

1955

Laura M. Price v. Edward E. Price : Brief of Appellant

Utah Supreme Court

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No. 8342

IN THE SUPREME COURT

OF THE

STATE OF UTAH

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LAURA M. PRICE,

Plaintiff & Respondent

vs.

EDWARD E. PRICE,

Defendant & Appellant.

No. 8342

APPELLANT'S BRIEF

FILED
JUL 13 1955

Clerk, Supreme Court, Utah

Omer J. Call

Attorney for Appellant

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IN THE SUPREME COURT
OF THE STATE OF UTAH

LAURA M. PRICE,

Plaintiff & Respondent

vs.

No. 8342

EDWARD E. PRICE,

Defendant & Appellant.

APPELLANT'S BRIEF

STATEMENT OF FACTS

Plaintiff in this matter was awarded an interlocutory decree of divorce on August 10, 1946 in a contested divorce proceeding at Brigham City, Utah. At the time of the divorce the parties were the owners of a home in Garland, Utah and a lot in Tremonton, Utah with a C.O.C. barracks located upon it. Plaintiff was awarded the home and lot in Garland, Utah and the sum of "\$50.00 per month alimony and support money for herself and minor children." At the time of the divorce there were four minor children, Lois, Edna, Owen and Tamara

Price whose custody was awarded to plaintiff, and a minor child, DeLawn Price, whose custody was awarded to the defendant. The award to the plaintiff of the \$50.00 per month and the distribution of the property was based upon the Court's finding that the defendant was capable of earning \$250.00 per month gross. Apparently the bitterness between the parties persisted and on March 16, 1948 an instrument was signed entitled "Satisfaction and Release of Judgment and Release of Lien on Real Estate", which was signed by the plaintiff herein and duly acknowledged on said date and filed herein, and which Release the Court announced was good and valid and not touched with fraud (Tr.88). Thereafter, on April 10, 1948, the defendant married his present wife, June M. Price, and this couple has one child, Debra Price, age 4 years, as of May, 1954.

The plaintiff, since the divorce in 1946, remarried one A. C. McLaughlin and was thereafter divorced from McLaughlin and awarded \$50.00 per month alimony from McLaughlin. That after the

divorce from McLaughlin she married Leander Payne and moved to Logan approximately 1½ years before May of 1954. Of the four children whose custody was awarded to plaintiff the two older ones were married in about the year 1949 or 1950 (Tr.33), and the remaining two children, Owen and Tamara, reside with plaintiff. When the plaintiff with her new husband, Leander Payne, moved to Logan, Utah they enrolled the children, Owen and Tamara Price, in the Logan schools under the name of Payne (Tr.65-76), and Leander Payne and the plaintiff both held the children out to be the children of Leander Payne. In fact, they had the children "sealed" to them at the Logan Temple (Tr.65).

On February 1, 1954 an Order to Show Cause and Restraining Order in this matter was issued by the Court compelling the defendant to be and appear and show cause why he should not be held in contempt of Court for his failure to continue making payments under the divorce decree of 1946. The defendant appeared on the 27th day of April to show cause but by stipulation the matter was continued until such

time as counsel for plaintiff could file a petition for modification of the Decree. Defendant filed a Return on the Order to Show Cause and also filed Objections and Answer to the Petition for Modification, and hearing was had on plaintiff's petition and Order to Show Cause and the defendant's Return and Answer on May 11, 1954. Defendant showed (Tr. 32, see also Cross Pet.41) he suffered from heart trouble, earned less than \$1,000.00 per year in any year since 1948 (Tr.29-31) and was unable to adequately support his present family, in fact, his 4-year old daughter is going without proper medical attention (Tr.82-83 and 36).

On the 1st day of February 1955 Findings and Conclusions were filed as was an Order modifying the decree of divorce. By the order modifying the decree of divorce the defendant was ordered to pay the sum of \$25.00 per month each for the support of the two minor children, Tamara and Owen, and plaintiff was awarded judgment for \$2,880.00. On the 10th day of February 1955 the defendant filed

a Motion for Amendment of Findings and Order and for a New Trial, and the Court, on the 1st day of March 1955, amended the order modifying the decree of divorce by reducing the judgment awarded to plaintiff from \$2,880.00 to \$1,880.00 and thereafter this appeal was filed.

