

1956

Tristram B. Johnson v. Roswell Miller, III : Brief of Appellant

Utah Supreme Court

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McBroom & Hanni; Attorneys for Appellant;

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IN THE SUPREME COURT
of the

STATE OF UTAH FILED

JUL 25 1956

Clerk, Supreme Court, Utah

TRISTAM B. JOHNSON,

Plaintiff and Respondent,

vs.

Civil No. 8522

ROSWELL MILLER, III,

Defendant and Appellant.

BRIEF OF APPELLANT

McBROOM & HANNI,

Attorneys for Appellant.

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IN THE SUPREME COURT
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STATE OF UTAH

TRISTAM B. JOHNSON,

Plaintiff and Respondent,

vs.

ROSWELL MILLER, III,

Defendant and Appellant.

Civil No. 8522

BRIEF OF APPELLANT

STATEMENT OF FACTS

Tristam B. Johnson, plaintiff and respondent, commenced this action against Roswell Miller, defendant and appellant, on the 8th day of November, 1955, (R.6) to recover damages for alienation of affections and criminal conversation of plaintiff's former wife, Helen Harris Johnson (R. 1-4).

Plaintiff took defendant's deposition on the 13th day of January, 1956, (R. 47-48). Defendant refused to answer certain questions propounded to defendant at the taking of said deposition, which deposition is a part of the record herein (R. 60-61). Thereafter on the 22nd day of March, 1956, the

trial court entered an order requiring defendant to answer said questions and assessing attorney's fees against defendant in the amount of \$100.00 on the ground that defendant's refusal to answer the questions was without substantial justification (R. 47-48). From this order defendant appeals.

STATEMENT OF POINTS

POINT I

(a) THE CAUSES OF ACTION FOR ALIENATION OF AFFECTIONS AND CRIMINAL CONVERSATION ARE ABOLISHED BY STATUTE IN THE JURISDICTIONS CONCERNING WHICH SAID QUESTIONS WERE ASKED.

(b) SINCE THE ACTS OF APPELLANT IN SAID JURISDICTIONS HAD NO OPERATIVE EFFECT, APPELLANT WAS PRIVILEGED NOT TO ANSWER THE QUESTIONS BY REASON OF THE PROVISIONS OF SECTION 78-24-9, UTAH CODE ANNOTATED, 1953.

POINT II

SAID ORDER VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS IN THAT THE ANSWERS TO SAID QUESTIONS WOULD TEND TO INCRIMINATE APPELLANT.

POINT III

THE COURT COMMITTED ERROR IN ASSESSING ATTORNEYS' FEES AGAINST APPELLANT.

STATEMENT OF THE RECORD

As heretofore noted respondent commenced this action on the 8th day of November, 1955 (R. 5). On the 13th day of January, 1956, prior to the time

that appellant had answered respondent's complaint (R. 14) and prior to the time that appellant was required to answer respondent's complaint (R. 11), respondent took appellant's deposition on oral interrogatories (R. 47-48).

At the taking of said deposition respondent propounded certain questions to appellant concerning appellant's relationships with respondent's former wife in the states of New Jersey, New York, Pennsylvania, Nevada, Wyoming, Idaho and Canada. See appellant's deposition and record 25-42. Both the preliminary and ultimate questions propounded by respondent at the taking of said deposition were directed at the relationships between appellant and respondent's former wife and were particularly directed at establishing the fact that appellant had had sexual intercourse with respondent's former wife. Appellant refused to answer such questions. Thereafter appellant filed his answer on January 24, 1956 (R. 14-15).

Appellant also filed amendments to his answer in which he pleaded as affirmative defenses the laws of New Jersey, New York, Pennsylvania, Nevada and Wyoming abolishing the causes of action for alienation of affections and criminal conversation (R. 16-17, 21-22, 19-20).

