

1955

In the Matter of the Guardianship of Florence S. Valentine, Alleged Incompetent : Brief of Respondent - Intervenor

Utah Supreme Court

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

IN THE MATTER OF THE
GUARDIANSHIP OF FLORENCE
S. VALENTINE, ALLEGED
INCOMPETENT.

Case No. 8415

BRIEF OF RESPONDENT - INTERVENOR

FILED

NOV 21 1955

Clerk, Supreme Court, Utah

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& MABEY**

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IN THE MATTER OF THE
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} Case No. 8415

BRIEF OF RESPONDENT

STATEMENT OF FACTS

The facts and issues in this appeal can best be appreciated by the court after a statement as to the identity and interest of the respective parties and the issues before the court.

A. DRAMATIS PERSONAE

1. Florence S. Valentine

Florence S. Valentine is the widow of J. Howard Valentine, founder and promoter of Western States Refining Company, who died in November, 1952. She and her children inherited from him in excess of 380,000 shares of the stock in that company. In 1953, suit was commenced against her individually and as executrix of

the estate of J. Howard Valentine, deceased, and as guardian of her then minor children, and Associated Dealers, a Valentine-controlled corporation, to cancel certain of the shares of stock in Western States Refining Company which they had received by gift or inheritance from J. Howard Valentine, on the basis that the shares had been illegally issued to Mr. Valentine, and for a money judgment for sums alleged to have been wrongfully received by Mr. and Mrs. Valentine from the corporation and for the unpaid portion of water in other shares of Western States stock issued to them. This action is No. 98754, in the Third Judicial District Court.

In February, 1954, Mrs. Valentine employed Irwin Arnovitz to represent her in all her capacities in that litigation.

2. Irwin Arnovitz

Irwin Arnovitz is a member of the Bar of this court and is the Petitioner who is seeking in these proceedings to have his former client declared incompetent and to have a guardian appointed for her personal estate. He was employed by Mrs. Valentine in February, 1954, to represent her in the suit then pending in the Third Judicial District Court as No. 98754. This case was tried over an extended period in April, 1954, and at the conclusion of the trial, Judge Jeppson entered tentative findings in favor of the corporation and against Mr. Arnovitz' clients. After considerable delay, due primarily to Mr. Arnovitz' absence in Europe, a final judgment was entered against Mrs. Valentine in all her capacities in January, 1955, for cancellation of 73,311 shares of

Western States Refining Company stock received by her and her children from the late J. H. Valentine, and a money judgment of approximately \$103,000 for which a lien was impressed against an additional 136,000 shares of Western States Refining Company stock on the finding that said shares had not been fully paid for by Mr. Valentine. Apparently dissatisfied with Mr. Arnovitz' handling of her case, Mrs. Valentine discharged him in early March, 1955. When he appeared without authority in the Eliason case, (which will be mentioned below) she discharged him a second time on May 3, 1955. Shortly after that incident, Mr. Arnovitz filed the petition which is before this court to have Mrs. Valentine declared incompetent.

3. Sid H. Eliason

Sid H. Eliason is a Salt Lake businessman and is represented in these proceedings by the author of this brief. In November 1953, a Mr. D. H. Linney purchased an option from Mrs. Valentine to acquire 300,000 shares of Western States Refining Company stock from her and a coporation known as "Associated Dealers", which she controlled, for One Dollar per share. In 1954 Mr. Eliason became financially interested in the Refining Company and among other things, purchased an assignment of the above referred to option from Mr. Linney. Mrs. Valentine refused to perform the option and Eliason brought suit against her and Associated Dealers for specific performance. This is case No. 101780 in the Third Judicial District Court.

