

1959

Howard B. Cahoon v. Robert P. Felton : Brief of Appellant

Utah Supreme Court

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In the
Supreme Court of the State of Utah

HOWARD B. CAHOON,

Respondent.

v.

ROBERT P. PELTON,

Appellant.

Case No.
8976

FILED
FEB 26 1959

BRIEF OF APPELLANT

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In the
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HOWARD B. CAHOON,

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

This case was brought in two causes of action. The first is for alienation of affections and the second for criminal conversation. The case was tried twice. At the first trial, the jury returned a verdict of no cause of action on the first cause of action and \$20,000 compensatory and \$5,000 punitive damages on the second cause of action. The defendant moved for a new trial on the second cause of action and the trial court in a Memorandum Decision found

that the verdict on the second cause of action was excessive in the amount of \$15,000 general damages and \$4,000 punitive damages and ordered that plaintiff remit the said \$19,000 or submit to a new trial on the second cause of action. The plaintiff elected to submit to a new trial. Defendant objected to a new trial on the first cause of action for the reason that the plaintiff had not moved for a new trial on that cause of action and did so for the first time in a motion dated the 5th day of September, 1958, whereas the Court had signed a Memorandum Decision on the 20th day of May, 1958 granting a new trial on the second cause of action only and judgment was made and entered on the 17th day of April, 1958. Plaintiff's counsel attempted to avoid the necessity of making a motion for a new trial on the April judgment by causing a new judgment, obtained *ex parte*, to be entered dated the 5th day of September, 1958. After hearing these motions, the Honorable Stewart M. Hanson, before whom the first trial was held, ordered a new trial on both causes of action.

The case was tried for the second time before the Honorable A. H. Ellett. At the conclusion of the evidence, the Court submitted a series of special verdicts to the jury. In response to these special verdicts, the jurors found that the defendant alienated the affections of the plaintiff's "wife" and had criminal conversation with her. They assessed \$2,500 general damages on the first cause of action for alienation of affections and assessed \$25,000 general damages plus \$12,000 punitive damages for the criminal conversation. They also made a special finding that the plaintiff would have spent \$17,000 supporting his "wife"

if his "wife" had never known Pelton. The question then naturally arose as to what all these special findings meant. Plaintiff claimed that his total verdict should have been \$2,500 plus \$25,000 plus \$12,000 or a total of \$39,500. The defendant claimed that the jurors intended that the \$17,000 should be deducted from the \$39,500, leaving a verdict of \$22,500. The Court entered judgment for \$26,000, his theory as indicated by this Memorandum Decision being that the jury intended the \$17,000 as an offset, but that their intention could not be given full effect because an offset was only proper against the alienation of affections action and not against the action for criminal conversation. The Court further found that the punitive damages were excessive by \$11,000. The trial court denied motions made and argued by defendant for a judgment notwithstanding the verdict and for a new trial.

From these two judgments and from the rulings of the Court, defendant takes this appeal.

STATEMENT OF FACTS

The evidence introduced at both trials is substantially the same. Therefore, the facts will be considered as though the evidence was introduced in one case.

The plaintiff was at the time of the trials unmarried, having been divorced by his former wife, Dorothy Cahoon, also known as Dorothy Williams, and Dorothy Shaw, hereinafter referred to as Mrs. Shaw, in Nevada on December 4, 1956, in an action in which she, as plaintiff, alleged, proved and was adjudged to have sustained extreme mental

cruelty (R. 453-494). Plaintiff's said wife married Gerald F. Shaw, a Las Vegas taxi operator, in December, 1957 after a seven-month acquaintance and presently resides with Shaw in the Cahoon family home in Las Vegas, Nevada (R. 625).

The plaintiff at the time of the second trial was 43 years of age. He first met Mrs. Shaw when she was working at the Hotel Utah as a waitress (R. 416). He went with her about a year and a half and "married" her on June 28, 1947 [The record incorrectly states 1957] (R. 416). At the time of their "marriage" Dorothy had two children by a prior marriage, Roxanne, then age 7, and Sylvia, then age 5 (R. 416-417). It also appears that at the time the plaintiff "married" Mrs. Shaw, she had not obtained a final decree of divorce. Exhibit D-2 shows that she obtained a final decree of divorce in California from Mark H. Williams on the 7th day of June, 1948, almost one year after her "marriage" to plaintiff. The affidavit for a final decree shows that an interlocutory decree was entered as of the 13th day of March, 1946 (Exhibit D-2). Exhibit D-2 shows that the final decree was entered *nunc pro tunc* as of June 23, 1948. The only marriage performed between plaintiff and his "wife" was the marriage performed on the 28th day of June, 1948, almost a year prior to the time application was made for a final decree (R. 480).

Plaintiff and Mrs. Shaw lived the first two years of their "marriage" in Salt Lake City, Utah (R. 447). During this time they had one child. While in Salt Lake City, they worked together in the Jiffy Dog Business. They started this business in their home and later opened an office on

State Street (R. 460). According to the plaintiff this was a period of happiness. They "went on a number of trips * * * both were active in the Variety Club in Salt Lake City" and his "wife" "seemed to love me and enjoy my company, and we both had a lot of fun together" (R. 459). Mrs. Shaw, however, testified to a different feeling which existed during this period. She stated that from the very beginning there was no affection in their "marriage." She remembered on numerous occasions on 19th East when "we moved into our home up there, I remember many nights that he's, I mean, being a newlywed, I expected, you know, the usual love and it just wasn't there. I would get out of bed and slam the door and go out in the front room and sleep. I mean, he was very cold and indifferent to me" (R. 628). She further testified that during this period and while on a trip to Montana, her husband had struck her in the nose causing it to bleed. While they were in Salt Lake City nothing at all interfered with their "marriage" other than their own conduct (R. 481). After living two years in Salt Lake City they moved to Las Vegas where plaintiff operated two drive-in theatres. While there, plaintiff and Mrs. Shaw met defendant at a Kiwanian convention. This was in November of 1954 (R. 418).

At all times material to the case the plaintiff and Mrs. Shaw were domiciled and actually lived in the State of Nevada.

In the summer and early fall of 1955, Mrs. Shaw spent two or three weeks on a vacation in Salt Lake City (R. 473). Early in 1956, plaintiff for the first time observed a change in her attitude toward him (R. 473). She seemed

pleased when he left town and when they were ready to leave on a planned trip to New Orleans she urged him to go alone which resulted in the trip being cancelled (R. 474). During this period of growing indifference, he saw Pelton in the bar at the Riviera Hotel in Las Vegas. He observed that Pelton "ducked his head down and turned away from me." At that time plaintiff testified he had not suspected that anything was wrong (R. 475).

Mrs. Shaw testified, as herein indicated, that from the beginning there was little, if any, affection existing between herself and her husband. When asked specifically whether or not defendant had alienated her affections from her husband, she testified "I can't see how it would be possible * * * there certainly weren't any wifely affections or husband so I don't see—I have never been able to understand how affections can be alienated if there are no affections" (R. 627).

She explained some of the incidents which alienated whatever affection she had for her husband. The first difficulty arose at the very beginning of their "married" life and it was because of plaintiff's lack of sexual interest in her (R. 628). This indifference persisted throughout their "married" life, so much so that she suggested that he see a doctor which he finally did. The doctor apparently suggested some pills which he did take "for a week. Then he perished the thought. And that would be the end of it" (R. 631).

She testified "during our whole married life, there were times that there was no intercourse, sometimes from—as long as six to nine months" (R. 631).

When Mrs. Shaw's sister, Virginia, related to her an incident which occurred when the plaintiff made a "pass" at her while drunk in a tourist cabin in California she was only a little amazed. She testified "I was a little amazed." "I would say that Howard is naturally a cold, frigid man and that no woman would interest him" (R. 641).

This lack of sexual interest and affection caused Mrs. Shaw to consult a lawyer in 1955. This lawyer was a mutual friend. He called the plaintiff to his office and talked to the plaintiff about the lack of affection which plaintiff had for Mrs. Shaw (R. 237). This all occurred before Pelton had any association with Mrs. Shaw.