On the 22nd day of March, 1956, pursuant to

respondent's motion, the court entered an order requiring appellant to answer the questions propounded to him at the taking of his deposition and assessing attorney's fees against appellant on the ground that appellant's refusal to answer the questions was without substantial justification (R. 47-48).

Pursuant to stipulation of the parties the statutes of New Jersey, New York, Pennsylvania, Nevada and Wyoming abolishing the causes of action for alienation of affections and criminal conversation were in evidence and before the court at the hearing of said motion (R. 43-44, 21-22).

Pursuant to stipulation of the parties the statutes of the aforesaid jurisdictions subjecting appellant to danger of prosecution for adultery and the statutes of the United States subjecting appellant to danger of criminal prosecution for transporting a female in interstate and foreign commerce for immoral purposes were in evidence and before the court on the hearing of said motion (R. 44-45).

POINT I

(a) THE CAUSES OF ACTION FOR ALIENATION OF AFFECTIONS AND CRIMINAL CONVERSATION ARE ABOLISHED BY STATUTE IN THE JURISDICTIONS CONCERNING WHICH SAID QUESTIONS WERE ASKED.

At all times material to this action, appellant, respondent and respondent's former wife resided

and were domiciled in the State of New Jersey (R. 5, appellant's deposition pp. 4-8, 25-26). As above set forth respondent propounded specific questions as to appellant's acts and relationships with respondent's former wife in New Jersey, New York, Pennsylvania, Nevada and Wyoming. The causes of action for alienation of affections and criminal conversation are abolished by statute in said jurisdictions. The preambles to the statutes, declaring the public policy of those states with reference to the causes of action, and the provisions of the statutes are in substance the same. See: Chapter 279, Laws of New Jersey, 1935, Sections 23-1 through 23-6 of Title 2-A of the Revised Statutes of the State of New Jersey; Sections 61-a through 61-i of Article 2-A of the Civil Practice Act of the State of New York; Chapter 36, Session Laws of Wyoming, 1941, Chapter 3, Sections 512 through 516 of the Wyoming Compiled Statutes, 1945; No. 189, Laws of Pennsylvania, 1935, Title 48, Sections 170 through 177, Purdon's Pennsylvania Statutes, 1936; and, Chapter 53, Laws of Nevada, 1943, Sections 4071 through 4071.07, Nevada Compiled Laws of 1929, 1949 Supplement. The New Jersey statute, Chapter 279, Laws of New Jersey, 1935, reads as follows:

“AN ACT declaring and carrying into effect the public policy of the State of New Jersey with respect to causes of action for alienation of the affections, criminal conversation, seduc-

tion, and breach of contract to marry, actions thereon, contracts with respect thereto and acts and proceedings in connection therewith. WHEREAS, The remedies herein provided for by law for the enforcement of actions based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry have been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases have resulted in the perpetration of frauds, it is hereby declared as the public policy of the State of New Jersey that the best interests of the people of the State will be served by the abolition of such remedies. Consequently, in the public interest, the necessity for the enactment of this article is hereby declared as a matter of legislative determination; therefore,

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The rights of action heretofore existing to recover sums of money as damage for the alienation of affections, criminal conversation, seduction, or breach of contract to marry are hereby abolished.

* * * *

4. *No act hereafter done within this State shall operate to give rise, either within*

*or without this State, to any of the rights of action abolished by this article. * * ** (Italics added.)

5. It shall hereinafter be unlawful for any person, either as a party or attorney, or an agent or other person in behalf of either, to file or serve, cause to be filed or served or threaten to file or serve, or to threaten to cause to be filed or served, any process or pleading, in any court of the State setting forth or seeking to recover a sum of money upon any cause of action abolished or barred by this article, whether such cause of action arose within or without the state.