STATEMENT OF POINTS

1. Insufficient Findings of Fact were made on some issues, and no Findings of Fact were made on other issues.
2. The Findings of Fact which were made were not supported by the evidence.
3. Error in awarding judgment to plaintiff for \$1,880.00.
4. Error in awarding plaintiff judgment for \$25.00 per month for each of two minor children.
5. It is inequitable to award plaintiff \$50.00 per month for the support of the two minor children and also inequitable to award her any sum as and for past due installments.

ARGUMENT

POINT 1: INSUFFICIENT FINDINGS OF FACT WERE MADE ON SOME ISSUES, AND NO FINDINGS OF FACT WERE MADE ON OTHER ISSUES.

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This Court, in the case of Osmus vs. Osmus, 114 Utah 216 at page 223, reiterates as a principal firmly established in this State that in order to entitle either party to modification of a decree of alimony or support money, such party must plead and prove change in circumstances such as to require a change in the terms of the Decree. In the instant case the only part of plaintiff's petition for modification which could be construed to contain a plea of changed circumstances appears in paragraph 4 thereof "that the cost of living has materially increased since the decree of divorce was rendered; that a reasonable amount for the support of each minor child would be the sum of \$37.00 for food, clothing, and personal care and medical, dental and household supplies." Whether there was an allegation of changed circumstances or not there was no proof of any changed circumstances, and in fact the plaintiff in her testimony (Tr.68) indicated that the cost for the food for children would be the same in 1948, 1946, and 1954. On this essential point of what changed circum-

modification there is no finding by the Court. While this Court has in the case of Anderson vs. Anderson, 110 Utah 300, indicated a person would not be entitled to a pro rata reduction of support money where the number of minor children had changed since the original decree, still it would seem that in order for a Court in the instant case to award judgment to plaintiff for the sum of \$25.00 per month for the support of each minor child herein, would require a finding of changed circumstances from 1946. There is no finding of what the changed circumstances were.

There were further no Findings of Fact on the issues raised by defendant in his objections and answer to plaintiff's petition, particularly as to defendant's ability to pay based on his allegations of reduced earnings and reduced ability to work because of heart trouble. There is, in fact, no finding by the Court as to what the defendant's earnings are.

No findings were made upon the amount of support contributed in the past by the defendant to

the plaintiff, nor was any finding made on what portion of the original amount of alimony and support money was apportioned as alimony and what portion for each minor child. It is impossible to tell upon what facts the Court arrived at the figure of \$1,880.00.

The Court invited plaintiff's counsel to file another petition for modification should circumstances change so as to entitle the children to more money than the Court awarded (Tr.89), but the Court makes no finding of what the income of the defendant is so that in the event of a future petition for modification there would be no basis upon which to establish a changed circumstance in this regard.

POINT 2: THE FINDINGS OF FACT WHICH WERE MADE WERE NOT SUPPORTED BY THE EVIDENCE.

The Court's finding of fact No. 5, entered on the 1st day of February 1955, to-wit:

"The Court further finds that the defendant at all times hereinabove mentioned was and still is an ablebodied man in more or less constant receipt of wages and income sufficient to pay \$25.00 per month support money for each of the two minor children."

is not supported by the evidence adduced at the trial, in fact the only evidence as to defendant's physical condition was furnished by Cross Petition Exhibit #1 which is the statement of Dr. Viko and was admitted in the evidence upon stipulation of counsel which positively establishes the fact that the defendant suffered from heart trouble, and by the testimony of defendant (Tr.31-32) and defendant's present wife, June M. Price (Tr.81-82) to the effect that he had heart trouble and was unable to work. The only evidence on the defendant's ability to pay for the support of his minor children was to the effect that he had some income from house-moving activities which he engaged in with his son, and that he was not in receipt of any wages nor income aside from the proceeds from the house-moving venture. The evidence here is conclusive that he never received more than two-thirds of \$1,440.00 (Tr.30, 80) for any year since the divorce and in some years his net proceeds were much less (Tr.29-30), in fact, as little as two-thirds of \$615.05. Plaintiff at no time

disputes his earnings nor shows any earnings in excess of the sums received through the house-moving. Defendant's testimony with regard to his earnings are born out by the fact that defendant lives in a converted C.C.C. Barracks (Tr.27) without even a bathroom, has had only one suit of clothes during the past four years and dresses always in overalls and work shirt (Tr.31), that the minor child of the defendant and his present wife, June M. Price, is in dire need of medical attention which the parties have been unable to provide for her because of lack of funds (Tr. 82-83).