Mrs. Shaw also testified to other incidents which caused her to lose whatever affection she had for her husband. She spoke of these to Mrs. Thiriot, the wife of her husband's friend, and complained to her that her husband had been very rude in her presence. She said "I mean, he was rude, as much as his belching and making those strange noises and then laughing like a child * * *." This was prior to the time that she met Mr. Pelton.

Her husband's conduct in staying out all night or until late unusual hours of the morning playing panguini also was a source of annoyance to Mrs. Shaw. She said "Well, for a length, quite a long length of time, he got a streak; and he would on numerous occasions stay out and play panguini all night and then he would come home and sleep most of the day" (R. 633).

The most serious difficulty which arose between plaintiff and his "wife" commenced long prior to the time she met the defendant. It was an incident which concerned their last child. On this occasion, while Mrs. Shaw was pregnant, she testified that her husband accused her of being pregnant with a child not his. Her exact words in this respect were as follows: "Well, there was an occasion when I became pregnant with Brit, who is four years old now, and at the time I found it out, from the Doctor, Howard was in Los Angeles and when he came home, I told him. And he said, 'Well.' He said 'that isn't my baby.' And I said 'Well, if it isn't yours, I don't know whose it is.' And he said 'Well,'—he didn't say anything for a couple of days. Then he said, 'Well, if this isn't my baby,' he says 'I want you to have an abortion' " (R. 629).

The defendant admitted that a conversation of this nature had occurred. However, he testified that he desired her to have an abortion because of their different blood types and not because the child was not his. He admitted, however, that he made the accusation to his "wife" that the child was not his but that he did it simply because he was mad (R. 206). The accusation of paternity occurred prior to the time of Pelton.

The plaintiff, for the most part, did not deny the accusations made by Mrs. Shaw against him which she claimed had caused her to lose any affection she may have had. He thought that his sexual interest in her was normal and that there was a deep and abiding affection existing between them.

The testimony of plaintiff's stepdaughter, Roxanne Freeman, was introduced in evidence. This testimony, which was undisputed showed that plaintiff and Mrs. Shaw were having difficulties before Pelton and that Mrs. Shaw was out with other men. This evidence is as follows:

"Q. Do you know of any other man or men that your mother went out with prior to the time that your mother and father were divorced other than the defendant, Pelton?

"A. Never, their names. There are times she did go out dancing with a girl that used to live with us, that used to take care of us.

"Q. With men?

"A. They would go out on Boulder Highway or over to the Saddle Club to dance" (R. 529, 530).

* * * *

"Q. How many such occasions were there when your mother and Mrs. Dunklin were out dancing with other men?

"A. Oh usually, maybe, when mother would get off work out at the theatre or may be on Saturday nights. Usually when Sylvia or one of us was there to watch the children.

"Q. Would you say once or twice a week?

"A. Maybe once a week.

"Q. Over a period of months?

"A. Yes, uh huh.

"Q. And it was during the year 1954 and 1955, would you say?

"A. Yes.

* * * *

"Q. But you didn't know the names of any of the men?

"A. No.

"Q. Did any of the men come to the house?

"A. No. There was a man that brought her home one night from one of the bars or clubs some place.

"Q. What time did he bring her home?

"A. It was about 6:00 in the morning, about 5:00 or 6:00 in the morning. Many times Dad would be out playing cards" (R. 530-531).

The testimony of Mrs. Shaw's sister, Virginia Holt, is also enlightening:

"Q. And also prior to the time she met Mr. Pelton, did you know something of your sister's attitude and her conduct, Mrs. Holt?

"A. Yes.

"Q. And prior to that time do you know of your own knowledge if she was going out with other men?

"A. Yes, she was.

"Q. And how did you know that, Mrs. Holt?

"A. Well, I have seen her.

"Q. Other men when she was drinking?

"A. Yes.

"Q. Has your sister talked to you about those occasions?

"A. Yes (R. 662-663).

"Q. Now, how many occasions, Mrs. Holt, did you see your sister out at this time?

"A. Several.

"Q. And that was prior to the time of 1956, was it not?

"A. Yes" (R. 663).

The evidence concerning Mrs. Shaw and Pelton is scanty. The testimony relating to their conduct shows that they corresponded together, that they went out together, both in Salt Lake and in Nevada, but mostly in Nevada. They boated together along with plaintiff's stepdaughter and her boy friend and apparently went swimming together. The defendant came to the home of plaintiff at least on one occasion when plaintiff was not present and was served a highball and according to the testimony of plaintiff's stepdaughter, kissed Mrs. Shaw on that occasion. This was denied by the defendant. The defendant and Mrs. Shaw were seen on one occasion alone together in a motel room (R. 525).

Plaintiff first learned that his "wife" had been seeing the defendant Pelton at a time when plaintiff was in Las Vegas, Nevada and plaintiff testified that it was in Las Vegas, Nevada that *his feelings were wounded*, and where he observed a change in his "wife's" attitude towards him (R. 491-492).

The only direct evidence of criminal conversation came from the testimony of plaintiff's brother, Richard Cahoon. He stated that he had a conversation with the defendant at the defendant's place of business sometime in December, 1956 in which the following was stated: "I said, 'Well, what about the time Roxanne said that you slept with Dorothy there in Howard's home?' And he emphatically denied it. He said that the times he slept with Dorothy was either in his motel in Las Vegas or in Salt Lake City where the children weren't around * * *" (R. 541). This con-

versation was categorically denied by the defendant (R. 604).

It is also significant that Roxanne, the plaintiff's step-daughter, did not testify to the allegations made in Richard Cahoon's question.

While the plaintiff's brother, Richard Cahoon, made several efforts to converse with the defendant, the plaintiff himself never, on any occasion, ever spoke to Pelton or asked him any questions relative to his alleged conduct with Mrs. Shaw but simply filed suit for alienation of affections and criminal conversation.

STATEMENT OF POINTS

POINT I.

THE ALLEGED MARRIAGE BETWEEN PLAINTIFF AND MRS. SHAW PROVIDES NO BASIS FOR A CAUSE OF ACTION AGAINST DEFENDANT.

POINT II.

AN ACTION FOR CRIMINAL CONVERSATION IS NOT PERMITTED UNDER THE UTAH LAW.

POINT III.

THE COURT ERRED IN INSTRUCTING THE JURY ON THE ISSUE OF PUNITIVE DAMAGES AND IN PERMITTING EVIDENCE OF

WEALTH TO BE INTRODUCED ON THE
ISSUE OF PUNITIVE DAMAGES.

POINT IV.

THE COURT ERRED IN GRANTING A NEW
TRIAL ON THE FIRST CAUSE OF ACTION.

POINT V.

THE COURT COMMITTED PREJUDICIAL
ERROR AT THE SECOND TRIAL IN GIVING
INSTRUCTION NO. 11 (R. 124-125).

POINT VI.

PLAINTIFF IS BARRED FROM BRINGING
AN ACTION ARISING OUT OF HIS MAR-
RIAGE BY REASON OF A PRIOR DIVORCE
OBTAINED BY MRS. SHAW BASED ON HIS
MISCONDUCT.

POINT VII.

THE COURT COMMITTED PREJUDICIAL
ERROR IN REFUSING TO GIVE DEFEN-
DANT'S REQUESTED INSTRUCTION NO. 22
(R. 114) AND IN GIVING INSTRUCTION NO.
13 (R. 126) AND NO. 15 (R. 128).

POINT VIII.

THE COURT COMMITTED PREJUDICIAL
ERROR IN INSTRUCTING THE JURY ON THE
LIFE EXPECTANCY TABLES, INSTRUCTION

NO. 7, FIRST TRIAL (R. 21), INSTRUCTION NO. 15, SECOND TRIAL (R. 128) AND IN PERMITTING COUNSEL TO ARGUE FROM THE SAME TO THE JURY.

