

1956

James A. Chrysler v. Grace Chrysler : Brief of Plaintiff and Appellant

Utah Supreme Court

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

FILED

AUG 31 1956

JAMES A. CHRYSLER,

**Plaintiff &
Appellant,**

— vs. —

GRACE CHRYSLER,

**Defendant &
Respondent.**

Clerk, Supreme Court, Utah

**Case
No. 8515**

Brief of Plaintiff and Appellant

EDWARD SHEYA

Attorney for Plaintiff and Appellant

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IN THE SUPREME COURT of the STATE OF UTAH

JAMES A. CHRYSLER,

**Plaintiff &
Appellant,**

— vs. —

GRACE CHRYSLER,

**Defendant &
Respondent.**

**Case
No. 8515**

BRIEF OF PLAINTIFF AND APPELLANT

The parties will be referred to as they appeared below, the appellant herein being the plaintiff, and the respondent, the defendant.

The figures in parentheses refer to the page number of the Record; when preceded by the abbreviation Tr., reference is to the transcript of the testimony.

STATEMENT OF THE CASE

Plaintiff filed his Complaint for Divorce against the defendant in the District Court of Grand County, State of Utah, on the 21st day of April, 1955 (1). Defendant, on the 27th day of April, 1955 filed her Answer and Counterclaim thereto (5-7). Defendant filed a reply to said Counterclaim on the 12th day of May, 1955 (10).

Plaintiff's attorney at the outset of this case and at the time of the entry of the Decree herein was Maxwell Bentley, Esquire, of Moab, Utah. Shortly after the Decree was entered, Mr. Bentley withdrew as plaintiff's counsel. Plaintiff then employed Edward Sheya, of Price, Utah, to represent him in proceedings to set aside the Findings of Fact and Conclusions of Law and Decree of Divorce in the Trial court. From an adverse ruling therein, said attorney was employed to prosecute this appeal.

During the pendency of this action, the plaintiff became a resident of the State of Nevada. A trial setting herein was made for November 28, 1955 at 10 A. M. with the concurrence of plaintiff's former attorney, Maxwell Bentley, and Hanson and Ruggeri, attorneys for defendant. Said setting was made in plaintiff's absence while he was in Nevada. Plaintiff was engaged in the construction business, and was performing such work in Nevada at said time (Tr. 20). Mr. Bentley sent a letter to plaintiff prior to November 28, 1955, wherein he advised plaintiff that said case was to be heard November 28, 1955 at 10 o'clock A.M. at Moab, Utah (Pl's Exh. 2 p. 1) The said letter was addressed to the plaintiff in care of Joseph P. Haller, his Nevada attorney, at Suite 1, Mason-

ic Building, Reno, Nevada. The said Joseph P. Haller was at said time plaintiff's attorney in connection with another action filed in Nevada. (Pl's Exh. 2). Said letter was not opened by attorney Haller for the reason that it was addressed to said plaintiff in care of said attorney and said attorney was not authorized to open said mail. (Pl's Exh. 2). He caused said letter to be filed in his office until such time as plaintiff came to his office. By coincidence, on November 28, 1955, at about 10:30 A. M. Reno, Nevada time, plaintiff happened to come to attorney Haller's office and said attorney then handed him said letter. The plaintiff opened it in the presence of said attorney and for the first time was apprized of said trial date (Pl's Exh. 2 pp. 1-2). There is one hour's difference between Reno, Nevada time and Moab, Utah time; that 10:30 A. M. Reno, Nevada time would be 11:30 A. M. Moab, Utah time; plaintiff first learned of said trial date approximately one and one-half hours after the hearing was scheduled to and did commence (Pl's Exh. 2) The trial Court heard the defendant's evidence on her counterclaim on November 28, 1955, commencing at 10 A. M., awarded judgment against the plaintiff, and recessed at 10:30 A. M. on said date, all in the absence of both plaintiff and his attorney (21). When plaintiff opened said letter on November 28, 1955 at 10:30 A.M. Reno time (11:30 A. M. Moab time) it was too late to procure counsel to appear for him at said trial. He didn't know until later on said day that his attorney of record, Mr. Bentley, was in Wyoming when the hearing took place. Plaintiff caused a telephone call to be placed to the office of his said attorney upon opening said letter, by at-