That part of findings of fact No. 3 that

"There is now due under the said Decree the sum of \$4,450.00 as of May 18, 1954, and that the children's share of the above amount for the support of the children is the sum of \$1,880.00"

is not supported by any evidence in the record.

POINT #3: ERROR IN AWARDING JUDGMENT TO PLAINTIFF FOR \$1,880.00.

As to point #3 the Court erred in awarding plaintiff judgment for \$1,880.00, and appellant contends that upon the granting of the divorce in

in 1946 the plaintiff became a femme sole and was capable of contracting with any party, including her ex-husband, so that in March of 1948 when the plaintiff released for \$1,700.00 her judgment, lien, and all claims against the defendant, it was an act that she was certainly capable of doing. The trial court apparently agreed with the plaintiff's contention that she could not release the judgment for the support of the minor children in the future, although plaintiff did not claim that the release was not binding so as to release claimed back due payments up to the time of the release, and the Court expressly determined (Tr.38) that the release was valid.

Plaintiff's contention seems wrong on two grounds, the first of which is that if the release and satisfaction of judgment is sufficient to discharge the obligation for past due installments, then until such time as the plaintiff moved to set aside the release, the release should continue to be effective as to past due installments. The second reason would seem that under our statute either or both parents is obligated by statute to provide

the necessities for the minor children, Sec. 30-2-9 UCA 1953. Also it would seem under Sec. 76-15-1 UCA 1953 that both parents could be charged with failure to provide for the minor children. These sections of the statute are pointed out simply to call attention to the fact that if both father and the mother are liable for the support of the minor children then it would seem the appellant mother, being a femme sole, could contract and agree for valuable consideration to relieve the father of the obligation to support the children, and such contract should be binding until such time as the same is set aside.

While no case directly in point in our State was found there are a great number of cases throughout the United States and England which support defendant's contentions. They are *Pye vs. Pye* 152 N.Y.S. page 564, where the plaintiff attempted to have a Writ of Execution for back alimony due from her husband and in which case the defendant, the former husband of the plaintiff, defended on the grounds that he had a valid and subsisting release

and satisfaction of the judgment and the Court said

"The written agreement by which plaintiff agreed to accept \$925.00 in full payment of the alimony awarded to her by decree herein, which sum was paid to her, is still in force and is binding upon the plaintiff until set aside. Galuska vs. Galuska 116 N.Y. 635, 22 N.E. 1114; Winter vs. Winter 191 N.Y. 462; 84 N.E. 382; Greenfield vs. Greenfield, 161 App. Div. 573, 146 N.Y.S. 865."

For decisions to the effect that even though a release is void, until such time as it is repudiated the release would be valid and binding up to the time of its repudiation, see Gehring vs. Gehring, 30 N.Y.S. 2d 257, 262 App.Div. 1065.

In Van Ness vs. Ransom 115 N.Y.S. 251, 164 App. Div. 483 wherein plaintiff sued to recover back due alimony under a divorce Decree and defendant alleged as a defense a release which plaintiff denied signing, the Court held that the "release immediately released the judgment" and further held that the wife's denial of the execution of the release was insufficient to rebut the acknowledgment which appeared on the release.

In the case of Parker vs. Parker, 179 N.Y.S. 51—189 App.Div. 603, plaintiff sought back alimony

for 18 years under a Decree of divorce modified some 14 years previous, claiming that the modification when obtained was a fraud upon the Court. Plaintiff also sought \$1,320.00 which the defendant had failed to pay under the modified Decree and as to which \$1,320.00 the defendant claimed a written consent to reduction of alimony by plaintiff was given. It had been six years since the claimed written consent had been given and the Court said of the plaintiff

"She should in the circumstances be deemed estopped at this late date from claiming that the payments of alimony made by the defendant were not all of the alimony she was entitled to receive under the judgment or the judgment as modified, for had she at the time pressed the claim she now makes the defendant might have obtained further modification of those judgments."