POINT IX.

THE COURT COMMITTED REVERSIBLE ERROR IN THE SECOND TRIAL IN ALLOWING AN OFFSET OF \$17,000.00 AGAINST ONLY THE ALIENATION OF AFFECTIONS JUDGMENT.

POINT X.

THE COURT COMMITTED PREJUDICIAL ERROR IN PERMITTING COUNSEL FOR THE DEFENDANT TO READ TO THE JURORS QUESTIONS AND ANSWERS FROM DEPOSITIONS IN WHICH THE WITNESSES CLAIMED THEIR PRIVILEGE AGAINST SELF INCRIMINATION.

POINT XI.

THE COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NOS. 24, 25 AND 26.

POINT XII.

THE COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 20.

POINT XIII.

THE COURT COMMITTED PREJUDICIAL
ERROR IN ITS INSTRUCTION NO. 12.

POINT XIV.

THE COURT COMMITTED PREJUDICIAL
ERROR IN ITS INSTRUCTION NO. 13.

POINT XV.

THE TRIAL COURT ERRED IN REFUSING
TO GRANT A NEW TRIAL ON THE GROUNDS
THAT THE VERDICT WAS GROSSLY EX-
CESSIVE AND UNWARRANTED BY THE
EVIDENCE.

ARGUMENT

POINT I.

THE ALLEGED MARRIAGE B E T W E E N
PLAINTIFF AND MRS. SHAW PROVIDES NO
BASIS FOR A CAUSE OF ACTION AGAINST
DEFENDANT.

The Legislature of the State of Utah has provided that
certain marriages are prohibited and void. Section 30-1-2,
Utah Code Annotated, 1953, provides as follows:

“The following marriages are prohibited and
declared void:

* * * *

“(2) When there is a husband or wife living from whom the person marrying has not been divorced.

* * * *

“(7) Between a divorced person and any person other than the one from whom the divorce was secured until the divorce decree becomes absolute, if an appeal is taken, until after the affirmance of the decree.”

The alleged marriage performed between the plaintiff and Mrs. Shaw occurred on June 27, 1947. At that time Mrs. Shaw was not finally divorced from her husband, Mark H. Williams.

Exhibit D-2 shows that she obtained a final decree of divorce from Mark H. Williams on the 7th day of June, 1948, almost a year after her marriage to the plaintiff. The affidavit for a final decree was not even made until after Mrs. Shaw “married” the plaintiff in Salt Lake City. The fact that the decree was entered *nunc pro tunc* as of June 23, 1948 five days before the marriage performed between the Plaintiff and Mrs. Shaw does not render the marriage valid. The only marriage performed between the plaintiff and Mrs. Shaw was the marriage of June 28, 1948.

If the marriage of the plaintiff and Mrs. Shaw was void and unlawful at its inception, as provided by statutes of the State of Utah, it could not subsequently be rendered valid. Void marriages are not marriages at all and do not even require an annulment proceeding to determine their nullity. In *Sanders v. Industrial Commission*, 64 Utah 372, 230 Pac. 1026, followed in *Jenkins v. Jenkins*, 107 Utah 239, 153 P. 2d 262 and in *Re Dalton's Estate*, 109 Utah 503,

167 P. 2d 690, the Court held that where a woman remarried within six months after entry of interlocutory divorce decree the marriage was void *ab initio* and no rights accrued to either party to the marriage by reason thereof.

In the *Jenkins* case *supra*, the Court said:

“In view of the fact that the plaintiff had only an interlocutory decree of divorce from her prior marriage and said decree had not yet become final, she was still married at the time of her purported marriage to defendant and the trial court correctly held that the purported marriage was void *ab initio*.”

The Court further said:

“The continued cohabitation as man and wife after the said interlocutory decree became final would not validate the void marriage. See *Sanders v. Industrial Commission*, *supra*. Since the purported marriage was void, there was no grounds nor necessity for divorce. However, it is proper for the good of society and the peace of mind of the persons concerned that void marriages be so declared by a decree of the court. Such a declaration could properly have been obtained by a suit for an annulment.”

The California courts have likewise held that a marriage performed before a final decree is entered is void. The California statute which is applicable is as follows:

CC 132:

“Final judgment may be entered one year after the entry of the interlocutory judgment on the motion of either party or on the court’s own motion. The *final judgment* restores the parties to the status of single persons. The death of either party after the entry of the interlocutory judgment does not im-

pair the power of the court to enter a final judgment. *Such entry does not validate any marriage contracted by either party before the entry thereof nor constitute any defense in any criminal prosecution against either of them.*" (Emphasis ours.)

The California courts had occasion to construe the foregoing statute in *Corbett v. Corbett*, 298 Pac. 819, 113 Cal. App. 595, decided April 23, 1931 by the District Court of Appeals, Third District in California. In that case the defendant had obtained an interlocutory decree of divorce on June 29, 1926. Before obtaining a final decree and more than one year after the interlocutory decree had been awarded she married the plaintiff. A final decree was entered after the subsequent marriage. Thereafter, a suit was brought for annulment of the last marriage. The Court in sustaining the trial court's judgment granting the annulment said:

"Until the final judgment of divorce has been actually rendered and entered, the spouses are not restored to their status of unmarried persons. Until this final decree has been actually rendered and entered, the spouses are disqualified from remarrying."

The California court quoted from Section 132 of the Civil Code wherein it is provided as follows:

"When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons, and permit either to marry after the entry thereof."

The California court then said:

“This language clearly prohibits a person from remarrying until after the actual rendition and entry of his final judgment of divorce.”

Since the *Corbett* case, the California Legislature has enacted into law the following provision (West's Annotated California Code Section 133) :

“Entry of Final Judgment Nunc Pro Tunc: Effect of such Entry; Marriage Subsequent to Interlocutory Judgment Validated. Whenever either of the parties in a divorce action is, under the law, entitled to a final judgment, but by mistake, negligence or inadvertence the same has not been signed, filed and entered, if no appeal has been taken from the interlocutory judgment or motion made for a new trial, the court, on the motion of either party thereto or upon its own motion, may cause a final judgment to be signed, dated, filed and entered therein granting the divorce as of the date when the same could have been given or made by the court if applied for. The court may cause such final judgment to be signed, dated, filed and entered nunc pro tunc as aforesaid, even though a final judgment may have been previously entered whereby mistake, negligence or inadvertence the same has not been signed, filed or entered as soon as it could have been entered under the law if applied for. Upon the filing of such final judgment, the parties to such action shall be deemed to have been restored to the status of single persons as of the date affixed to such judgment, and any marriage of either of such parties subsequent to one year after the granting of the interlocutory judgment as shown by the minutes of the court, and after the final judgment could have been entered under the law if applied for,

shall be valid for all purposes as of the date affixed to such final judgment upon the filing thereof."

It thus appears clear that the California Legislature has provided that a void marriage performed during the interlocutory period can be rendered valid by entering a retroactive *nunc pro tunc* order after the marriage has been performed. This, of course, would be binding on the California courts in construing marriages performed in the State of California. Whether or not it is binding in Utah is the question before this Court.

In determining whether or not the marriage in Utah is valid, we must look to the law of the state where the marriage was performed. This rule is stated in Restatement Conflict of Laws, Section 121. In *Huard v. McTeigh*, 113 Ore. 279, 232 Pac. 658, 39 A. L. R. 528, the Oregon court construed as void a marriage which was performed in Victoria, British Columbia during an interlocutory period from a divorce granted in the State of Washington. At the time the marriage was performed in Victoria, the two parties were residents of Washington. The Washington statutes provided:

"And it shall be unlawful for any divorced person to intermarry with any third person within six months from the date of the entry of the judgment or decree granting the divorce, or in case an appeal is taken, it shall be unlawful to contract such marriage until judgment be rendered on said appeal in the Supreme Court."

The Washington statutes further provided:

"All marriages contracted in violation of the provision of this section whether contracted within or without this state shall be void."