Mrs. Valentine was first represented in that action

by Samuel W. Stewart and Stewart, Cannon and Hanson. Shortly before the matter was set for trial, on March 2, 1955, she employed Herbert B. Maw to represent her in that action and in Case No. 98754. Mr. Maw obtained a continuance of the trial of the Eliason suit until May 2, 1955 in order to familiarize himself with the facts of the case and filed an amended answer setting up a number of additional defenses. Pending the trial, considerable negotiations were had between counsel for Mr. Eliason and Mr. Maw and James L. White, who held a power of attorney from Mrs. Valentine to discuss a settlement, but not to complete one, toward settlement of both cases. Counsel were unable to reach agreement and Case No. 101780 was tried before Judge Ray Van Cott, Jr., on May 2, and 3, 1955. Judgment for specific performance of the option was granted to Mr. Eliason. A few days later, Arnovitz filed the Petition in this case. No notice of filing of the petition or of the date of hearing thereon was served upon Mr. Eliason or his counsel, although the proceeding was a patent attempt to defeat the Eliason judgment. Mr. Arnovitz also intervened in case No. 101780 to file a motion for a new trial. This motion was denied by Judge Van Cott without passing on the question of the right or power of Mr. Arnovitz to intervene. No appeal has been taken in that action.

As soon as counsel for Eliason discovered the existence of the Arnovitz petition, leave to intervene herein was asked and granted the day before the petition was to be heard.

It will be readily seen that Eliason did not intervene

in this proceeding on behalf of Mrs. Valentine. He intervened to protect against any collateral attack by this proceeding his interest in the 300,000 shares of stock in Western States Refining Company obtained by reason of his judgment for specific performance of the option. This position of adverse interest has been frankly stated from the beginning by intervenor without any camouflage or protestations of innocence.

B. The Issue

The true issue before this court may best be stated by reference to the orders appealed from.

The order of August 2, 1955 signed by Judge Baker reads in part as follows:

“The alleged incompetent Florence S. Valentine and the Intervenor have moved the court to dismiss the proceedings on the ground that the Petition and the facts stated in open court in support thereof by petitioner did not constitute grounds upon which a guardian should be appointed and good cause appearing therefor,

“IT IS HEREBY ORDERED, ADJUDGED and DECREED that the petition for appointment of a guardian of the property of Florence S. Valentine, be and it hereby is dismissed.” (R. 40)

Mr. Arnovitz then filed a so-called Amendment to the Petition and this came on for hearing before the Honorable Joseph G. Jeppson, who had also tried No. 98754. Judge Jeppson's order reads in part as follows:

“It appearing to the court that the petition of said Irwin Arnovitz had heretofore been dismissed under date of August 2, 1955, upon motion of the alleged incompetent and the intervenor that

the facts stated in the petition and the statement of Petitioner in open court as to what he proposed to prove did not constitute grounds upon which a guardian should be appointed, and it appearing to the court that the proposed amendment to the petition did not submit any additional facts which would constitute grounds upon which a guardian should be appointed,

“IT IS HEREBY ORDERED, ADJUDGED and DECREED, that the amended petition for the appointment of a guardian of Florence S. Valentine, be, and it hereby is dismissed.” (R. 43)

Thus, it is readily apparent that the rulings below were not alone based upon the allegations of the petition, but were based on the opening statement of Mr. Arnovitz at the hearing before Judge Baker as to what he proposed to prove. Therefore, the issue before this court is whether, assuming all the facts stated in the petition, and in Mr. Arnovitz' opening statement to be true, the trial court correctly non-suited Mr. Arnovitz. This, of course, is not what Mr. Arnovitz would like to have this court believe the issue is, as shown by his brief to this court and his failure in his designation of record (R. 53) to even mention the transcript of the hearing before Judge Baker. Again, if it had not been for intervenor making an additional designation of the record, all the facts would not have come before this court.

Judge Baker in granting the motion to dismiss, acted upon the facts in the allegations in the petition and those facts stated in the opening statement of Mr. Arnovitz as to what he proposed to prove. The transcript of the

hearing before Judge Baker bears this out. At page 10 of the record, the trial court said:

“The Court. You may proceed.

“Mr. Arnovitz: The matter requires some little statement. I would like to make this outline to the court. * * *”

Mr. Arnovitz then proceeded for some fourteen pages of transcript to outline the facts he would prove in his proposed case. At page 26 of the transcript the court inquired:

“The Court: Well, what do you intend to show regarding her incompetence?