6. All contracts and instruments of every kind, name, nature or description, which may hereafter be executed within this State in payment, satisfaction, settlement or compromise of any claim or cause of action abolished or barred by this article, whether such claim or cause of action arose within or without this State, are hereby declared to be contrary to the public policy of this State and absolutely void. It shall be unlawful to cause, induce or procure any person to execute such a contract or instrument; or cause, induce or procure any person to give, pay, transfer or deliver any money or thing of value in payment, satisfaction, settlement or compromise of any such claim or cause of action; or to receive, take or accept any such money or thing of value as such payment, satisfaction, settlement or compromise. It shall be unlawful to commence or cause to be commenced, either as party or attorney, or as agent or otherwise in behalf of either, in any

court of this State, any proceeding or action seeking to enforce or recover upon any such contract or instrument, knowing it to be such, whether the same shall have been executed within or without this state * * *.

7. Any person who shall violate any of the provisions of this article shall be guilty of a felony which shall be punishable by a fine of not less than one thousand dollars (\$1,000.00) nor more than five thousand dollars (\$5,000.00), or by imprisonment for a term of not less than one year nor more than five years, or by both such fine and imprisonment, in the discretion of the court. (The penalty has since been reduced to a misdemeanor in New Jersey. It remains a felony in other jurisdictions.)

8. This article shall be liberally construed to effectuate the objects and purposes thereof and the public policy of the State as hereby declared. * * *”

The aforesaid statutes as a matter of declared public policy abolish said actions and provide that *no act or acts done within those jurisdictions shall operate to give rise, either within or without said jurisdictions, to any of the rights of action set forth in respondent's complaint.*

Counsel for appellant has made a detailed search of the authorities under both the federal and state rules of civil procedure and the codes of civil procedure. This search has failed to disclose any decisions on the precise question presented herein,

to-wit, whether or not a plaintiff in an action for alienation of affections and criminal conversation brought in a state recognizing such actions may go into acts claimed to have occurred in a state or states in which such actions have as a matter of declared public policy been abolished by statutes that specifically provide that no act or acts done in such states shall have operative effect either within or without such states.

In a very similar situation that was in principle the same as the matter presented here the New York court refused to permit discovery by the plaintiff. See *In Re Glasser* (1950) 100 N.Y.S. 2d 723. In the *Glasser* case the plaintiff instituted an action for alienation of affections in the State of Connecticut where such actions are recognized. In the course of the proceedings the plaintiff sought to force discovery of evidence of certain actions of the defendant within the State of New York. The New York court refused to permit the discovery on the ground that the New York statute had abolished the cause of action for alienation of affections. In so holding the New York court quoted verbatim the statute abolishing causes of action for alienation of affections and criminal conversation and, in particular, that part of the statute that expressly provides that no act or acts done within the State of New York shall operate to give rise, either within or without

the state, to any of the rights thereby abolished.

The questions asked by respondent were directed specifically to the social relationships and the fact of sexual intercourse between appellant and respondent's former wife in New York, New Jersey, Pennsylvania, Nevada and Wyoming, where the causes of action for alienation of affections and criminal conversation are abolished by statute.

The questions sought to elicit answers as to specific instances and as to specific acts in the jurisdictions above named. An examination of appellant's deposition, pages 1 to 37, shows the questions followed the same general pattern, to-wit:

(1) Were you alone with Helen in the State of New Jersey or New York?

(2) Did you register as man and wife in a hotel in New York?

(3) Did you have sexual relations with Helen in the State of New Jersey or New York?

The acts and conduct of appellant and respondent's former wife cannot, under the express wording of said statutes, operate to give rise to any rights in favor of respondent either within or without said states. To require appellant to answer these questions would be directly in the teeth of the declared public policy of said statutes, which is to prevent abuse and humiliation and directly in the teeth of

Rules 30(b), 30(d) and 37(a), Utah Rules of Civil Procedure, which rules expressly provide for protection of parties and witnesses from examination that, as in the case before this court, subjects the deponent to annoyance, embarrassment and oppression.