The Oregon court in determining the British Columbia marriage invalid said :

“Until the expiration of the statutory period against remarriage had expired, the defendant *did not have capacity* to enter into a contract of marriage. In contemplation of law her social status was the same as if no decree had been made. At the time of her alleged marriage at Victoria, she had a husband living. This marriage at the time of its inception was therefore polygamous in character. When persons enter into a contract of marriage, either pursuant to statute or common law, it is essential to the validity of the same *that they have capacity* and are competent so to contract. (Emphasis added.)

* * * *

“The general rule, for which we take it no authorities need be cited, is that a marriage valid where solemnized is valid every where. The converse of this rule, however, is more applicable to the case at bar. *A marriage invalid where solemnized is invalid everywhere.* *Hutchins v. Kimmel*, 31 Mich. 126, 18 Am. Rep. 164. *People v. Shaw*, 259 Ill. 544, L. R. A., 1915 East 87, 102 N. E. 1031. The legality of a marriage must be determined by the laws of the state in which the marriage is consummated.

* * * *

“The marriage was invalid in its inception and ever remains so while the parties reside in the State of Washington.” (Emphasis added.)

At the time the marriage was performed in Utah, the California law provided and still so provides that until a final decree is entered neither party having an interlocutory

decree of divorce can perform a valid marriage either in California or elsewhere. The Utah law also so provides. The conclusion is, therefore, inescapable that at the time the marriage between plaintiff and "Dorothy Williams" was performed in Utah, "Dorothy Williams" did not have the capacity to contract a valid marriage in the State of Utah. The marriage at that moment was not voidable. It was void. In some states a *nunc pro tunc* entry of an order made by a court based on a prior judicial act renders the prior marriage valid. This is in accordance with the common law rule that formal entry of a judicial act previously made, may be made *nunc pro tunc*. However, a *nunc pro tunc* entry of an order previously made is entirely different from the *nunc pro tunc* rendition of a judgment which is to take retroactive effect. We are aware of no Utah decision which permits a *nunc pro tunc* effect to be given to the making of an order.

The California legislation goes far beyond the traditional judicial *nunc pro tunc* order and provides that even where no judicial act has been performed and no final decree granted or entered, the court upon a showing of negligence on the part of either party to the interlocutory decree of divorce may back date the final order from the date when it was actually entered to a prior date when it could have been entered had the parties applied to the court and made a proper showing. This, of course, means that California is making a retroactive law, which if given effect in another state would have retroactive effect on acts which were void at their inception. This, we believe, is not only on its face unsound but is against good public policy

and in any event is against the stated public policy of the State of Utah. This policy is stated by Justice Wolfe in a special concurring opinion in the case of *In Re Vitas' Estate*, 110 Utah 187, 170 P. 2d 183, as follows:

“Logically all marriages proscribed by Section 40-1-2 whether with one having a disability or because not solemnized when made by our domiciliaries outside of this state would be against our announced public policy and our courts should therefore not recognize them.”

Even if the Utah court had not announced the public policy of the state in this regard, sound reason would require that a marriage performed under the circumstances in this case should not be considered valid as against the defendant. If the position taken by the plaintiff in this case is correct, “Mrs. Williams” at the time she entered into the ceremony with the plaintiff had it within her power at any time in the future to treat the marriage performed between herself and the plaintiff as either void, as provided by the Utah statute, or valid as provided by the California Legislature *at her election*. She could have lived with the plaintiff in the State of Utah for as many years as she so desired with an option on her part to make the marriage valid by her *ex parte* conduct in California, or to treat it as void as provided by the Utah statute by not obtaining a *nunc pro tunc* order in California. Certainly contracts, and particularly marriage contracts, cannot be so loosely construed.

Other Utah statutes bearing upon this point are as follows:

“30-3-8—Remarriage—when unlawful:

“It shall be unlawful for either party to a divorce proceeding whose marriage is dissolved by the decree to marry any person other than the husband or wife from whom the divorce was granted until it becomes absolute, and if an appeal is taken until after affirmance of the decree.”

The situation would be quite different if the invalidation of this marriage would affect the legitimacy of the children by this marriage. 77-60-14, Utah Code Annotated, 1953 eliminates that problem. The situation would also be different if either plaintiff or Mrs. Shaw were questioning the validity of the marriage. In either case, other principles of law would be invoked.

POINT II.

AN ACTION FOR CRIMINAL CONVERSATION IS NOT PERMITTED UNDER THE UTAH LAW.

We have no statutory law which authorizes a suit for criminal conversation nor do we have any judicial authority in this jurisdiction by decision or otherwise which authorizes such an action. If the right to such an action exists, it exists by virtue of the common law. The common law in Utah was adopted in 1898 by what is known as Chapter 3, 68-3-1, Utah Code Annotated, 1953. It is as follows:

“The common law of England so far as it is not repugnant to or in conflict with, the constitu-

tion or laws of the United States, or the constitution or laws of this state, and so far only as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, is hereby adopted, and shall be the rule of decision in all courts of this state."

The question then becomes: What was the common law of England with reference to actions for criminal conversation? Prior to 1857, the right to an action for criminal conversation existed under the common law of England. As will be shown, under Point 3 *infra*, this cause of action was quite different from the cause of action as conceived by both trial courts in the instant case. Whatever may have been the nature of the cause of action at common law in England, it was repealed by the Matrimonial Causes Act of 1857. Under this Act, a new cause of action was substituted for the old, which new cause of action provided that a claim for damages could be made by a husband against one who had engaged in intercourse with his wife *in an action wherein the husband sought divorce against his wife by reason of this infidelity*. In *Butterworth v. Butterworth*, 10 British Ruling Cases, Page 352, decided in 1920, there is a very interesting discussion on this point. The question before the court in that case concerned the measure of damages to be applied in a case arising under the Matrimonial Causes Act. The court said:

"The powers of the divorce court to award damages for adultery rests in Section 33 of the Matrimonial Causes Act, 1857, which Act abolished the old action of criminal conversation."

The court in commenting on the old repealed cause of action observed:

“The risk of damages might well have been deemed a check to the wanton inclinations of an intended adulterer. Whether the act has achieved its purpose I do not inquire. The matter is one for debate elsewhere. It may perhaps be regarded by many as a strong deterrent. It will suffice to say that the claim to damages for adultery is purely to anglo saxon countries and, as pointed out in the Royal Commission on Divorces, 1912, page 126, foreigners cannot understand how the English law allows it.”

In *Buchanan v. Crites*, 106 Utah 428, 150 P. 2d 100, the Supreme Court of Utah in discussing the adoption of the common law of England said:

“The common law of England as adopted by the various American jurisdictions, in addition to the principles developed by court decision *included all statutes in effect in England at the time of the adoption*. By virtue of statute /5 Richard II/ all forceable entries were made unlawful.” (Emphasis added.)

If Utah adopted the common law of England as modified by the Matrimonial Causes Act, then it must be concluded that no cause of action exists in the State of Utah for criminal conversation. If on the other hand it is concluded that the Matrimonial Causes Act did not affect the common law right to bring an action for criminal conversation, then the primary question becomes what was the common law right to such an action.

In *Crocker v. Crocker*, 98 Fed. 702, decided by the Federal Circuit Court in a case arising in Massachusetts, the Circuit Judge writing in 1899, three years after Utah became a state, discussed the common law right to bring an action for criminal conversation. The Court said:

"It will be seen that the common law gives a husband three different suits arising out of three different classes of circumstances. One is that '*per quod consortium amisit*,' arising out of a physical injury done the wife by trespass. The development of the law lead to including in this class cases of injury to the wife's person arising from mere negligence. The next class of cases consists of those commonly known as actions of 'criminal conversation.' The basis of this is trespass *vi et armis*, on the theory that the wife is not a free agent or separate person, and that, therefore, her consent is immaterial, so that the adulterer is pursued as a mere trespasser. The inapplicability of this class of actions as a remedy for a wrong complained of by the wife is at once apparent when it is remembered that it lies at common law, in behalf of the husband, even though the wife may be the actual seducer."