torney Haller, which call was answered by one Kline D. Strong, who shared a telephone line with attorney Bentley at Moab (Pl's Exh. 3). Mr. Strong was asked by Mr. Haller to find out what disposition had been made of the Chrysler case and to call him back. Strong contacted Veone Dalton, Clerk of the District Court of Grand County and later advised the plaintiff by telephone that judgment in the case had already been entered against Mr. Chrysler (Pl's Exh. 3). From Mr. Kline's written statement, (Pl's Exh. 3), it appears there was some understanding between Mr. Bentley and the plaintiff that Mr. Bentley was to try to get a postponement of this case, until some future time, but it does not appear therefrom until what date. Since plaintiff did not know of the setting of November 28, 1955, and a postponement was mentioned to Mr. Strong after knowledge of this trial date, the postponement must have been contemplated for some date beyond the date finally agreed upon by the respective attorneys.

By reason of the above and foregoing, plaintiff did not have an opportunity to attend said hearing, nor did he have an opportunity to present any evidence before the trial Court, nor to contact counsel in time to attend said hearing or to request the trial Court to allow plaintiff sufficient time to attend said hearing and to give testimony at the same. Plaintiff was prevented from attending said hearing through no fault of his own, and was free from any negligence in connection therewith (38).

The Court below on January 4, 1956, about 5 weeks after the hearing, entered Findings of Fact and Conclusions of Law and a Decree in favor of the defendant (22-

33), awarding her a lump sum judgment of \$5,000.00 payable forthwith, together with monthly sums of \$100.00 per month, commencing December 1, 1955, to continue as long as defendant remained unmarried, all for and as alimony (30). Said lump sum was made the first lien upon certain real property consisting of a number of uranium claims, more particularly described in said Decree (30, 31, 32). Defendant was further awarded the following property, to-wit: One deep freezer, one 1953 Mercury Sedan, one 1954 Fleetwood 21 foot house trailer, together with certain personal effects, wearing apparel and ornaments, together with the sum of \$200.00 as an attorney's fee for defendant's attorneys (33). Said lump sum of \$5,000.00 was awarded to defendant notwithstanding the fact that she did not specifically pray for the same in her counterclaim (6, 7), and the evidence fails to sustain the same. The findings of Fact and Conclusions of Law and Decree herein were filed in the office of the Clerk of Grand County, Utah, on January 4, 1956 (22, 29).

Plaintiff made a Motion to set aside said Findings of Fact and Conclusions of Law and Decree filed February 9, 1956 (37). A hearing was had thereon before the Honorable F. W. Keller, District Judge, on February 27, 1956 (45). Said Court, on said date, made an order denying said Motion, without prejudice. The formal order was signed March 7, 1956 and filed March 9, 1956 (47). Notice of the last Order was served on March 8, 1956 and filed March 9, 1956 (48). It is from said Order that plaintiff prosecutes this Appeal.

It is conceded that the plaintiff had taken up residence in the State of Nevada pending the trial setting and hearing in this action. He had retained counsel in the State of Utah to prepare the case for trial and to notify him of the date the matter would be heard. The case had been pending from the 21st day of April, 1955 to the 28th day of November, 1955, the day it was heard in plaintiff's absence. In the interim, plaintiff's business interests took him to the State of Nevada. As aforesaid, he was engaged in the construction business and said business took him to various states. He had lived in the States of California (Tr. 35), Utah (Tr. 4), Nevada (Tr. 34), and now resides in Colorado (Tr. 36), where he is following the same vocation. Although he intended to return to the State of Utah to prosecute this action, as soon as he was notified of the date of trial, while he was in Nevada and after having established residence there, he filed an action for Divorce in that State against the defendant (Def's Exh. 4). Plaintiff did not thereby intend to, nor did he abandon the Utah action. This position is substantiated by the fact that he continued to retain the services of his attorney, Maxwell Bentley, to represent him in the Utah action. Plaintiff was expecting to receive notice from said attorney as to the date of trial. Mr. Bentley did send written notice thereof, which did not come to plaintiff's attention in time for reasons stated above (Pl's Exh. 2). Plaintiff caused a telephone call to be placed immediately to Mr. Bentley upon opening the letter from the latter notifying him of the trial date (Pl's Exh. 3). Plaintiff through attorney Haller requested Mr. Strong