“Mr. Arnovitz: We are going to show she is unable to alone carry out her business affairs which, under our statute, comes under the definition of incompetence.”

And then, on page 27, line 19, Mr. Arnovitz summed it up by saying:

“We intend to substantiate the facts as stated.”

Counsel for Eliason inquired at page 28 of the record:

“Mr. Billings: What other evidence do you have other than stated this morning in your statement?”

Mr. Arnovitz replied (R. 29):

“Arnovitz: It would be this court would have the right to observe witnesses.”

In other words, all Arnovitz could ever gain by a hearing would be for the court to determine whether or not it

would believe the witnesses, assuming they would testify as he claimed.

It is submitted nothing further could be gained from such an inquisition of Mrs. Valentine. The trial court, after hearing Mr. Arnovitz offer and detail his proof, stated (R. 29, lines 25-59) :

“The court: Well, I doubt the sufficiency of these grounds, as stated, I doubt the sufficiency of any of these grounds to prove this woman is incompetent. Is that the sole issue to be before this court?”

Mr. Arnovitz again asked the court to hear the evidence as to whether he would prove what he said he was going to prove, but offered to prove no other facts than as theretofore stated in his opening statement.

Counsel for Eliason had moved to dismiss at the conclusion of Mr. Arnovitz' opening statement on the ground that the facts as alleged in the petition and as stated in the opening statement did not constitute grounds in law for the appointment of a guardian of Mrs. Valentine as an alleged incompetent (R. 26, line 7 and R-30, line 15) and that Mr. Arnovitz was not a proper party to file the petition. Mrs. Valentine then joined in this motion (R. 35, lines 26-29). The court then took the matter under advisement and later granted the motion to dismiss on the grounds stated. (R. 40)

It is in this posture then, that the orders dismissing the petition come before this court for review.

There is only one issue: Do the facts as stated in the petition and in Mr. Arnovitz' opening statement, constitute grounds showing it to be necessary that a guardian

should be appointed for the property of Mrs. Valentine on the basis that she is incompetent as defined in Section 75-13-20, Utah Code Annotated, 1953? This issue can be resolved on the record before this court, without camouflage as to the true nature of the decision of the court below.

STATEMENT OF POINTS

I. THE PROCEDURE ADOPTED WAS CORRECT.

II. MRS. VALENTINE IS NOT INCOMPETENT AS DEFINED IN SECTION 75-13-20, UTAH CODE ANNOTATED, 1953.

III. PETITIONER ARNOVITZ IS NOT A PROPER PARTY TO FILE THE SUBJECT PETITION.

ARGUMENT

I. THE PROCEDURE ADOPTED WAS CORRECT.

The procedure adopted by the trial court in dismissing the petition, after the opening statement of Mr. Arnovitz as to what he would seek to establish by the incompetency of Mrs. Valentine and the necessity for a guardian, has long been recognized. See Bancroft "Code Practice and Remedies," § 524, and annotations at 83 ALR 219 and 129 ALR 557. As stated by the Circuit Court of Appeals (C.A. 5, 1947) in *Cutliff v. Comr. of Internal Revenue*, 163 F. 2d 891:

"The opening statements of counsel are not idle talk, but may afford the basis of deciding the case."

The Supreme Court of the United States has recognized that there is no question of the power of the trial court to direct a verdict for defendant or dismiss the proceedings upon the opening statement of plaintiff's counsel

where that statement establishes that the plaintiff has no rights in the matter. As the court in *Best v. Dep. of Com.*, 291 U.S. 411, 78 L. Ed. 882, 885 said:

“The power of the court to act upon the facts conceded by counsel is as plain as the power to act upon evidence produced.”

The comment of Mr. Justice Field in one of the leading cases before the Supreme Court on such procedure, *Oscanyan v. Winchester Repeating Arms Co.*, 103 U.S. 261, 26 L. Ed. 539, 541, is particularly appropriate here:

“Here there were no unguarded expressions used nor any ambiguous statements made. The opening counsel was fully apprised of all the facts out of which his client’s claim originated and seldom was a case opened with greater fullness of detail.”