The court further said:

"At common law, as we have already said, the husband had an action for a trespass committed on the person of the wife, and for the consequences of a negligent act through which the wife suffered personal injury; but, even in those jurisdictions where the wife has been given a sole cause of action for tort, it has been found necessary to apply to the Legislature before a like action could be given her, even for the maiming of the husband, through which her pecuniary support, to which she had been accustomed, might be taken away."

It will thus be observed that the common law right to bring an action for criminal conversation was a peculiar development of the Anglo-Saxon law. It was based on coverture of the wife; of her inability to bring an action in her own name; and on a sort of property right which the husband had in his wife. The action was actually for trespass. Because of this peculiar development it was unthinkable at early common law that a wife could bring an action for criminal conversation against one who had sexual relations with her husband. We submit that this peculiar development of the English common law and the peculiar grounds upon which it was based were and are repugnant to the laws of the State of Utah and are not consistent with and adapted to the necessities of the people of this state as indicated in 68-3-1, Utah Code Annotated, 1953.

In the State of Utah, a husband has no property right in his wife. Women in the State of Utah have been completely emancipated. In fact, Utah has been a leader in this respect. In Utah, a wife has a right to bring actions in her own name. If criminal conversation is suitable and consistent with our laws and the necessities of our people, it necessarily would be available to both a husband and wife alike. The common law of England as it existed in territorial days offered no authority which would permit a wife or husband to bring a suit for criminal conversation.

We are not unmindful of the modern common law which is in effect in some states which permits actions for criminal conversation on an entirely different basis than that conceived by the common law of England and by the

early common law as it was followed in most of the early decisions in this country. We further note that in some jurisdictions the right to bring such an action is based on statute, and that in at least four jurisdictions the right has been abolished by statute. [See *Young v. Young*, 184 So. 187, 236 Ala. 627; *Bean v. McFarland*, 273 N. W. 332, 280 Mich. 19; *Burton v. Burton*, 192 Atl. 727; 15 N. J. (Misc.) 532; *Hanfgarn v. Mark*, 10 N. E. 2d 556, 274 N. Y. 570.]

In any event this is a case of first impression in this jurisdiction. The cause of action is in general modern disrepute. It had its origin in an antiquated property right which a husband had in his wife and depended on the coverture of the wife and the fiction that she could not consent. It was considered a trespass *vi et armis*. Without this peculiar development based on fictions and archaic ideas of marriage the cause of action would undoubtedly never have originated. It would have developed as a part of the action for alienation of affections. It has in fact, for all practical purposes, been cut back to that status by the Matrimonial Causes Act of 1857. We believe that this court should not create in this case of first impression, unpopular causes of action especially in the face of our statutory adoption of the common law of England, which abolished it and the peculiar archaic history which created it.

POINT III.

THE COURT ERRED IN INSTRUCTING THE
JURY ON THE ISSUE OF PUNITIVE DAM-
AGES AND IN PERMITTING EVIDENCE OF

WEALTH TO BE INTRODUCED ON THE ISSUE OF PUNITIVE DAMAGES.

The common law of England, as developed by the English courts, did not permit punitive damages in a case of criminal conversation. This is clearly indicated in *Butterworth v. Butterworth*, *supra* wherein the issue concerned the type of damages allowable to a husband against his wife's paramour in an action arising under the Matrimonial Causes Act. The court said:

"Excluding then the cases which fall within *Bernstein v. Bernstein*, *supra*, and excluding also this specific provision of Section 33 as to the allocation of awarded damages, it is clear that the claim to damages is to be tried as if in an action for criminal conversation."

The court then quoted from *Darbishire v. Darbishire*, 1890, 62 L. T. N. S. 664 wherein Lord Hansen said:

"A basic question is whether the damages are compensatory only, or whether they may be what the law calls exemplary or punitive damages."

The court in answering this query said:

"That the damages are at large is clear. This appears from all the decisions and text books * * * Apparently the action for criminal conversation became conspicuously *sui generis* and grew to be subject to particular rules as to damages, distinguishing it from other tort. In none of the textbooks later than Blackstone, it is stated that the damages may be exemplary or punitive * * * I can find no case in which the Judge told the jury that they might get exemplary or punitive damages in a case for criminal conversation."

The court, in *Butterworth v. Butterworth, supra*, then went on to say:

"I must therefore take it now to be the settled rule of this court, in spite of heavy verdicts given by certain juries that compensatory damages can only be given and that exemplary or punitive damages are not permissible. That it is not the function of the court to punish adultery as such, or to penalize mere sexual immorality as such, seems to be cogent as shown by the apparent settled rule [to which I hereafter refer], that costs are not given against a correspondent who was unaware at the time of his adultery that the woman was married."

If the common law of England clearly did not allow exemplary or punitive damages for criminal conversation, how did the law become established in some of the early decisions in this country?

One of the early decisions is the case of *Cornelius v. Hambay*, 150 Pa. 359, 24 Atl. 515, wherein the Pennsylvania court held that plaintiff was entitled to punitive damages in cases of this kind. The court in justifying its position said:

"This belongs to a class of cases in which the plaintiff has been allowed from time immemorial to recover punitive damages. Hence, we cannot sustain the fifth specification, in which it is alleged that the learned Judge erred in applying this principle. In view of the fact that it is the settled rule in the state, and so understood by nearly every practitioner, we do not care to enter into a discussion of the controversy upon this subject which has recently arisen between some of our text writers. Those who are curious in regard to it are referred

to the second volume of Greenleaf on Evidence,
* * * .”

This casual reference by the court to Greenleaf on Evidence, is especially interesting because Greenleaf on Evidence does not agree with the court's conclusion. In Volume 2, Greenleaf on Evidence, 16th Edition, Page 45, Section 55, the following is stated relative to the question of whether punitive damages are allowed in actions of this kind:

“But it seems that evidence of the defendant's property cannot be given in chief, in order to acquire damages, the true question being, not how much money the defendant is able to pay, but how much damage the plaintiff has sustained.”

As stated in *Butterworth v. Butterworth*, *supra*, “In none of the textbooks later than Blackstone it is stated that damages may be exemplary or punitive.”

It is suggested by counsel that the idea of punitive damages in this country arose not from authority in the English common law but from a statement by Blackstone which was misconstrued by the early lawyers in this country and by the early decisions.

Blackstone's statement is quoted in *Bean v. McFarland*, *supra*, as follows:

“Blackstone in the commentary states ‘adultery, or criminal conversation with a man's wife, though it is, as a public crime, left by our law to the coercion of the spiritual courts; yet considered as a civil injury * * * the law gives a satisfaction to the husband for it by an action of trespass *vi et*

armis against the adulterer wherein the damages recovered are usually very large and exemplary.’”

We submit that the foregoing gratuitous remarks of Mr. Blackstone, even assuming they should be given the force of law, do not “hold” that a jury should be instructed on the issue of punitive damages. We suggest that the comments of Blackstone form the basic authority for the proposition that punitive damages should be allowed and that as indicated in *Butterworth v. Butterworth, supra*, there are no English cases “in which the Judge told the jury that they might get exemplary or punitive damages in a case for criminal conversation.” Nor do we see any good reason why punitive damages should be allowed, particularly if there has not been alienation of affections. The law provides a punitive remedy for adultery under the penal code. Instructing the jury on punitive damages in both alienation of affections and criminal conversation permits the jury to punish twice for the same misconduct.

There is yet another compelling reason why punitive damages should not be allowed. Generally, the wife is quite as guilty as the defendant. It is not uncommon that she is the actual seducer. She is at least in *pari delicto* with the defendant. If the purpose is to punish what happens to the wife? In cases of reconciliation, also not uncommon, she actually may become the beneficiary of her own wrong by sharing in the punitive damages assessed against the one she may have seduced. While the penal code may not be adapted to the punishing of those who alienate affections, the same is not true for those who commit adultery.