That the law of the place where the acts of appellant are claimed to have occurred determines whether or not such acts have operative effect or give rise to any rights in favor of respondent, see: 15 C.J.S. Conflict of Laws, Sec. 12, p. 897; *Buhler v. Maddison* (1947) 109 U. 267, 176 P. 2d 118; *Pringle v. Gibson* (1937) 135 Me. 297, 195 A. 695.

Professor Wigmore, in discussing the question of whether or not the law of the place where the acts occur or the law of the forum determines the question of admissability of evidence, reviews the authorities and concludes that the law of the forum determines the admissability of evidence, Vol. 1, Wigmore,, *On Evidence*, 3rd Ed., Sec. 5. He goes on to state, *ibid*, p. 162:

“But there are certain apparent exceptions to it (the rule that the admissability of evidence is determined by reference to the law of the forum) which are in truth instances of separate principles and need to be distinguished:

“(1) Some rule of substantive law as to the *validity of an act*, in form or in essentials, may be adopted from the foreign law, because

of the party's domicile or of the place of the transaction; and thus a question may arise whether a particular requirement is a rule of evidence or a rule of substantive law."

He then reviews the authorities, *ibid*, pp. 162-164, to the effect that where the law of the place where the acts occur makes such acts invalid in the sense of not having operative effect, evidence as to the acts is inadmissible under the law of the forum even though by the law of the forum such acts would have had operative effect. The following are examples. Whether or not oral evidence is admissible to vary the terms of a written contract is determined by reference to the law of the place where the contract is made and not by reference to the law of the forum, *Dunn v. Welsh* (1879) 62 Ga. 241, and *Baxter Nat. Bank v. Talbot* (1891) 154 Mass. 213, 38 N.E. 163, 13 L.R.A. 52, because the law of the place where the acts occur determines their operative effect. The procedure to be followed in hearings on commitments in extradition proceedings is determined by reference to the law of the forum, but such procedural rules do not give rise to a right in the defendants to introduce evidence made irrelevant by treaty between the United States and a foreign country, *Collins v. Loysel* (1922) 259 U.S. 309, 66 L. Ed. 956, 42 Sup. Ct. 469.

(b) SINCE THE ACTS OF APPELLANT IN SAID

JURISDICTIONS HAD NO OPERATIVE EFFECT, APPELLANT WAS PRIVILEGED NOT TO ANSWER THE QUESTIONS BY REASON OF THE PROVISIONS OF SECTION 78-24-9, UTAH CODE ANNOTATED, 1953.

Section 78-24-9, Utah Code Annotated, 1953, reads as follows:

“A witness must answer questions legal and pertinent to the matter in issue although his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; *nor need he give an answer which will have a direct tendency to degrade his character unless it is to the very fact in issue or to a fact from which the fact in issue would be presumed.* But a witness must answer as to the fact of his previous conviction of felony.” (Italics added.)

As above set forth, supra page 5, the causes of action for alienation of affections and criminal conversation are abolished in the jurisdictions concerning which appellant was interrogated. By the express wording of the statutes abolishing the causes of action the acts of appellant in those jurisdictions do not have operative effect. The questions asked of appellant were not, therefore, directed to the fact in issue or a fact from which the fact in issue could be inferred. The questions asked of appellant had a direct tendency to degrade his character. Appellant was, therefore, privileged not to answer the questions under the express wording of the statute quoted above.

Appellant is now married to respondent's former wife. Respondent and respondent's former wife have four minor children. Appellant has two minor children. Since the acts of appellant inquired about are not operative and do not give rise to any rights whatever in favor of respondent, we submit that requiring appellant to answer those questions would serve only to subject appellant, respondent's former wife and the six minor children of the parties to extreme embarrassment, annoyance and humiliation.

POINT II

SAID ORDER VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS IN THAT THE ANSWERS TO SAID QUESTIONS WOULD TEND TO INCRIMINATE APPELLANT.

