulated a moderate marital estate consisting primarily of the equity in their real property. The amount of this equity is approximately \$54,000. The defendant, being the wife of the plaintiff of 16 years and the mother of the parties' four children, is equitably entitled to more than a \$13,500, no interest lien in the real property when the plaintiff is entitled to possession of the property for himself, his new wife, and the children.

The defendant respectfully submits that the District Court's grant of a divorce to the plaintiff against the defendant should be reversed, that the defendant should not be responsible for any obligation to the plaintiff's parents and that the defendant should be entitled to a lien for one-half of the equity in the parties' real property.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of May, 1980.

HANSON, RUSSON, HANSON & DUNN

  
REX J. HANSON  
TIMOTHY R. HANSON  
Attorneys for Defendant  
702 Kearns Building  
Salt Lake City, Utah 84101

#### DELIVERY CERTIFICATE

I hereby certify that I delivered two (2) copies of the foregoing to Gordon A. Madsen and Robert C. Cummings, Attorneys for Plaintiff, Respondent and Cross-Appellant Joel H. Izatt, 320 South 300 East, Salt Lake City, Utah 84111, this 5<sup>th</sup> day of May, 1980.