POINT IV.

THE COURT ERRED IN GRANTING A NEW TRIAL ON THE FIRST CAUSE OF ACTION.

A. *The Plaintiff Did Not Make a Timely Motion for a New Trial.*

At the first trial the jury returned a verdict on April 17, 1958 of no cause of action for alienation of affections, and returned a verdict on the second cause of action for \$25,000.00 for criminal conversation. A judgment was entered on the verdict on April 7, 1958 which embodied the language of the verdict providing no cause of action and the language indicating a verdict of \$25,000.00 on the second cause of action. The formal words of the judgment were "WHEREFORE, * * * IT IS ADJUDGED and DECREED that said plaintiff have and recover from defendant the sum of \$25,000.00." Within the ten days provided by the new rule, defendant made a motion for judgment notwithstanding the verdict and for a new trial on the second cause of action only. The court in a Memoranda Decision dated the 20th day of May, 1958 found that the verdict was excessive and ordered a remittitor or a new trial (R. 74, 75).

On the 5th day of September, 1958 the plaintiff *ex parte* caused a new judgment on the verdict to be entered reciting a judgment of no cause of action for alienation of affections and on that day filed a motion for a new trial on both the first and second cause of action. The court in an order dated the 3rd day of June, 1958 granted the motion for a new trial.

It will be noted that the motion for a new trial on the first cause of action was filed over six weeks after the judgment was entered on the 17th day of June. Plaintiff attempted to escape the consequences of this late filing by causing a new judgment to be entered on the 5th day of September on the pretext that the judgment of April 17, 1958 did not clearly show a no cause of action on the first cause of action. It will be further noted that this new judgment was filed without notice even though notice is required under the Utah Rules of Civil Procedure, Rule 60(a).

Whether notice was required or not the so called new judgment did not alter plaintiff's status. The judgment of April 17, 1958 needed no amendment. It recited everything anyone need know to ascertain what had occurred (R. 70). Nor did plaintiff make any objection to it until September 5, 1958 when he without notice caused a new judgment to be entered which in no material way changed the original.

The rule is stated in 49 C. J. S., Page 180, Section 62, as follows:

"Generally the sufficiency of a judgment rests in its substance rather in its form, and, although an informal judgment may be opened to criticism, strict formality ordinarily is not essential to the validity of a judgment, and, if the record entry is sufficient in substance, mere irregularity or want of technical form will not render it invalid. Even where the form of a judgment is prescribed by statute, a departure from it is not necessarily fatal to the adjudication, a substantial compliance with statutory provisions with respect to form being sufficient."

As a practical matter the purpose of a judgment is to clearly inform so that execution may be made thereon. To say that the judgment of April 17, 1958 was not sufficiently informative would be to strain the technical beyond all sense of reality.

B. There Is No Evidence That the Wife's Affections Were Alienated Outside the State of Nevada.

No competent evidence was received upon which the jury could find that defendant alienated Mrs. Shaw's affections in the State of Utah.

It must be conceded at the outset that any alienation of affections in the State of Nevada is not actionable in the State of Utah. The court correctly instructed the jury in this respect at the first trial in Instruction No. 5 wherein the court said that an act resulting in alienation of affections must have "occurred within the State of Utah and not in the State of Nevada."

The record conclusively shows that if any alienation took place it was in Nevada. It was after plaintiff and his "wife" had moved from Salt Lake City that they first met the defendant (R. 418). The last time Mrs. Shaw was in Salt Lake City was in the summer of 1955 when she spent a three-week vacation with her family (R. 473). It was not until early 1956 that plaintiff first observed the change in her attitude toward him (R. 473). This was at a time that both plaintiff and Mrs. Shaw lived continuously in Las Vegas and at a time when defendant saw her there on several occasions (R. 475). A finding by the jury that the alienation took place in Utah would have no basis in the

evidence. The only possibility in this respect consisted of letter writing by defendant from Utah to Mrs. Shaw in Nevada.

It is submitted that if this caused the alienation of affections, the alienation necessarily took place in Nevada where the letters were received and not in Utah where the letters were mailed. We believe this conclusion is fundamental.

It is the law of the place where the alleged tort has been committed by which liability is to be determined.

Buhler v. Maddison, 105 Utah 39, 176 P. 2d 118

State v. Devot, 66 Utah 319, 242 Pac. 395

Orr v. Sassemann, 239 F. Supp. 548

Wawrzen v. Rosenberg, 12 F. Supp. 548

The place of the wrong is the place where the last event necessary to give rise to liability occurs. *Orr v. Sassman*, *supra*. *Restatement Conflict of Laws*, Sec. 377. In this case, the last even unquestionably occurred in the State of Nevada.

Under the circumstances of this case, the law of Nevada clearly governs liability. A case closely in point is *Gordon v. Parker*, 83 F. Supp. 40.

POINT V.

THE COURT COMMITTED PREJUDICIAL
ERROR AT THE SECOND TRIAL IN GIVING
INSTRUCTION NO. 11 (R. 124-125).

Instruction No. 11 is the sort of instruction that would clearly influence a jury in its deliberations. In it the court

categorically states what must be found. After clearly stating that the "plaintiff" cannot recover on his charge of alienation of affections provided affections were lost in Nevada, the court then inconsistently said in subparagraph (e) of Instruction 11 that he can recover if "Robert P. Pelton was not in Nevada at the time he caused her to lose her affections for Howard B. Cahoon."

The difficulty with this instruction is that the question is not where Pelton was, but where was Mrs. Shaw at the time the alienation of affections took place. The seriousness of this error becomes more apparent upon looking at the evidence of this case. During 1956 when plaintiff observed for the first time a change in his "wife's" attitude toward him, his "wife" was residing almost continuously in Las Vegas (R. 473). Her contacts with Pelton consisted almost exclusively of visits made by him to Las Vegas and by telephone calls and letters which came from outside the State of Nevada. These letters were written two or three times a month (R. 588). There were five or six telephone calls in 1956 (R. 588). If the jury found that these letters or phone calls made by Pelton while he "was not in Nevada" caused plaintiff's "wife" to lose her affections for her husband, then Instruction No. 11, and particularly subparagraph (e) thereof, directs the jury to find in favor of the plaintiff even though the affections were alienated in Nevada. Notwithstanding the fact that the affections were lost in Nevada, the jury could and probably did find that defendant was liable because he was not in Nevada, at the time the affections were lost.

POINT VI.

PLAINTIFF IS BARRED FROM BRINGING AN ACTION ARISING OUT OF HIS MARRIAGE BY REASON OF A PRIOR DIVORCE OBTAINED BY MRS. SHAW BASED ON HIS MISCONDUCT.

On December 4, 1956, Mrs. Shaw obtained a divorce from plaintiff on the grounds of extreme mental cruelty (R. 699). She was awarded custody of the minor children of the parties. Defendant filed no counterclaim or cross complaint and made no allegation or claim that the divorce was in any way caused by defendant's misconduct. Almost a year after this divorce was obtained, to wit, on the 7th day of October, 1957, plaintiff filed his action against the defendant for alienation of affections and criminal conversation.

Several courts, including the courts of England, have held that a prior divorce prevents a plaintiff from recovering for rights "acquired by marriage." See Iowa cases cited *infra*, and *Bergman v. Solomon*, 143 Ky. 581; 136 S. W. 1010, *Pollard v. Ward*, 289 Mo. 275; 233 S. W. 14, *Berney v. Adriance*, 157 App. Div. 628, 142 N. Y. S. 748, *Fry v. Derstler* (Pa.) 2 Yeates 278, *Weedon v. Trimbrell*, 5 T. R. 357, 110 Eng. Reprint 199.

