

1989

# Johanson v. Fischer : Unknown

Utah Supreme Court

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## Recommended Citation

Legal Brief, *Johanson v. Fischer*, No. 890053.00 (Utah Supreme Court, 1989).  
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UTAH SUPREME COURT

BRIEF

890053

SNOW, NUFFER, ENGSTROM & DRAKE

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June 8, 1989

**FILE**  
JUN 07 1989

Mr. Geoffery Butler  
Clerk of the Utah Supreme Court  
332 State Capitol Building  
Salt Lake City, Utah 84114

Re: In the matter of the Adoption of W.A.T., V.E.T, J.T.T., J.S.T., J.L.T,  
and B.D.T, Minors, Appeal No. 890053  
Set for Argument June 12, 1989

Dear Mr. Butler:

In the brief period since the submission of our reply brief, additional authority has come to our attention. Since this authority is significant, we submit this letter under Rule 24(j), Rules of the Utah Supreme Court.

Utah law presently provides:

The following marriages are prohibited and declared void: . . .  
(2) when there is a husband or wife living, from whom the  
person marrying has not been divorced . . . Utah Code Ann. §30-  
1-2.

This provision is a derivative of the first Territorial law regulating  
narrriage which was passed in January 1888. It was remarkable because it  
prohibited polygamous marriages . . ."1 As it appears in II Compiled Laws of  
Jtah (1888) the pertinent part of that statute reads:

Marriage is prohibited and declared void . . . .  
2. When there is a husband or wife living, from whom the person  
marrying has not been divorced.<sup>2</sup>

<sup>1</sup> 3 Whitney, Orson F., History of Utah, 616 (1898).

<sup>2</sup> § 2584, s.2, II Compiled Laws of Utah (1888) page 92.

Mr. Geoffery Butler  
June 8, 1989  
Page 2

The act also provided for penalties for those licensing or performing "prohibited marriages."<sup>3</sup> It also recognized the validity of prohibited marriages if they were valid when and where performed.<sup>4</sup>

The existence of this early statute bears on the legislative history of Article III, Section 1, as discussed in Point III of the Appellants' Brief. The statute also bears on the argument made at page 37 of that brief on legislative implementation of Article III, Section 1, while the language of these provisions should also be considered with the "Comparison of the Documentary Use of Terms" in the Addendum to the Reply Brief.

This letter might appropriately be inserted at page 38 of the Appellants' Brief or in Addendum Item No. 3 of the Addendum to the Reply Brief. Since this case is set for argument June 12th at 9:00 a.m., we ask for your cooperation in seeing that this letter is placed with the briefs. Attached to this letter are copies of the cited sources.

Very truly yours,

SNOW, NUFFER, ENGSTROM & DRAKE



David Nuffer

DN/mg

cc: Tim Anderson, Esq., et. al.  
Brad Englund, Esq.  
Patricia Christensen, Esq.  
Paul Van Dam, Esq.

File: 504201  
mg1 6/7 p3

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<sup>3</sup> § 2597, s. 16, and § 2596, s. 15, II Compiled Laws of Utah (1888) page 94.

<sup>4</sup> § 2587, s.5, II Compiled Laws of Utah (1888) page 93.

3 Whitney, Orson F., History of Utah,  
pages 615-616 (1898)

# HISTORY OF UTAH

COMPRISING

PRELIMINARY CHAPTERS ON THE PREVIOUS HISTORY OF HER FOUNDERS, ACCOUNTS OF EARLY SPANISH AND AMERICAN EXPLORATIONS IN THE ROCKY MOUNTAIN REGION, THE ADVENT OF THE MORMON PIONEERS, THE ESTABLISHMENT AND DISSOLUTION OF THE PROVISIONAL GOVERNMENT OF THE STATE OF DESERET, AND THE SUBSEQUENT CREATION AND DEVELOPMENT OF THE TERRITORY.

IN FOUR VOLUMES.—VOL. III.

BY ORSON F. WHITNEY.  
PROPERTY  
OF THE  
Dixie Normal College,  
ST. GEORGE, UTAH.