And so in that case it appeared that even though plaintiff did not have a record of the release of the judgment or the consent to the modification, the Court was willing to apply an estoppel against the wife to prevent her from obtaining any sum in excess of the amount fixed by the subsequent agreement for modification. An interesting and important

fact in this case was that the Court used only the term alimony, but as a matter of fact the support of four minor children was involved and apparently the same rule was applied to the sums due under the Decree whether designated alimony or support money.

The New York rule as above appears to be that the release or satisfaction of the mother is valid and binding until set aside and operates to prevent the enforcement of a Writ of Execution for back due support money or alimony as claimed by such party. A much stronger position is taken by the Missouri Court in Francis vs. Francis, 192 Mo. App. 710, 179 S.W. 975, in which plaintiff and defendant were divorced in 1903 and plaintiff awarded \$40.00 per month alimony. (Here again however the \$40.00 was to cover as well the support of minor children). In 1912 plaintiff caused the execution and garnishment to be issued for \$6,984.84. Thereafter, both parties being represented by counsel, plaintiff executed a release in favor of the defendant of all past due alimony for \$600.00 cash

cash and all future alimony for \$1.00. In pursuance of that agreement the defendant paid to the plaintiff the sum of \$601.00 and defendant defends on the grounds that the contract relieved him of further liability. Plaintiff was seeking to set aside the release as well as have the Writ of Execution enforced, however the trial Court denied her release and the Supreme Court in passing upon the question had this to say:

"In the case at bar we have the fact of the plaintiff here by a solemn covenant and agreement in writing acknowledged by her before a public official agreeing to accept \$600.00 in satisfaction of the accrued installments, to have the former order or judgment changed accordingly by the Court, and to accept \$1.00 in lieu of alimony in gross.—Here in point of fact was a valid executed contract which plaintiff could not rescind. When the Court enforced it, it did no more than what it had a right to do independent of the agreement, and, as we have said, simply enforced and carried out the contract that the parties had made.-----"

In the case of Wolfe vs. Wolfe, decided in Illinois in 1940, 24 N.E. 871, the parties were divorced in 1928 and plaintiff was awarded \$25.00 per week for the support of a minor child. There-

after the Decree was modified to provide \$15.00

for the support of the minor child. In June of 1934 the plaintiff and defendant orally agreed that \$12.50 would be paid by defendant. Five years later in 1939 the plaintiff seeks judgment of \$876.25 for unpaid installments under said Decree, and the defendant alleged the oral consent to the reduced alimony and the fact of five years acquiescence and further pointed out to the Court that the grandmother of the child had had it at least for part of that period. The trial Court refused to grant plaintiff relief and the Supreme Court noted

"When plaintiff accepted these payments for a period of five years, equity and justice would seem to deny her any right to complain to the Court unless it could be made to appear that the financial condition of defendant had so improved that he should be ordered to pay the amount provided for in the original Decree.---"

In all of the above cited cases, numerous other cases throughout most of the states were cited in support of the decisions rendered. Among the cited cases was the case of Neely vs. Neely, 9 Ohio Dec. Reprint 201, where the Court held that

the wife became a femme sole upon the granting of the divorce and was able to contract the same as any other person with regard to alimony, and cited English cases to the same effect.

Innes vs. McColgan, a California case in 118 Pac.2d 855, was a tax case which passed upon the effectiveness of an agreement discharging the husband from an alimony Decree awarding plaintiff \$300.00 per month, and there the Court said:

"Of course as between plaintiff and his divorced wife the documents they executed in May, 1935 and the payment of \$25,000.00 into the trust fund constituted a complete release by the wife of the obligation of the husband to support her insofar as that result could have been accomplished by a contract between them. Had the wife by execution or otherwise obtained further money from plaintiff under the support provisions of the divorce decree it is probable that plaintiff could have had his remedy against her for the damages suffered recoverable in an action for breach of contract."

Our own case of Openshaw vs. Openshaw, 105 Utah 574, 144 Pac.2d 528, used language on Page 578 which would indicate that this Court would take into consideration acts of the party claiming rights under the Decree, if she had acted in such manner

the Decree was sought to be enforced, when the Court said

"-----When the right to collect money under the terms of a Decree has vested, it is not within the province of a Court to divest such right, unless the party who claims the right has acted in such a manner as to clearly prejudice the substantial rights of the party against whom the right is sought to be enforced-----"(Underlining added)

The Court again states

"-----The plaintiff therefore properly applied to the Court for determination of the precise amount due and owing for which execution should issue; and absent any competent facts to establish release, satisfaction, offsets, estoppel, or other bases for reducing the amount for which execution should issue, (Underlining added) plaintiff was entitled to an order showing that \$7,717.42 was the aggregate amount in arrears within a period of eight years for which execution should issue."