It was so held in *Gleason v. Knapp*, 56 Mich. 291, 22 N. W. 865, as follows:

"If plaintiff had such a cause of action as he now asserts, it would not only have been admissible in evidence in that divorce suit, but it would have been an absolute and perfect defense to it. The

suggestion of the Circuit Judge that the jury might, if they saw fit, infer that that very divorce suit was the outcome of defendant's misconduct, cannot be allowed any force, since defendant's failure to defend on that ground, when that defense was open to him, and, according to his claim now, was known to him, left it as completely cut off as any other; and the decree is legally conclusive against him, that no such facts exist."

It was also so held in *Duff v. Henderson* (1921), 191 Iowa 819, 183 N. W. 475, which overruled *Wood v. Mathews*, 47 Iowa 409, and held in conformity with *Hamilton v. McNeil*, 150 Iowa 470; 129 N. W. 480. The court in *Duff v. Henderson*, *supra*, said:

"The court now holds that the appellant cannot maintain an action against the appellee for either alienation of the wife's affections or for criminal conversation, and the fact that appellant's wife obtained a divorce from him subsequent to the acts complained of is a complete bar to the right of the appellant to maintain either of said causes of action."

The Utah Supreme Court had this question before it so far as alienation of affections is concerned in the case of *Sadleir v. Knapton*, 5 Utah 2d 33, 296 P. 2d 278. The majority of this court held *contra* to the position urged here. Two dissenting Justices felt that a prior divorce should bar the action. Justice Henriod, in urging the Iowa position stated in the *Hamilton Case*, *supra*, said:

"Many Utah statutes were lifted from those of Iowa. The parent of 30-3-9, U. C. A., around which this case revolves, apparently was taken from Iowa, having been enacted in 1852. Iowa's in 1851. The statutes are identical. The statute of Missouri is not,

but is similar. Under the circumstances we should give great weight to the judicial interpretation of the Iowa statute by the Iowa courts, which in the Hamilton case, placed an opposite interpretation on its identical statute than is placed on our statute by the main opinion. We should follow the Iowa decision for the reason stated above and for reasons following.

“The main opinion arbitrarily excludes the right to sue for alienation of a wife’s affections from the rights ‘acquired by marriage,’ saying the quoted phrase means only rights between the spouses. There is absolutely no statutory basis for such a connotation. If a husband did not get the right to sue for alienation of his wife’s affections from the marriage, where did he get it? He had no such right during courtship, nor does he have such right after divorce. He has no such right where his mistress is lured away by Justice CROCKETT’S illicit suitor. There can be no logical or other escape from the fact that where there is no marriage there is no right to sue, so that it follows that a husband *has* to acquire his right to sue for alienation of his wife’s affections specifically, distinctly and directly from the consummation of a marriage. To say otherwise is to ignore fact and resort to fiction, putting words in the legislature’s mouth that it did not utter.

“If the legislature, as far back as 1852, or at any time thereafter, had intended to say what this court now says it said, it simply could have added three little words to its enactment, italicized as follows:

“‘When a divorce is decreed the guilty party forfeits all rights *against the other* acquired by marriage.’

“Who are we to read into the statute those italicized words left out by the legislature?”

POINT VII.

THE COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 22 (R. 114) AND IN GIVING INSTRUCTION NO. 13 (R. 126) AND NO. 15 (R. 128).

Defendant's Requested Instruction No. 22 was as follows:

"You are instructed that plaintiff is not entitled to recover any damages for loss of services, affection, consortium, companionship and society occurring, if at all, after December 4, 1956."

As herein shown plaintiff's "wife" obtained a divorce from plaintiff on December 4, 1956. This divorce was obtained on the grounds of plaintiff's misconduct. It had nothing to do with the defendant, and to so conclude would go beyond the decree and assume that the divorce was not decided for the reasons given. Thus, plaintiff, because of his own misconduct deprived himself of his "wife's" services, affection, consortium and society from December 4, 1956 and thereafter. Yet, the jury was instructed in Instruction No. 13 that plaintiff was:

"Entitled to recover such a sum of money as will fairly and reasonably compensate him for any loss of the companionship, aid, society and services of his wife which he has suffered and is reasonably certain to suffer *in the future* (emphasis ours) as a proximate result of the conduct of the other person."

In Instruction No. 15, the jury was invited to extend this damage element, not only into the indefinite future, but

for the entire life expectancy of the plaintiff and his wife, to wit: 28.43 years and 33.44 years. Instruction No. 15 further advised the jury that they could compensate the plaintiff for the loss of such affection if they found that "such affection would have continued for the joint lives of Howard B. Cahoon and Dorothy W. Cahoon (R. 128).

In *Beach v. Brown*, 20 Wash. 266, 43 L. R. A. 114, 72 Am. St. Rep. 98, 5 Pac. 46, a plaintiff wife brought suit for alienation of affections after she had divorced her husband. [presumably because of the grievance giving rise to the alienation] The court after holding that she might bring the action even after the divorce [Note, as pointed out in the Iowa decision these cases are distinguishable from those wherein the divorce was granted *because of the plaintiff's misconduct*] had been granted prior to the filing of alienation of affections said:

"Of course, the damages could not be calculated after the time when the decree of divorce was obtained."

What was said in *Beach v. Brown*, *supra*, is *a fortiori* so when applied to a case wherein the plaintiff was the wrong doer against whom the divorce was obtained. It was so held in *Prettyman v. Williamson*, 1 Penne. (Delaware) 224, 39 Atl. 731, [an action for alienation of affections] wherein the court said:

"The divorce granted by the legislature to Mrs. Prettyman, * * * may be and should be considered by you in mitigation of damages, if you should think the plaintiff entitled to recover damages, because the plaintiff would not be entitled to

any compensation for the loss of affection, society and services of his wife after she ceased to be his wife."

See also *Wilson v. Coulter*, 51 N. Y. S. 804.

Even if a divorce is not a complete defense to an action of this type, it does not follow that the plaintiff may recover damages for loss of services, companionship, etc., occurring after the date of a divorce in which he is the guilty party, or to which he agrees, thereby voluntarily giving up the right to such services and companionship. The court should not permit plaintiff to recover the pecuniary value of services, companionship, etc. to which he has no right.

POINT VIII.

THE COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY ON THE LIFE EXPECTANCY TABLES, INSTRUCTION NO. 7, FIRST TRIAL (R. 21), INSTRUCTION NO. 15, SECOND TRIAL (R. 128) AND IN PERMITTING COUNSEL TO ARGUE FROM THE SAME TO THE JURY.

In both trials, the Court instructed the jury on the life expectancy tables. For the reasons stated in Point VII, *supra*, this was error. There are additional reasons why the tables were inadmissible. Even without a divorce, instructing the jury on the basis of mortality tables permits the jury to indulge a presumption based upon other presumptions. It permits the jury to presume, not only that the plaintiff and his wife will live the normal life span

but that during this entire time they will continue to have love and affection for one another. It permits the additional presumption that plaintiff will continue to endure injury for an extended period of time. In the instant case, the first presumption reaches beyond the reasonable in view of the uncontradicted evidence that plaintiff's wife had only recently undergone a hysterectomy for carcinoma. The second presumption is impossible because of the divorce granted December 4, 1956.

In *Johnson v. Richards*, decided by the Supreme Court of Idaho in 1930, 50 Idaho 150, 294 Pac. 507, the court in an alienation of affections case clearly held that such tables are inadmissible. The court said:

“Over objection of appellant, the court admitted in evidence the American Experience Tables of Mortality (41 C. J. p. 216, note 65a) ‘for the purpose of showing the expectancy on the life of’ plaintiff’s husband. Respondent urges that the table is applicable to both respondent and her husband, their ages being the same, and was admissible to show the number of years respondent might have expected the association and support of her husband, on the theory that, where the marital relation is once shown to exist, there is a presumption that it continues until death. 38 C. J. p. 1328, § 102. Assuming such a presumption applicable to a case of this character, it is based upon the further presumption that the love and affection existing between the spouses would likewise continue until the death of one of them. We question if we are permitted to indulge in the latter presumption; but, in any event, we are asked to base a presumption upon a presumption, which we cannot do. The gravamen of respondent’s right to recover is founded upon the loss of her husband’s conjugal society or consortium, 30 C. J.

p. 1123; *Pugsley v. Smyth*, 98 Or. 448, 194 P. 686; *Boom v. Boom*, 206 Iowa 70, 220 N. W. 17. Such loss may or may not be permanent, according as the parties interested may subsequently determine. The same reasoning applies to the loss of support. Respondent was deprived of something that is of its nature not necessarily permanent; and mortality tables, 'at the best uncertain and conjectural evidence.' (*Kahn v. Herold* [C. C.] 147 F. 575, 582), could not aid the jury in assessing respondent's damages. See 3 Nichols on Applied Evidence, p. 3123. The expectation of life of respondent or her husband was not relevant under the facts of the instant case, and the admission of the tables was error."