There is a history in all men's lives,  
Figuring the nature of the time deceased ;  
The which observed, a man may prophesy  
With a near aim, of the main chance of things  
As yet not come to life ; which in their seeds,  
And weak beginnings, lie intreasured.—*Shakespeare.*

SALT LAKE CITY, UTAH:  
GEORGE Q. CANNON & SONS CO., PUBLISHERS  
JANUARY, 1896.

were in the Council, and their three confreres in the House. With the exception of Mr. McLaughlin, the Park City representative, who had sat in the previous Legislature, these were the first Liberals ever numbered among the law-makers of Utah. Their election was mainly due to the operations of the anti-polygamy acts of 1882 and 1887, disfranchising Mormon voters, and causing a reapportionment of the Territory.

In joint session, on the 10th of January, the Legislative Assembly received Governor West's message, which was read to them by its author. The Mormon members listened with patience, the non-Mormons with satisfaction, to the oft-told tale of the "irrepressible conflict" between the Latter-day Saints and the people of Ohio, Missouri, Illinois, and finally the Gentiles of Utah: to charges of mistreatment of Federal officials by Mormons; to the usual arraignment of priestly rule and polygamy, with references to the antagonism existing between certain local laws and the Organic Act. The message urged a *bona fide* abandonment of polygamy, a disregard of ecclesiastical authority in civil affairs, and the enactment of laws that would end the necessity for the Utah Commission. Dire disasters were predicted unless these suggestions were heeded.

On January 13th, the Speaker of the House—Hon. William W. Riter—laid before that body a bill providing for the punishment of polygamy. The reputed author of the measure was Hon. William H. King, of Millard County. The bill did not become law, being deemed superfluous in view of other legislation upon the subject.

The Legislature adjourned on the 10th of March. Among the important measures enacted were bills for the bonding of the Territory to the amount of one hundred and fifty thousand dollars; a part of the money thus obtained to be used in the establishment of a Reform School and an Agricultural College; the former in Weber County, the latter in Cache County. This bonded debt—the first that Utah ever assumed—was rendered necessary by the exhaustion of the entire revenue of the Territory for two years in various appropriations.

Fifty thousand dollars was given to the University of Deseret—three-fifths of the amount for the establishment of an institute for deaf mutes; twenty-five thousand dollars was appropriated for the improvement of Capitol Hill, and twenty thousand for the improvement of the Tenth Ward Square, which valuable properties had been bestowed by Salt Lake City upon the Territory. The Tenth Ward Square was to be used for permanent fair grounds. The board of directors of the Deseret Agricultural and Manufacturing Society, under whose auspices the Territorial fairs were held, was made elective by the joint vote of the Legislative Assembly. Non-Mormons were given representation upon this board, and upon the boards of the Reform School and Agricultural College.

Other important laws passed at this session were those establishing uniform systems of municipal and county government; providing for ward representation in city councils; and the election of county commissioners by districts in lieu of selectmen at large.

A law regulating marriage was also placed upon the statute book of the Territory. It was framed by Hon. E. D. Hoge. It prohibited polygamous marriages, miscegenation, marriages within the fourth degree of consanguinity, and required that public records of all marriages performed in Utah, be kept in the offices of the county clerks. The authority to solemnize marriages was restricted to civil magistrates and ministers and priests of any religious denomination, and these were to officiate only upon the presentation of licenses issued to the contracting parties by the county clerks.

Governor West, before the close of the session, sent to the Council nominations for certain offices; the same as those that Governor Murray and some of his predecessors had claimed the right to fill by appointment under Section Seven of the Organic Act; and the question of which, having been passed upon, and Governor Murray's action in appointing Arthur Pratt and Bolivar Roberts Territorial Auditor and Territorial Treasurer sustained by the Supreme Court of the Territory, was now pending in the Supreme Court of the United States. In view of this, and for other reasons,



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THE

# COMPILED LAWS OF UTAH

THE DECLARATION OF INDEPENDENCE

AND

CONSTITUTION OF THE UNITED STATES

AND

STATUTES OF THE UNITED STATES LOCALLY

APPLICABLE AND IMPORTANT.