to ascertain the status of this case and to notify him (Pl's Exh. 3). Mr. Strong did so, as aforesaid. Such solicitude on the part of the plaintiff does not evince any intention whatsoever on his part to abandon this case. His reasons for filing an action in Nevada do not appear in the Record, because plaintiff has never had the opportunity to appear before the trial Court and present his side of the case. The trial Court was urged to set aside the Findings and Decree herein, in order to permit the plaintiff to enlighten the Court on all pertinent matters in connection with this case. His motion was denied. Plaintiff has never had his day in Court with respect to this action. Through no fault or negligence of his own, the plaintiff has been deprived of an opportunity of presenting his evidence in support of his Complaint to the trial Court. All he has requested and now requests is that he be accorded such an opportunity, which would be in accordance with justice, equity and fair play.

The Record in this case is uncontroverted on the proposition that plaintiff learned too late of the setting date of this action. It is true that his attorney, Mr. Bentley, knew of said date, and that he attempted to communicate the same to the plaintiff. Mr. Haller, in his Affidavit, in evidence herein, explains the circumstances surrounding the receipt of Mr. Bentley's letter by him and states it was unopened until plaintiff came to his office November 28, 1955, at about 10:30 A. M. Reno time (Pl's Exh. 2), and the same remains uncontradicted. Said Affidavit unequivocally points out why it was physically impossible for plaintiff to be present at said hearing in Moab, and that plaintiff tried in vain to contact his attorney, Mr.

Bentley, as soon as he opened said letter and learned for the first time of the date of said hearing.

There is no evidence in the Record impeaching the facts set forth in said Affidavit, and upon the basis thereof, plaintiff was deprived of the opportunity to be heard in said case by circumstances wholly beyond his control, and without any fault on his part. Under such facts and circumstances plaintiff avers it was an abuse of discretion on the part of the trial Court to deny plaintiff's Motion to set aside said Findings and Conclusions and Decree.

The question before this Court is, Should the plaintiff be denied his day in Court, because he did not learn of the trial date in time to be present and to give testimony thereat, in view of all the above circumstances? There is no evidence that he had actual knowledge of the trial setting until after judgment had been entered. He used due diligence upon first learning belatedly thereof. His affidavit states that he would have attended said hearing had he seasonably received notice thereof; that he had a meritorious cause of action which he was prevented from presenting through no fault of his own (37-41 incl.).

SPECIFICATION OF POINTS RELIED UPON

1. The Court was without jurisdiction to enter judgment in this case.
2. The Court abused its discretion in denying plaintiff's Motion to Set Aside Divorce Decree.

BRIEF OF THE ARGUMENT

1. THE COURT ERRED IN AWARDING A DECREE OF DIVORCE HEREIN FOR LACK OF JURISDICTIONAL FACTS.

2. THE COURT ERRED IN DENYING PLAINTIFF'S MOTION TO SET ASIDE DIVORCE DECREE UNDER THE CIRCUMSTANCES OF THIS CASE, THUS ABUSING ITS DISCRETION.

ARGUMENT

I

THE COURT ERRED IN AWARDING A DECREE OF DIVORCE HEREIN FOR LACK OF JURISDICTIONAL FACTS.