In the instant case defendant, in reliance upon the release and satisfaction obtained from the plaintiff, one month later entered into a new marriage. He has had one child born as the issue of this marriage and his undisputed testimony is that there is not sufficient money for him to support his present family.

While the point will be taken up also in

another place in the brief, mention is made here of the further facts that this plaintiff has, if we are to take the witness, Shumway's, testimony (Tr.8), and the defendant's testimony (Tr.34), advised defendant she wants nothing more from him, and this fact seems in part at least corroborated by the plaintiff's own testimony, (Tr.73) to the effect that she advised her attorney just prior to the execution of the release in March, 1948 that if she could just get enough money out of her ex-husband to pay the taxes and fix the bathroom in her new home in Brigham City the attorney could have everything else. It would thus seem that she would certainly also tell her ex-husband that if she could only get enough money to do all these things that she would surely release him and expect nothing more from him. Also, it should have some weight in determining the point of whether or not she was entitled to a judgment for \$1,880.00 that the plaintiff held the children out to be the children of her new husband, Leander Payne, and in fact admitted that she took them to the Temple and had them "sealed" to herself and Leander Payne.

Without urging the legal effect of such a "sealing" it is certainly obvious what the plaintiff desired and what she felt about the matter which was that she did not want the children to be the children of defendant if she could do anything to change it and she apparently wanted the defendant to know that she had had the children "sealed" to herself and her present husband. It therefore seems that in view of the complete release and satisfaction of the judgment, the holding out of the children to be the children of her then husband, Leander Payne, and the "sealing" of the children to herself and Leander Payne, that the strongest possible case was made for the view that she should have no judgment for back due alimony. In fact, it would seem that under such circumstances the Court would be justified in applying the Missouri rule to the extent of denying her judgment for any sums whatever, and terminating her rights to future support money.

POINT #4: ERROR IN AWARDING PLAINTIFF JUDGMENT FOR \$25.00 PER MONTH FOR EACH OF TWO MINOR CHILDREN.

Defendant contends (as has often been reiterated by this Court), that the basis upon which an award for support money is to be made is the need of the person supported and the defendant's ability to pay. Defendant certainly does not here urge that his ability to pay does not permit the payment of such a sum for the said children. The fact that the parties while they were still living together were obliged to accept relief, the standard of living of the defendant and his new family, including making their home in a C.C.C. Barracks and their very modest, if not negligible clothing, corroborate the evidence adduced by defendant as to his earnings. It is apparent from the record, (Tr.50) that the money borrowed by the defendant to pay to plaintiff and for her benefit when the release and satisfaction was given in March of 1948, was repaid by the present wife of the defendant out of money which she had from the sale of property owned by her prior to the marriage to defendant. The fact that the defendant's present wife gets out in work clothes and works at the

manual labor of moving jacks, blocks, jacking up buildings, and driving the trucks for the movement of such buildings is evidence of the efforts being made by defendant and his family to eke out an existence. It is clear that the Court considered only the needs of the minor children of plaintiff rather than the needs and the ability of the defendant to pay. The undisputed evidence before the Court is that the defendant's maximum income for any one year was two-thirds of \$1,460.00 for the entire year. To say that he had the ability out of such income to pay \$600.00 to the plaintiff for the support of her children would be to completely disregard the rights of the second family. While it is true that in many cases of remarriage after divorce one is inclined to the view that the second family is acquired with full knowledge of the obligations to the first family, still in this case where there was a full satisfaction and release of judgment upon the payment of the \$1700.00, verbal statements that plaintiff never wanted anything

further from defendant and the holding out of the defendant's children to be the children of the new husband, Leander Payne, certainly would make the second marriage contracted by the defendant free from such objection. To fix the sum of \$50.00 per month to be paid by defendant does not take into consideration the realities of the situation and compels the defendant either to fall into contempt of the Court's order, or to deny his present family even the barest existence. It is a Decree impossible of performance.