Under our rules of civil procedure, it would appear to be proper under Rule 12(c) and Rule 56. *Firfer v. U.S.*, 208 F. 2d 524 (C.A. D.C. 1953). Under such circumstances, no findings of fact are required. See Rule 52 (a). The facts as stated by the petition and by Mr. Arnovitz in his opening statement are treated as proof and as though the evidence described had actually been introduced. *Charpentier v. Socony-Vacuum Oil Co.*, (N.H. 1940) 13 A. 2d 141; Anno: 83 ALR 226, 129 ALR 560.

The cases cited by appellant in his brief stand for no different rule. *In Re Lee’s Guardianship*, 267 P. 2d 847 (Calif. 1954), the California court rule on the basis of “highly conflicting affidavits.” Of course, under Rule 56, a summary judgment would be improper when a conflict in material evidence exists. In the case of *In Re*

Tilton's Estate and Guardianship, 114 P. 595, there had been a hearing and the appeal was from a failure to dismiss on the grounds that the petition was uncertain, stated merely conclusions, and on the ground of a claimed lack of jurisdiction. The California court merely held that there were sufficient facts alleged to give it jurisdiction and to make an inquiry necessary as to whether the guardian was competent. No other statement was made by the petitioner as to what he would prove as was in the case at bar. In the case of *In Re Denny's Guardianship*, 218 P. 2d 792, the California trial court rejected the petition on the ground that a Nevada divorce was invalid and hence the court was without jurisdiction. On appeal it was held that the defendant could not assert the invalidity of the Nevada divorce as she was the one who had obtained the divorce and that therefore the court should have heard the evidence to determine whether it was necessary and proper to have a guardian appointed for the minor children of the parties. These cases pose a far different situation from the case at bar where the court ruled only after the petitioner had stated in detail all the evidence he was going to present as to the competency of Mrs. Valentine.

In the first Arnovitz case, *Heath et al. v. Arnovitz, et al.*, 102 U. 1, 126 P. 2d 1058 (1942), the appellant had filed a special and general demurrer. This court ruled that the general statements in the petition in the language of the statute were sufficient to escape a general or special demurrer. But here, the petition has gone further than merely alleging in general terms the language of 75-

13-20. Petitioner has detailed for some eight pages in his petition facts he claims establish Mrs. Valentine's incompetency and stated for some fourteen plus pages of transcript what he proposed to prove to the court in this regard. All the lower court could have found by hearing the evidence would be questions as to the veracity of the witnesses or whether their story was as good as Mr. Arnovitz stated it would be.

II. MRS. VALENTINE IS NOT INCOMPETENT AS DEFINED IN SECTION 75-13-20, UTAH CODE ANNOTATED, 1953.

For the purposes of this argument, we will accept in general the allegations of fact made in the petition and in Mr. Arnovitz' opening statement as being established, but to meet any innuendos that may arise from such acceptance in general we desire to make it clear that such allegations are only one party's myopic views of the actual facts.

Section 75-13-19 provides for appointment of a guardian of the estate of an incompetent when it appears necessary upon a petition of a relative or friend. This appeal raises the question of whether on the facts established by Mr. Arnovitz in his petition, and in his statement to the court it is demonstrated that Mrs. Valentine is incompetent as defined in the Utah statute, and whether Petitioner Arnovitz may be classed as a "relative" or "friend."

Section 75-13-20 defines incompetency as follows:

"The words 'incompetent', 'mentally incompetent' and 'incapable', as used in this title, shall be construed to mean any person who, though not

insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons.”

This court had before it the language of this section in *Heath, et al. v. Arnovitz, et al.*, supra, which for comparison with the case at bar, might be designated the first Arnovitz case.