The questions propounded to appellant at the taking of the deposition consisted of preliminary questions as to appellant's whereabouts on particular occasions, immediately followed by questions as to whether or not appellant saw respondent's former wife on those occasions and invariably culminating in questions as to whether or not appellant and respondent's former wife had sexual intercourse on those occasions, all of which formed a link in the line of questions tending to show that appellant had committed adultery with respondent's former wife. The questions were also directed at whether or not appellant had transported respondent's former wife

across state lines and into Canada for immoral purposes.

That the facts sought to be elicited constituted adultery under the laws of New York, New Jersey, Pennsylvania, Nevada, Wyoming and Idaho and the crime of transporting a female person in interstate and foreign commerce for immoral purposes in violation of the Federal Mann Act, see record pp. 44-45.

That a person is not required to testify to facts that may tend to incriminate him under the laws of another jurisdiction, see: *United States v. Saline Bank* (1828) 1 Pet. 100, 7 L. Ed. 69; *Ballman v. Fagin* (1905) 200 U.S. 186, 26 Sup. Ct. 212, 50 L. Ed. 433; *United States v. Lombardo* (1915, D.C. Wash.) 228 Fed. 980; *In Re Doyle* (1930, D.C.N.Y.) 42 Fed. 2d 686; *Morse v. Nussbaum* (1900) 55 App. Div. 245, 67 N.Y.S. 492; *In Re Kanter* (1902, D.C. N.Y.) 117 Fed. 356; and, *In Rē Feldstein* (1900, D.C.N.Y.) 103 Fed. 269.

In *United States v. Saline Bank* the United States Supreme Court affirmed the federal court for the district of Virginia in holding that the privilege against self-incrimination applied to matters that would tend to incriminate the defendants under state law. The court, speaking through Chief Justice Marshall, said at 1 Pet. p. 104:

“This is a bill in equity for a discovery and relief. The defendants set up a plea in

bar, alleging that the discovery would subject them to penalties under the statute of Virginia. The court below decided in favor of the validity of the plea and dismissed the bill. It is apparent that in every step of the suit the facts required to be discovered in support of the suit would expose the parties to danger. The rule clearly is, that a party is not bound to make any discovery which would expose him to penalty, and this case falls within it. The decree of the court below is therefore affirmed."

In *Ballman v. Fagin* it was held that a witness called before a federal grand jury could refuse, under the claim of privilege against incrimination, to produce a cash book and could refuse to disclose whether or not he had control thereof because to do so might tend to show him guilty of a criminal stock transaction in violation of state law. The supreme court, speaking through Justice Holmes, said at 200 U.S. p. 195:

"The subject under investigation, according to the government's statement, was the criminal liability of some employee of a national bank from the vaults of which a large amount of cash had disappeared. The book very possibly may have disclosed dealings with the person or persons naturally suspected, and, especially in view of the charges that Ballman kept a 'bucket shop', dealings of a nature likely to lead to a charge that Ballman was an abettor of the guilty man. If he was, he was guilty of a misdemeanor under revised

statute Section 5209, and no more bound to produce the book than to give testimony to the facts which is disclosed.

“Not impossibly Ballman took this aspect of the matter for granted, as one which would be perceived by the court without his disagreeably emphasizing his own fears. But he did call attention to another less likely to be known. As we have said, he set forth that there were many proceedings on foot against him as a party to a ‘bucket shop’ and so subject to the criminal law of the state in which the grand jury was sitting. According to *United States v. Saline Bank*, he was exonerated from disclosures which would have exposed him to the penalties of the state law.”