Sec. 30-3-1, Utah Code Annotated, 1953, as amended, provides, among other things, “. . . and the Court may decree a dissolution of the marriage contract between the plaintiff and defendant in all cases where the plaintiff shall have been an **actual and bona fide** resident of this state and of the county where the action is brought for three months **next prior** to the commencement of the action . . .” (Emphasis mine).

I submit that the only evidence touching directly on the subject of residence is found on page 4 of the Transcript of the Reporter, commencing on line 15, to-wit:

“Q. Now during the, this complaint was filed on the 11th day of April, A. D. 1955. How long have you been a resident of Grand County, you and your husband, prior to that time?

A. We first came out two years ago in November.

Q. In November of 1953?

A. Yes.

Q. And you have been a resident of Grand County, State of Utah, three months before the commencement of this action against you, is that right?

A. Yes." (Transcript p. 4, Lines 15-24). (Note: The complaint was actually filed April 21, 1955. The ten day summons was served April 11, 1955) (3, 4).

The above is the sum and substance of defendant's testimony as to residence in the State of Utah, and the County of Grand, for the purpose of securing a divorce from plaintiff on her counterclaim. It does not meet the requirements of our statute, to-wit: Sec. 30-3-1, U.C.A. 1953, as amended. There is no evidence that defendant was **an actual and bona fide** resident of this state for one year, and of the County of Grand for three months **next prior** to the commencement of the action. Defendant's testimony that she and her husband first came to Utah two years ago in November (November, 1953) does not fulfill the statutory requirements cited. Defendant's testimony does not show that either she or her husband were **actual and bona fide residents** of this state for one year **next prior** to the commencement of this action, nor does it show that either or both of them were actual and bona fide residents of Grand County for three months next prior to the commencement of the action. Defendant's evidence simply is that she and her husband first came out to Utah two years ago in November (which would be November, 1953). There is no testimony that they came out for the purpose of establishing residence in Utah or that they, or either of them, have been actual and bona fide residents of this State since November of 1953, or one year **next prior** to the date of the commence-

ment of said action. Since this matter goes to the question of jurisdiction, it is vital that the evidence clearly show the requisite period of actual and bona fide residence next prior to the commencement of the action. It does not do so. Jurisdiction cannot be presumed, waived, nor conferred. Not only does the evidence fail to show bona fide and actual residence for the requisite period, but there is no showing that the claimed residence of either party was **next prior** to the date of the commencement of the action.

Furthermore, as to residence in the County of Grand, defendant was asked merely if she had been a resident of Grand County three months **before** the commencement of the action against her (Emphasis mine). (Tr. p. 4, lines 21-23). She was not asked whether she was an actual and bona fide resident, or whether she had been such three months **next prior** to the commencement of the action. This is very important, because, as the question was put, defendant could well have been a resident of Grand County for three months at any time before the commencement of the action, but not necessarily next prior thereto, and still she could have answered the question put to her in the affirmative. Suppose she had resided in Grand County from November, 1953 to December 31, 1954, but had abandoned said residence on the latter date. Since the question put to her was whether she had resided in Grand County three months before (not next prior) to April 11, 1955, the date the action was started, she could truthfully answer "yes" to said question, but this would not entitle her to a divorce because said residence, according to our statute, must be three months **next prior** to the date the action is started. Yet, the only

testimony in the record relative to defendant's residence in Grand Couny is that she resided there three months **before** the commencement of the action against her. This showing clearly does not conform to the requirements of said Sec. 30-3-1, U.C.A. 1953, as amended, and the Court was without jurisdiction to award defendant a divorce upon this evidence. There was no attempt made to clarify or explain the residence of the defendant to show that it was actual and bona fide for the requisite period, or to show that it was next prior to the date the action was commenced. This omission on the all-important and decisive question of jurisdiction is fatal to defendant's action, and we urge this Court to dismiss said action for lack of jurisdiction. Under the circumstances, it was incumbent upon defendant to prove that either she or plaintiff complied with our statutory residence requirements in order to procure a divorce on her counterclaim. Weiss V. Weiss III U. 353, 179 P. 2nd 1005.