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COMPILED AND PUBLISHED

BY AUTHORITY.

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VOL. II.

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SALT LAKE CITY:

HERBERT PEMBROKE, BOOK, JOB AND LEGAL BLANK PRINTER, 72 EAST TEMPLE STREET

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1888.

## CHAPTER V.

## AN ACT REGULATING MARRIAGE.

SECTION.	SECTION.
2583 Marriages are cestuous and void within what degrees.	2592 License to be returned to clerk.
2584 Certain marriages are prohibited and void.	2593 License and certificate to be filed and recorded.
2585 Issue in certain case legitimate.	2594 Penalty for solemnizing marriages without license.
2586 Courts of equity jurisdiction may declare void certain marriages.	2595 Penalty for solemnizing marriage without authority.
2587 Marriages valid elsewhere, valid here.	2596 Penalty for solemnizing forbidden marriages.
2588 Marriage not invalid in certain cases.	2597 Penalty for issuing a license for a prohibited marriage
2589 Marriages solemnized by whom.	2598 In the absence of-clerk, probate judge to issue license.
2590 No marriage solemnized without a license.	2599 Marriages may be avoided or affirmed by a court of equity.
2591 License not to be issued to minors without parents' consent.	2600 Fines where paid.
	2601 Fees of clerk.

March 8, 1888  
Marriages within what degree are cestuous and void

§ 2583. s 1. Be it enacted, etc.: That marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and noices or aunts and nephews, or between any persons related to each other within and not including the fourth degree of consanguinity, computed according to the rules of civil law, are incestuous and void from the beginning, whether the relationship is legitimate or illegitimate.

Certain marriages are prohibited and declared void

§ 2584. s 2. Marriage is prohibited and declared void:

1. With an idiot or lunatic.
2. When there is a husband or wife living, from whom the person marrying has not been divorced.
3. When not solemnized by an authorized person, except as provided in section 7 of this act.
4. When at the time of marriage the male is under fourteen, or the female is under twelve years of age.

5. Between a negro and a white person.

6. Between a Mongolian and a white person.

§ 2585. s 3. When the marriage is contracted in good faith and with the belief of the parties, that a former husband

or wife, then living was dead or legally divorced, the issue of such marriage, born or begotten before notice of the mistake, shall be the legitimate issue of both parents. Issue in certain case legitimate.

§ 2586. s 4. Courts having general equity jurisdiction may declare void a marriage obtained by force or fraud, or at the instance of any next friend, where the male was under sixteen, or the female under fourteen years of age at the time of the marriage, and the marriage was without the consent of the father, mother, guardian or other person having the proper charge of his or her person, and has not been ratified, by cohabitation after that age. Courts of equity jurisdiction may declare void certain marriages

§ 2587. s 5. Marriages solemnized in any other county, State or Territory, if valid when solemnized, are valid here. Marriages valid elsewhere where valid here

§ 2588. s 6. No marriage solemnized before any person professing to have authority therefor, shall be invalid for want of such authority, if it is consummated with the belief of the parties, or either of them, that he had authority and that they have been lawfully married. No marriage solemnized by person professing authority invalid if consummated with belief of parties that he had authority.

§ 2589. s 7. Marriages shall be solemnized by the following persons only: Marriages shall be solemnized by whom.

1. Ministers of the gospel or priests of any denomination, in regular communion with any religious society.

2. Probate judges, justices of the peace and judges of the district and supreme courts.

§ 2590. s 8. No marriage shall be solemnized without a license therefor, issued by the clerk of the probate court of the county in which the female resides at the time; *Provided*, That when she is of full age or a widow, and it is issued on her application in person or by writing, signed by her, it may be issued by the clerk of any probate court. No marriage shall be solemnized without license.