In *United States v. Lombardo* the court held that defendant was privileged not to make certain sworn statements under federal law pertaining to prostitution because the statements might tend to show him guilty of operating a house of prostitution under the laws of the State of Washington. In so holding the court said at 228 Fed. p. 981 :

“The contention of the government that *Brown v. Walker* is controlling is not accepted. In the *Brown* case the immunity granted by the act was held as broad as the fifth amendment by a majority of the supreme court, and this immunity amendment was passed by congress after the decision in the *Counselman* case, presumably for the purpose of meeting the objection urged in that case. The minority of the court by a dissenting opinion held the immunity provision not broad

enough to meet the provisions of the fifth amendment. The immunity granted by this act is expressly limited to prosecutions 'under the laws of the United States' thus withdrawing the protection granted by the fifth amendment as to prosecutions under the state laws and abridging the protection granted by Section 9, Article 1 of the Constitution of Washington, which is not in harmony with the privileges and immunities granted to the citizens of the several states and inhibitions placed upon the several states by the Constitution of the United States."

In the case of *In Re Doyle* the federal court held that, under the privilege against self-incrimination, the witness in a grand jury investigation could refuse to answer certain questions which might tend to prove him guilty of splitting fees with public officials in violation of the criminal laws of the State of New York.

In the case of *In Re Feldstein* the witness was interrogated before the referee in bankruptcy regarding certain checks which had been given by the bankrupt to the witness. The object of the examination was to ascertain the consideration for those checks and to ascertain whether they were given for gambling debts which the trustee might recover by action against the witness. The penal code of the

State of New York made gambling a criminal offense. The court held that requiring the witness to answer the questions might tend to incriminate him under the laws of the state and therefore that his privilege applied and he did not have to answer the questions.

In *Morse v. Nussbaum* it was held that an officer of a corporation could claim the privilege against self-incrimination in an examination under a New York act suppressing monopolies, though the act assumed to grant immunity to a witness for all offenses on account of any transaction concerning which he might testify, since the state act could grant no immunity to prosecution under federal laws and since the testimony of the witness would be likely to subject him to prosecution under existing federal anti-trust laws.

It is stated by certain text writers that there is a conflict of authorities on the proposition of whether or not the privilege against self-incrimination extends to the possibility of criminal prosecution under the laws of another jurisdiction. See: 58 Am. Jur., Witnesses, Sec. 51; 82 A.L.R. 1380; and Vol. VII Wigmore *On Evidence*, 3rd Ed., Sec. 2258. The cases cited by appellant above are direct holdings that the privilege does extend to testimony that would tend to incriminate under the laws of another jurisdiction. *Brown v. Walker* (1896) 161 U.S. 591, 40 L.

Ed. 819, 16 Sup. Ct. Rep. 644, and *Hale v. Henkel* (1906) 201 U.S. 43, 50 L. Ed. 652, 26 Sup. Ct. Rep. 370, are the two main cases cited by the text writers as authority for the contrary view. In both *Brown v. Walker* and *Hale v. Henkel* the court held that the federal immunity statute involved afforded absolute immunity from prosecution both under federal and state law for the offenses to which the questions related and hence the witness was required to answer because his testimony could not, by reason of the immunity, incriminate him under federal law or the laws of any other jurisdiction. In *Jack v. Kansas* (1905) 199 U.S. 372, 50 L. Ed. 234, 26 Sup. Ct. Rep. 73, also cited by the text writers as authority for the contrary view, the court held that the witness in a state anti-trust proceeding was only required to answer questions pertaining to intrastate matters, as to which a state immunity statute granted complete immunity from state prosecution, and that the witness was not required to answer as to interstate matters and, therefore, he was not compelled to give evidence that might tend to incriminate him under federal law. See *United States v. Lombardo* and *In Doyle*, *supra* p. 15, distinguishing the above cases and the other authorities cited by the text writers on the same grounds.

POINT III

THE COURT COMMITTED ERROR IN ASSESSING ATTORNEYS' FEES AGAINST APPELLANT.

We submit that appellant's refusal to answer the questions was meritorious and that substantial justification existed therefor. The court therefore committed error in assessing attorney's fees against appellant. See Rule 37 (a) Utah Rules of Civil Procedure.

Respectfully submitted,

McBROOM & HANNI,

Attorneys for Appellant.