It has also been held that the matter of residence in a divorce action is jurisdictional and cannot be waived by the parties. Branch V. Branch, 30 Colo. 499, 71 P. 632.

The evidence must support a finding as to residence for the requisite period. Even though there is an allegation of such residence in the Complaint and an admission of such residence in the answer, the same is not sufficient, since the fact of residence is a jurisdictional prerequisite, and the evidence must affirmatively show the required residence. See People V. District Court, (Colo.), 258 P. 2nd, 483.

In the case at bar, Defendant in her counterclaim

alleged:

"1. Defendant is a resident of Grand County, State of Utah, and has been for more than three months prior to the filing of plaintiff's complaint herein" (6). It will be noted that defendant did not allege such residence as being actual and bona fide, nor that it was **next prior** to the commencement of said action (6). Plaintiff admitted said allegation in his reply (10).

Therefore, neither the defendant's counterclaim, nor the evidence above cited, conform to the requirements of Section 30-3-1 U.C.A., 1953, as amended, to confer the necessary jurisdiction to enable the court to grant a divorce. See *People V. District Court*, *supra*.

In *Hampshire V. Hampshire*, 70 Idaho 522, 223 P. 2nd 950, 21 ALR 2nd 1159, under Sec. 32-701, IC, which provides: "A divorce must not be granted unless the plaintiff has been a resident of the state for six full weeks next preceding the commencement of the action," the Idaho court said, "To constitute a residence within the meaning of the divorce statute, there must be a habitation or abode in a particular place, for the required time, and an intention to remain there permanently or indefinitely. An actual residence as distinguished from a constructive one is required. 17 Am. Jur. 280; 27C.J.S. Divorce, Sec. 76, p. 644; *Wood V. Wood* 140 Ark. 361, 215 S.W. 681."

The Idaho statute cited in the Hampshire case above did not require "actual" residence, but the court held actual residence as distinguished from a constructive one is required. Our Utah statute contains the words "actual"

and "bona fide" residence.

In the present case, neither "actual" nor "bona fide" residence is shown. There was no effort to show residence of the required kind, and certainly it was not shown that there was the residence required by the statute for the three month period next prior to the commencement of the action.

In *Weiss V. Weiss*, *supra*, the trial court found, among other things, that the plaintiff had not been an actual, bona fide resident of the county and state for the required statutory time. A decree of "no cause of action" was entered against the plaintiff and he was ordered to pay the defendant \$729.00 for the expenses of the suit, temporary alimony and attorney's fees. The first question this court was called upon to decide was whether or not the trial court erred in deciding the merits of the case after it had found that the plaintiff did not have the residence required by the statute to empower the court to grant a divorce.

In the course of its opinion, this court said: "The subject matter of a divorce action is the status of marriage existing between the plaintiff and defendant. The district courts of this state have jurisdiction of divorce generally, but do not have jurisdiction of the status of marriage existing between every husband and wife. . .

"The pronouncement by the Legislature that 'the court may decree a dissolution of the marriage contract . . . where the plaintiff shall have been an actual and bona fide resident of this state and of the county where the action is brought for three months next prior to the

commencement of the action' establishes some of the prerequisites to the district court obtaining jurisdiction of the status of marriage existing between the plaintiff and defendant in a particular divorce action. The above quoted sentence stating that 'the court may decree a dissolution of the marriage contract', etc. by implication also states that the court may not (shall not) decree a dissolution of the marriage contract where the plaintiff shall not have been an actual and bona fide resident of this state and of the county where the action is brought for three months next prior to the commencement of the action. This is a limitation on the power of the court to act in respect to the marriage contract and the marriage status ensuing therefrom. If the court finds that there was an actual and bona fide residence as specified, it has the power to dissolve or refuse to dissolve the contract, depending on what it concludes as to the merits of the case. If it finds that there was not such residence, it has no power to further act as to the marriage contract and if it acts in such regard it exceeds its authority."