§ 2591. s 9. If at the time of applying for license the male shall be under twenty-one, or the female under eighteen years of age, and not before married, no license shall issue without the consent of his or her father, mother or guardian, personally given or certified in writing to the clerk over his or her signature, attested by two or more subscribing witnesses, and proved by the oath of one of them, administered by the clerk. When the parties are personally unknown to the clerk, a license shall not issue until an affidavit is made before the clerk, which shall be filed and preserved by him, by the party applying for such license, showing that there is no lawful reason in the way of such marriage. The party License not to be issued to minors without consent of parents. If parties unknown to clerk, must make affidavit.

False swear-  
ing is perjury

making such affidavit, or any subscribing witness, if he falsely swear therein is guilty of perjury.

Person  
solemnizing  
marriage shall  
return license  
to clerk

§ 2592. s 10. The person solemnizing the marriage shall, within thirty days thereafter, return the license to the clerk of the probate court of the county whence it issued, with a certificate of the marriage over his signature, giving the date and place of celebration and the names of two or more witnesses present at the marriage. For failing to make such return, he is guilty of a misdemeanor.

License and  
certificate to  
be filed and  
recorded

§ 2593. s 11. The license, together with the certificate of the person officiating at the marriage, shall be filed and preserved by the said clerk and shall be recorded by him in a book kept for that purpose, which shall be properly indexed in the names of the parties so married.

Penalty for  
solemnizing  
marriage with-  
out license

§ 2594. s 12. If any person shall solemnize a marriage without such license, he shall be imprisoned not less than one nor more than twelve months in the county jail, or fined not more than one thousand dollars, or both fined and imprisoned.

Penalty for  
solemnizing  
marriage with-  
out authority  
or falsely per-  
sonating or  
forging name  
of parents

§ 2595. s 13. If any person, not authorized, shall solemnize a marriage under pretense of having authority, or falsely personate the father, mother or guardian in obtaining a license, or forges the name of any father, mother, or guardian to any writing purporting to give consent to such marriage, he shall be punished by imprisonment in the penitentiary not exceeding three years.

Penalty for  
solemnizing  
forbidden  
marriages

§ 2596. s 14. If any authorized person shall knowingly, with or without license, solemnize a marriage, such as is herein prohibited, he shall be imprisoned in the penitentiary not exceeding three years, or fined not exceeding one thousand dollars, or both fined and imprisoned.

Penalty of  
clerk for issu-  
ing license for  
a prohibited  
marriage

§ 2597. s 15. Every clerk or deputy clerk who shall knowingly issue a license for any prohibited marriage, shall be punished by confinement in the penitentiary for a term not exceeding two years or fined in any sum not exceeding one thousand dollars, or by both fine and imprisonment, and in case of conviction, shall be expelled from his office by the judgment of the court before which his conviction is had. And if he wilfully issue a license contrary to his duty as herein prescribed, he shall be fined not exceeding one thousand dollars.

§ 2598. s 16. In the absence of the clerk, or during a vacancy in the office, the license may be issued by the probat

**judge, who** so doing shall perform the duty and incur all In the absence of the clerk the probate judge shall issue  
**the responsibilities of the clerk, and be liable to the same**  
**penalties, and shall return a memorandum thereof to the clerk**  
**and the same shall be recorded as if issued by him.**

§ 2599. s 17. When doubt is felt as to the validity of If a doubt exists as to validity of marriage it may be avoided or affirmed by a court of equity.  
**a marriage, either party may, in a court of equity, demand its**  
**avoidance or affirmance, but when one of the parties was**  
**within the age of consent at the time of the marriage, the**  
**other party being of proper age, shall have no such proceed-**  
**ing for that cause against the party under age.**

§ 2600. s 18. All fines collected for any violation of Fines paid into the treasury.  
**this act, shall be paid into the treasury of the Territory.**

§ 2601. s 19. The clerks of the several probate courts Fees of clerks.  
**shall be entitled, for each license issued, the sum of one dol-**  
**lar, and for recording the same, when returned to him, the**  
**sum of one dollar and twenty-five cents, all of which he may**  
**demand at the time of issuing the license.**