In that case, Mr. Arnovitz, appearing as attorney in fact for the daughters of the alleged incompetent, had filed a petition to have one Joseph A. Heath declared incompetent and a guardian appointed for his property on the same ground as in the case at bar, i.e., that he was likely to be deceived or imposed upon by artful or designing persons. Referring to the statutory definition (Section 75-13-20) this court said in that case:

“The section implies physical or mental defects which interfere with the rational functioning of the mind. If the mind functions rationally but the individual acts in a way commonly designated as eccentric—that is, his acts deviate from the usual principally because he is less susceptible to public opinion than are many of us—he is not incompetent. One may love gardening—it was so testified of Mr. Heath—and not be interested in anything else even to the extent of losing his property at the hands of unscrupulous friends or relatives. He may be foolish in the eyes of many of us, but he is not incompetent. Competency is not measured by one’s ability to accumulate and hold the material things of life. Were it so, there would be many of our ministerial brethren—not to men-

tion some of our learned judicial associates—behind mental bars.”

In the first Arnovitz case, strong reliance was placed on the claim that Mr. Heath was not as astute a businessman as Mr. Arnovitz would have desired, and had suffered losses by not understanding all the important parts of business transactions. Said the court of this contention:

“Material loss in and of itself is a very dangerous bit of evidence from which to reason backward to a conclusion of incompetency. Such loss may be attributable to any number of causes such as indifference, laziness, lack of education, poor business judgment, dislike of a particular class of work or business—there are many possibilities. Thus, in passing upon the question of incompetency we must determine if the evidence of loss is accompanied by evidence of physical or mental defect which interferes with the rational functioning of the mind. Undue influence arising from deep friendship for, or extreme confidence in others, alone, is not evidence of incompetency of the victim. It may be the instrumentality used upon an incompetent victim but there must be other evidence of that incompetence. Strong mentalities are oftentimes the victims of undue influence.”

With these interpretations of the Utah statute in mind, the appellant's version of the facts in the case at bar, which might well be designated the second Arnovitz case, should be considered.

(a) Mr. Arnovitz complains that he was discharged after losing the Western States Refining Company case and his client will not appeal.

What an unfortunate situation our courts would be in,

and to what level would public opinion of the bar sink if every time an attorney lost a case and was discharged by his client, he could have the client hauled in for inquisition as to his competency!

(b) Mr. Arnovitz complains that Mrs. Valentine would not appeal the Western States case and otherwise would not follow his advice. He states that she has also discharged other attorneys and now appears on her own behalf.

To paraphrase the language of this court in the first Arnovitz case, "One may dislike lawyers—and insist on representing himself, even to the extent of losing his property at the hands of unscrupulous friends or lawyers. He may be foolish in the eyes of others, particularly lawyers, but he is not incompetent."

(c) Mr. Arnovitz complains Mrs. Valentine was unwilling to appeal the Western States Refining case or to settle both the Western States and Eliason cases.

The answer to that complaint may be found in this court's quotation from *O'Reilly v. McLean*, (1934) 84 Utah 551, at p. 557, 37 P. 2d 770, at 772, as follows:

"Were the mental faculties so deficient or impaired that there was not sufficient power to comprehend the subject of the contract, its nature and its probable consequences, and to act with discretion in relation thereto, or with relation to the ordinary affairs of life?"

and its comments thereon in the 1st Arnovitz case:

"In other words, the evidence must show a lack of power to function—not an unwillingness

to or lack of interest in functioning, be the latter two ever so reprehensible as personal characteristics." 126 P. 2d 1058, 1061.

(d) Mr. Arnovitz points out that the judgment which Mrs. Valentine declines to appeal affects the interests of her children as well as her own.

It may be that she is guilty of mismanagement or negligence as their guardian, or as executrix of the estate of her late husband, on which grounds she could be removed under sections 75-13-9 or 75-6-1, as either guardian or executrix. But that is a far different thing than taking from her the control of her own property. The comments of this court in the first Arnovitz case quoted above make that point abundantly clear.

As recognized by the California court in applying a similar statutory definition of incompetency:

"Generally speaking, an adult person has a right to control his own person and affairs, and that right should not be taken from him, except upon a showing of the statutory grounds warranting a restriction of his liberty of action for his own protection."

In re Watson, 168 P. 341, (Cal. 1917), *Estate of Schulmeyer*, 153 P. 233.