In the case at bar, the court could not find from the evidence that either the plaintiff or the defendant had been an actual and bona fide resident of the county and state for three months next prior to the commencement of the action because the evidence does not show any such residence. It is, therefore, plaintiff's contention that the court had no power to act because it had acquired no jurisdiction and when it did act the court acted wholly without authority.

THE COURT ERRED IN DENYING PLAINTIFF'S MOTION TO SET ASIDE DIVORCE DECREE UNDER THE CIRCUMSTANCES OF THIS CASE, THUS ABUSING ITS DISCRETION.

Rule 60 (b), Utah Rules of Civil Procedure, provides, in part: "Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; . . ."

Plaintiff's affidavit herein sets forth that he has a meritorious cause of action hereing (39). The same has not been disputed. The Findings and Decree herein were filed January 4, 1956. Plaintiff made his motion to set aside the same on February 9, 1956.

"Where timely relief is sought from a default judgment and the movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits." Moore's Fed. Practice, Vol. 7, p. 224.

The judgment taken herein was in the absence of the plaintiff and is in the nature of a default.

In Bylund V. Crook, 60 U. 285, 208 P. 504, although this court held that no reasonable grounds existed to set aside the default judgment, the court further stated: "Our

trial courts are usually very liberal in vacating and setting aside default judgments entered against a defaulting party by reason of mistake, inadvertence, or excusable neglect, or in case where there has been fraud or deceit practiced. **Under our practice it is generally regarded as an abuse of discretion for a trial court not to vacate and set aside a default judgment where there is any reasonable ground for doing so, and timely application is made.**" (Emphasis mine).

In *Cutler V. Haycock*, 32 U. 354, 90 P. 897, summons was served upon the defendant and he sent the same to his attorney about 50 miles away. The attorney prepared a demurrer and caused it to be served on plaintiff's attorney by leaving a copy at his residence with his wife, the attorney being absent, on the last day allowed for service, and on the same day mailed the demurrer with proof of service attached to the Clerk of the Court, but it did not reach the clerk until after the default had been entered against the defendant. Before judgment, defendant requested plaintiff's attorney to call the court's attention to the demurrer. Plaintiff's attorney refused, offered proof and took judgment.

While our court states that the default and judgment were entered herein as of strict legal right, the main question in the court's opinion was, Should the default and judgment have been set aside by the District Court upon the showing made by appellant? The court points out the general rule that whether a default and judgment should or should not be vacated is one to be passed upon by the trial court, and that it rests within its sound discretion is elementary. The court then says, "It is equal-

ly elementary that this discretion is to be applied to the facts as they appear in each case, and, in the exercise of this discretion, the aim and object should be the promotion and furtherance of justice and the protection of the rights of all concerned. As has been well said, in all doubtful cases the general rule of courts is to incline towards granting relief from default, and to bring about a judgment on the merits. (Citing authorities). This rule, as it appears from the authorities, is of almost universal application, and is defeated only in cases where the default is the result of inexcusable neglect of the party in default, or where it would be inequitable to set it aside."

The court after stating that appellant's conduct was not without some excuse due to the sparsely settled country where none of the modern facilities or conveniences for communication are shown to exist, and the attorney and client lived about 50 miles apart, etc., says further: "Upon the other hand, there is not the slightest intimation that the respondent would have suffered either inconvenience or loss of any kind by setting aside the default. If costs are involved, the court can always protect against those. This is not a case where a party at great expense and sacrifice of time had prepared for trial, and would be compelled to undergo it all again if the other party is permitted to defend; nor does it present a case where any evidence has been lost to the prevailing party."

Again, the court says: "Law and courts alike abhor a result that condemns a party unheard, and, unless the law unavoidably requires and justice demands it, where

a party has not by his own inexcusable neglect deprived himself of the right, the courts should, and will, where equity permits, afford relief, to the end that a party may be given a hearing." The court directed the district court to vacate the judgment and set aside the default.