The Court seems to take the view either that the defendant could earn more money or did earn more money although no finding is made specifically on these points and yet there is no dispute in the case but what the only source of income of the defendant is his house moving. It is further evident that defendant had to have a permit to move any house, that he had to make a report to his Public Service Commission concerning each house or building moved, and to state his income from each such movement. This point is mentioned

to show that his record of income would have to square up with his permits. Defendant's present wife testified as to all of these matters and that she kept the books and that the book from which the income of the parties was determined included an account of all houses or buildings moved by the defendant and his son. It seems impossible therefore from the record for the Court to assume that the defendant earned anymore money than testified to by him. On the other hand, the condition of his health as evidenced by the report of Dr. Vike and from his testimony and his wife's testimony, is that he suffers from heart trouble and is frequently ill for periods of time ranging from a day or two up to three months (Tr.82).

Defendant alleged in his cross petition for modification the fact that his income was now less than \$125.00 per month. As a matter of fact, the evidence indicates that his income never did exceed approximately \$1,000.00 per year. A further changed circumstance is that the defendant now has

a second family, acquired upon the justifiable assumption that he had been relieved from the support of the first family by his wife. In the divorce proceedings of 1946 the Court made a finding that the defendant was capable of earning \$250.00 per month and the award apparently was based upon that finding, taking into consideration the fact that the plaintiff was also awarded the home. Where the awarding of \$50.00 in 1946 was made for the benefit of the four minor children and the wife, circumstances have now changed that instead of four minor children there are only two minor children and the wife has remarried several times and it further appearing from the plaintiff's own testimony that the costs of supporting each child are approximately the same.

POINT #5: IT IS INEQUITABLE TO AWARD PLAINTIFF \$50.00 PER MONTH FOR THE SUPPORT OF THE TWO MINOR CHILDREN AND ALSO INEQUITABLE TO AWARD HER ANY SUM AS AND FOR PAST DUE INSTALLMENTS.

To grant the relief awarded by the trial court is inequitable as between the parties in view of the fact the award of \$50.00 per month was based upon earning capacity of \$250.00 per month.

Summing up then we can see that in March, 1948 in exchange for some \$1700.00 the plaintiff executes a release and satisfaction of all claims under the decree of divorce to the defendant; that in reliance upon said release the defendant enters into a marriage contract and has one child born as the issue of that marriage. That plaintiff herself remarries, divorces, and is remarried, that she goes through the procedure of having the defendant's minor children "sealed" to her and her new husband; that she registers them in school under the new husband's name and generally holds them out to the world to be the children of the new husband; that five years after the release and satisfaction she comes into Court seeking payment of all sums under the 1946 Decree of divorce as if no release and satisfaction has been given, admits that she is remarried and has no claim for alimony, that two of four minor children have married and are no longer dependent. That to grant her all or any part of the relief demanded would be inequitable and impractical and have the effect

of depriving the second or present family of any means of support, of punishing the defendant for his having heart trouble and being unable to work at manual labor, the only skills which he possesses. That it would be inequitable to permit the wife to release and satisfy all obligations under the Decree in order to obtain money from the defendant which apparently he had to borrow, to let her go on under such release and in effect take his children away from him and then five years later to permit her to have all of the benefits of said decree as if she had not released the same.

Defendant therefore earnestly urges the Court to (1) either remand the matter for the making of findings in keeping with the evidence or in supplying the findings themselves, (2) reverse and disallow the judgment of \$1880.00 entered by the lower Court in favor of plaintiff, and (3) in conformance with the changed circumstances and defendant's ability to pay, to fix a reasonable and proper sum, if any, of support money to be paid by defendant.

CONCLUSION

In conclusion the appellant requests the Court to give weight to the facts that he is afflicted with heart trouble and unable to perform manual labor, and that he is not skilled in any other field, and on that account his earnings are very meager; that he entered into a second marriage upon the belief that he was discharged by plaintiff's written release and satisfaction of the obligations of the first marriage; that he would be willing to provide for his first family if he had the means; that his second or present family is in fact inadequately provided for; that his children for all practical purposes have been taken away from him by plaintiff and her last husband; that plaintiff, for a good consideration, released defendant from the judgment; and to enter judgment accordingly.

Respectfully submitted,

OMER J. CALL
Attorney for Appellant