(e) Mr. Arnovitz contends that Mrs. Valentine, quite aside from the stock she received from her husband and contracted to sell to Mr. Eliason, purchased after Mr. Valentine's death 70,000 shares of Western States Refining Company stock at \$2.00 per share and later sold some of it for only .50 per share.

If that is a basis for incompetency, there are numerous professional investors and stock brokers who are in danger of having a guardian appointed for their property, particularly, if they have ever had Mr. Arnovitz as their legal counsel.

(f) Mr. Arnovitz complains about Mrs. Valentine's conduct of the litigation with Mr. Eliason. First of all, she did not decide to employ him. Then, he claims, she would not cooperate fully with Mr. Maw to enable him to prepare her case.

From the records of that case, it is apparent that she furnished Mr. Maw sufficient information to enable him to prepare and file an amended answer. Her deposition was taken by plaintiff in that case and Mr. Maw was present on that occasion. It is difficult to characterize that conduct as lack of cooperation. Mr. Arnovitz also points out that she failed to appear for cross examination after having spent half a day on the stand giving her direct testimony. He quite overlooks the possibility that her experience with courts and courtrooms in the Western States Refining Company case may have made the prospects of a searching cross examination too miserable to warrant further court appearance. To make the record clear, in the Eliason case, no one was trying to take away her property for nothing. That action was to enforce a contract for the purchase and sale of 300,000 shares of stock at \$1 per share, which the evidence in that case showed was above the current market price, both at the time the option was given and at the time it was exercised.

Then, of course, Mr. Arnovitz is troubled by the fact that Mrs. Valentine sent telegrams not only formally discharging Mr. Maw but even Mr. Arnovitz himself for the second time, because of his unasked for appearance at the trial as an "observer." One may characterize Mrs. Valentine's conduct with respect to her employment of counsel as eccentric, but as this court has stated, "that is not incompetency." *Heath v. Arnovitz*, supra.

(g) Mr. Arnovitz mentions disharmony in the management of Western States Refining Company due to the activities of Mrs. Valentine.

At her husband's death she succeeded him as chairman of the Board of Directors of that company. It is apparent from the record in this case alone that Mrs. Valentine is a very strong willed woman, yet with a woman's erratic and emotional tendencies, particularly, in business affairs. The stockholders' suit which was eventually filed in 1953 as Case No. 98754, was imminent at the time this disharmony existed. No wonder there was antagonism and disharmony among the board! She would have had to have the highest degree of administrative and executive skill to handle that situation. No one contends that Mrs. Valentine is a genius or even a good businesswoman, but that is no ground for the appointment of a guardian to look after her affairs. *In re Waites' Guardianship*, 97 P. 2d 238 (Calif. 1939); *In Re Baldridge*, 266 P. 2d 103, (Calif. 1954) *In Re Delany*, 226 S.W. 2d 366 (Mo. 1950).

Every businessman would be at the mercy of a "relative" or "friend" if this court would accept such a stand-

ard for incompetency. History is full of examples of inventors who died impoverished because they were not good businessmen. The old adage about "shirt sleeves to shirt sleeves in three generations" would not have developed if all sons and grandsons were successful in holding on the property their forebears had accumulated. Our society has not established the paternalistic practice of having a court step in and appoint a guardian merely because the heirs were unsuccessful businessmen or profligate dissipators of their patrimony.

(h) In his amendment to the petition (R. 41) Mr. Arnovitz complains that Mrs. Valentine relies on her own peculiar views of the law and has not delivered her stock to the clerk of the court or taken steps to collect the money deposited there by Mr. Eliason to carry out the judgment he had obtained for specific performance.