The court distinguishes this case from Peterson V. Crosier, 29 U. 235, 81 P. 860, where the defendant answered and was absent from the trial. Appellant's affidavit, the court found, tended to show a deliberate intent on the part of appellant to abandon his defense and permit plaintiff to take judgment against him. He and his counsel were advised that the case would be called for trial on the day for which it was set, but instead of preparing and appearing for trial, he showed indifference which is wholly inexcusable.

Plaintiff contends the case at bar is similar to the facts and circumstances set forth in Cutler V. Haycock, supra, except that plaintiff herein had filed his complaint and reply to defendant's counterclaim, but for reasons beyond his control, did not learn of the trial setting in time to be present at the hearing. He wanted to be present and introduce evidence in his behalf. He had retained counsel to prepare for trial and to advise him of the trial date. He did not show indifference nor did he abandon the case, but was waiting to hear from his attorney as to the trial date, and without his fault or negligence, he received the letter of notification of the trial date too late to be present for the hearing. This was excusable neglect and surprise entitling him to set aside the Findings and Decree and to be heard. Furthermore, defendant in the case at bar will not suffer any loss by having a hearing

on the merits. The court can impose terms, if necessary. Plaintiff's counsel stipulated at the hearing of the Motion that the court could do so if it saw fit (Tr. 30).

In *Quealy V. Willardson*, 35 U. 414, 100 P. 930, plaintiff brought a friendly mortgage foreclosure suit to aid defendant mortgagors in settling a third person's claim, which was accomplished. The suit lay dormant for about six years by reason of a dispute over plaintiff's attorney fee and a question of interest. At the end of that time, since no answer was filed, plaintiff took a default judgment for the unpaid part of the debt and attorney's fees. Defendants moved to set aside the default, tendering an answer denying the default and alleging payment.

Held, the motion was improperly overruled, especially since it appears that plaintiff suffered no injury through the delay and can suffer none by a trial on the merits.

Plaintiff calls attention to the case of *Utah Commercial & Savings Bank V. Trumbo* (Utah) 53 P. 1033. This action was to recover on a promissory note. Defendant's attorneys had previously withdrawn from the case and no answer had been filed during the statutory period, and judgment was entered. A motion was made to set aside the default and permit the defendant to file an answer and cross-complaint. This motion was denied. From the affidavits filed in support of said motion, it appeared that during all of the proceedings, including the entry of default and judgment, the defendant was continuously absent from the State of Utah and attending to business interests in California. The defendant, in his affidavit, stat-

ed that he had been informed and verily believed that his attorneys had entered his appearance in the action and believed that they had filed the proper pleadings to protect his rights; that he had no notice of their withdrawal from the case or of the entry of judgment by default until after the judgment had been taken against him; that when he learned of the judgment, he wired his attorney asking if he hadn't been attending to the case and requesting that he attend to it at once; that the judgment was a surprise to the defendant and that his application to vacate it was based upon his mistake and excusable neglect; that after the defendant had verily and fully stated the facts to his attorney, he was advised he had a good and meritorious defense.

This court, speaking through Justice Bartch, said: "If in such a case as is presented in this record, a court of justice can grant no relief, then it would seem difficult to conceive of a case where a court would be justified in granting relief from a judgment by default. Surely, it cannot be said that a person liable to be sued leaves his state at his peril, even when he has employed able counsel to care for his interests, lest perchance a judgment be taken by default which will leave him without remedy, regardless of any defense he may have. Such is not the law, and courts do not favor judgments by default. The policy of the law is that every man shall have his day in court before judgment shall be entered against him, and where a judgment by default has been entered, and within the proper time a good defense to the action in which the judgment was rendered is made to appear, and it is shown that the default was entered through ex-