Peculiar or not, the record in Case No. 98754, which is before this court on Mr. Arnovitz' pro se appeal, shows Western States Refining Company was unable to enforce its judgment which Mr. Arnovitz would like to appeal because Mrs. Valentine refused to deliver over the stock certificates. Finally, the Refinery Company obtained a court order cancelling the shares held by Mrs. Valentine and ordering the secretary of the company to issue new certificates and deliver them to the clerk of the court to enforce the judgment. The judgment in the Western States Refinery case was then carried out against these new certificates and Mr. Eliason enforced a portion of his judgment for specific performance by redeeming 136,000

shares from the lien imposed by the Western States' judgment. While technically the courts below have partially enforced the judgments against Mrs. Valentine, she still has possession of all the stock. As a result, there are duplicate shares outstanding, at least to the extent of 136,000 shares, and, as a consequence, the shares acquired by Mr. Eliason are of questionable marketability despite his judgment. In effect, Mrs. Valentine has frustrated the processes of the law by her attitude which Mr. Arnovitz condemns as a sign of incompetency. While not commendable, her actions have secured the ends she has desired—the thwarting of the orderly processes of law in carrying out the judgments obtained against her. One would hesitate to declare that Andrew Jackson was incompetent, yet he was reported to have said: "John Marshall has made his decision, now let him enforce it."

III. PETITIONER ARNOVITZ IS NOT A PROPER PARTY TO FILE THE SUBJECT PETITION.

Another question arises in this case which is also discussed in the first Arnovitz case. The statute (75-13-19, Utah Code Annotated, 1953) authorizes the filing of a petition for appointment of a guardian for incompetency by a relative or a friend. Needless to say, Mr. Arnovitz is not a relative, nor can he really be classified as a friend (*In Re Oswald*, (N.J. 1942) 28 A. 2d 399), despite the shining armor he has assumed throughout his brief.

In the first Arnovitz case, Mr. Arnovitz satisfied this court that he was the attorney in fact for the children and his act as such in filing the petition was, in legal ef-

fect, their own and that therefore, the requirement of the statute so far as a relative was concerned, was satisfied. In the case at bar, the record indicates that Mrs. Valentine has plenty of relatives (R. 48a), two sisters and a brother, who could act if they felt it necessary. No such relative has seen fit to join in the petition of Mr. Arnovitz. In fact, both sisters, whose statements are not reported in the transcript, (R. 36) appeared in opposition to the appointment. The pleadings in the petition would indicate that Mr. Arnovitz is relying on his position as counsel for the minor children in the Western States Refining Company case to justify the filing of the petition here. It is true he was the attorney for Florence S. Valentine, guardian of the estate of the then minor children. The record indicates (R. 44-45) that two of the children are now of age, but he was not their attorney in fact, as was the situation in the first Arnovitz case. It is indeed a broad stretch of jurisdiction which would enable him, as attorney for them in the Western States Refining Company case, to persuade a court to allow him to draw an order directing him to file a petition for the appointment of a guardian for the estate of their mother. If there is any question about her competency to act as their guardian or as executrix, the proper procedure would have been to have taken the steps for her removal in those capacities. That having been done, the guardian of the minor children might be a proper person to file a petition with respect to the competency of the mother, but not the discharged and disgruntled attorney.

It is difficult to see then, how the order of the judge

in the matter of the guardianship of the minor children (R. 48d, 48e) qualified Mr. Arnovitz as a relative under the statute to file the petition which is before this court.

This leaves only the category "friend." It is true that the courts have determined that no particular degree of intimacy is required to consider the person the "friend" of the alleged incompetent. *In Re Wagoner*, 151 Mich. 74, 114 N.W. 868, the court said:

"Courts have usually regarded a friend as one who entertains regard for another, who takes active interest in his welfare, or is one favorably disposed toward a person."

A friend has also been defined as one who:

"* * * is seemingly upon harmonious terms with another."

Grand v. Thompson, 174 Tenn. 278, 125 S.W. 2d 133.

It would take a great deal of soul searching to come to the conclusion that the Petitioner-appellant in this case, meets those definitions.

CONCLUSION

It is submitted that the courts below correctly concluded that the facts as stated in Mr. Arnovitz' petition and in his opening statement clearly show:

(a) That Mrs. Valentine is not incompetent to manage her property.

(b) That Mr. Arnovitz is not a proper party to file the subject petition.

For these reasons judgment of the courts below dismissing these proceedings should be affirmed.

Respectfully submitted,

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