cusable neglect or mistake, the default will be vacated, and judgment set aside, to permit a trial on the merits. It is true that ordinarily the setting aside of a judgment by default rests within the sound legal discretion of the court, and the appellate court will not interfere, but where, as in this case, it is made clearly to appear that there was such an abuse of discretion, through inadvertence or otherwise, as to render the action erroneous and unlawful, the appellate court will control such discretion, and set aside the illegal action. Such discretion does not confer upon the court an arbitrary power beyond that of review. It is an impartial legal discretion, which cannot be employed to the injury of any subject, but must be exercised fairly, reasonably, and in accordance with the established principles of law. The power of the court to set aside judgments by default is recognized and conferred in Sec. 3005, Rev. St. 1898, and should be liberally exercised for the purpose of directing proceedings and trying causes upon their substantial merits; and where the circumstances which led to the default are such as to cause the court to hesitate, it is better to resolve the doubt in favor of the application, so that a trial may be secured on the merits."

The court further stated, "In the case at bar the facts and circumstances show that it was an unavoidable misfortune to the defendant that he did not know that no attorney was representing him in the proceedings which led to the entry of judgment against him until after the entry had been made. We are therefore of the opinion that the court erred in refusing to vacate the default and set aside the judgment, and in refusing to permit the de-

fendant to plead to the merits."

The case at bar presents even more forceful reasons for setting aside the Findings and Decree because it is a divorce action. The Courts have generally held that in such an action, a liberal rule for vacating default judgments prevails, because the State is interested in the preservation of the marriage relation. See *Rehfuss V. Rehfuss*, (Calif.) 145 P. 1020, wherein the Court said a default judgment of divorce will be set aside on slight showing, for the state is also interested, being concerned with the preservation of the marriage relation. See also *McBlain V. McBlain*, (Calif.) 20 P. 61; *Wadsworth V. Wadsworth* 22 P. 648 (Calif.).

The plaintiff in the present case had misfortunes similar to defendant in *Utah Commercial & Savings Bank V. Trumbo*, *supra*. The plaintiff herein had the misfortune of being in Nevada when the case was heard and he had likewise employed an attorney, in whom he had confidence, to represent him herein. He also had the misfortune of not receiving the letter sent to him by his attorney, notifying him of the date set for trial until after judgment was entered, and consequently was not present at the trial (nor was his attorney) and judgment was rendered against him on the defendant's counterclaim. As soon as he learned of the trial setting, he immediately caused an inquiry to be made as to the status of the case and learned that judgment had already been entered against him. Therefore, the reasoning of the Court in the *Trumbo* case applies with equal, if not greater, force to the case at bar. See *Thomas V. Morris* 8 U. 284, 31 P. 446; *Capalija V. Kulish*, (Ore.) 201 P. 545; *Davidson V.*

Pickens, (Okla.) 261 P. 2nd. 872; Lake V. Lake, (Wyo.) 182 P. 2nd, 824.

CONCLUSION

In conclusion, the writer submits that the trial court did not have jurisdiction to grant defendant a divorce on her counterclaim for the reason that the evidence does not show the requisite statutory residence on the part of either the plaintiff or the defendant. However, if this were a case where the Court did have jurisdiction to act, the plaintiff's showing that without fault or negligence on his part, he did not receive notice of the trial setting until judgment had been entered against him; that he used due diligence to find out the status of the case immediately upon receiving said notice; that he had retained counsel to represent him in the action; that counsel did not appear at the trial and was in the State of Wyoming on the date thereof, which fact plaintiff learned only after the entry of judgment, together with the fact that the plaintiff's Affidavit shows that he has a meritorious cause of action and did move the Court to set aside the Findings and Decree and within the period provided in rule 60 (b), Utah Rules of Civil Procedure, all justify the granting of plaintiff's Motion to set aside the Findings and Decree of the trial court herein. Plaintiff submits that the refusal of the Court to set aside said Findings and Decree, under all of the facts and circumstances above set forth, was an abuse of its discretion and is against the policy of the law which favors the principle that every man shall have an opportunity to be heard before judgment is entered against him.

The Findings and Decree of the trial court should be set aside.

Respectfully submitted,

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appellant.