Counsel for plaintiff, relying on the Court's instructions relative to mortality tables placed on the blackboard, during his argument to the jury, the life expectancy of plaintiff and Mrs. Shaw computed not only in years but in days, to wit, 10,300 days. He then placed on the board a computation of damages based on \$10.00 per day, \$8.00 per day and \$5.00 per day, together with a per diem offset for support. This was excepted to by counsel for defendant (R. 713, 714).

We believe there is a recent trend which strongly condemns this type of argument. The following cases so hold: *Botta v. Brunner*, 26 N. J. 82, 138 Atl. 2d 713, *Ahlstrom v. Minneapolis St. Paul & Sault Ste. M. R. Co.*, 244 Minn. 1, 68 N. W. 2d 873, *Gardner v. State Taxi*, 142 N. E. 2d 586 (Sup. Jud. Ct. 1957), *Union Pacific R. Co v. Field*, 137 Fed. 14 (8 Cir. 1905), *Alabama G. S. R. Co. v. Carroll*, 84 Fed. 772 (5 Cir. 1898), *St. Louis & S. F. Ry. Co. v. Farr*, 56 Fed. 994 (8 Cir. 1893). An excellent expression of the

position here urged is found in *Braddock v. Seaboard Air Line Railroad Co.*, 80 So. 2d 662 (Fla. Sup. Ct. 1955). In the *Ahlstrom case*, supra, plaintiff's counsel did about what counsel for plaintiff did in the instant case. The court said:

“‘An award for pain, suffering, and disability on a per diem basis ignores the subjective basis of such damages. * * * Each day of suffering is a part of a whole and will vary and generally decrease as time goes on. *To permit a per diem evaluation of pain, suffering, and disability would plunge the already subjective determination into absurdity by demanding accurate mathematical computation of the present worth of an amount reached by guesswork.* (Emphasis added.) Certainly no amount of money per day could compensate a person reduced to plaintiff's position, and *to attempt such evaluation, as in this case, leads only to monstrous verdicts.* (Emphasis added.)

POINT IX.

THE COURT COMMITTED REVERSIBLE ERROR IN THE SECOND TRIAL IN ALLOWING AN OFFSET OF \$17,000.00 AGAINST ONLY THE ALIENATION OF AFFECTIONS JUDGMENT.

Preliminary to this discussion, we are impelled to suggest that the whole question of damages in an action for criminal conversation reveals the absurdity of the action, especially when it is coupled with an action for alienation of affections. Independently of the effect it may have of causing loss of affections, what is the damage sus-

tained by a husband in an action for criminal conversation? Aside from the archaic basis in the common law property right which created the action, how is a husband pecuniarily damaged? What actually happens in these cases is that the jury is looking to the punishment of the defendant and not to compensating the plaintiff. This is not necessarily so in alienation of affections cases.

Be this as it may, the Court in both trials instructed the jury that they could compensate plaintiff for defendant's acts of criminal conversation for "* * * any and all damage he did sustain as a result thereof * * *." Instruction No. 12 (R. 126). In Instruction No. 13 the Court amplified Instruction No. 12 by saying: "You are instructed that one who has lost the love and affection of his wife because of intentional conduct on the part of another man is entitled to recover such a sum of money as will fairly and reasonably compensate him for any loss of the companionship, aid, society and services of his wife, which he has suffered and is reasonably certain to suffer in the future as a proximate result of the conduct of the other person."

The jury in the second trial returned a verdict of \$2,500.00 for alienation of affections, and \$25,000.00 for criminal conversation, and further found that \$17,000.00 would have been contributed by the plaintiff to his wife's support had she never met defendant (R. 133). This, of course, was intended by the jury as an offset. The court allowed this offset only against the \$2,500.00 returned on the alienation of affections action on the theory that the value of the duty to support could be offset only against

the award for alienation of affections. The court reasoned that the value of the duty to support could be offset only against the value of lost services, and that, loss of services was, by the instructions, an element of damages in the cause of action for alienation of affections, but not an element of damages in the case of criminal conversation.

There are two fallacies to the trial court's reasoning. First, the authorities recognize that loss of the value of services, less the value of the duty to support, is an element of a cause of action for criminal conversation. *Rash v. Pratt*, 111 Atl. 225; *Allen v. Rossi*, 146 Atl. 692. This rule was recognized by plaintiff in plaintiff's requested instruction to the jury, No. A (R. 86). Second, the instructions given to the jury actually permitted recovery for loss of services on the criminal conversation cause of action.

In view of the foregoing, the amount found by the jury to represent the value of the duty of support was intended by the jury to and should have been offset against both the verdict for alienation of affections and the verdict for criminal conversation.

Whatever may have been the trial court's theory, the jury obviously did not understand it, and we submit that any juror reading Instructions Nos. 12 and 13 would have assumed, as this jury did, that the offset in the amount of \$17,000.00 would be allowed in determining the net verdict. It is little comfort to the defendant that the jury may have misunderstood the instructions. Instructions are intended to clarify, not confuse, and when they fail in this purpose, reversible error has been committed.

POINT X.

THE COURT COMMITTED PREJUDICIAL ERROR IN PERMITTING COUNSEL FOR THE DEFENDANT TO READ TO THE JURORS QUESTIONS AND ANSWERS FROM DEPOSITIONS IN WHICH THE WITNESSES CLAIMED THEIR PRIVILEGE AGAINST SELF INCRIMINATION.

At the second trial, defendant read to the jurors from the deposition of the defendant and also from the deposition of Mrs. Shaw (R. 579-614) (R. 642-647). Many of these questions elicited answers in which the witness claimed the privilege guaranteed by the Federal and State Constitutions and also by the statutes of the State of Utah. The following is typical:

“[To Mrs. Shaw]

“Question: When you saw Mr. Pelton again in Las Vegas after being up here in July of 1956, if you did see him after that, did you have sexual intercourse with him at all?

“Answer: I refuse to answer that question on the same grounds that it may tend to incriminate me (R. 646).”

Mrs. Shaw claimed her privilege at least ten times in three pages in the evidence read from her deposition by plaintiff's counsel (R. 644-646). We believe this constituted prejudicial error. Counsel had only one apparent purpose in reading to the jurors the claim of privilege. He intended to and did prejudice them against the defendant.

In *Masterson v. St. Louis Transit Company*, 204 Mo. 507, 103 S. W. 48, the Missouri Court paid its respects to this sort of evidence. In that case, plaintiff brought an action for the death of his son who was struck by a street car. At the trial, the street car motorman was asked if he had not previously refused to testify at the coroner's inquest on the grounds that his answers might tend to incriminate him. The Supreme Court of Missouri said that this evidence was properly excluded. The court said:

"Plaintiffs were not entitled to have the jury in this case draw an inference to the prejudice of the defendant from the fact that the motorman, through caution, or timidity for his own sake, would decline to testify before the coroner.

* * * *

"We are now asked to declare that it is a right which the citizen will exercise at his peril, the peril of being branded with suspicion, the peril of having it brought up against him to impeach himself if he should ever assert his innocence. Such a ruling would be a gross impairment of the constitutional right; because it would burden it with a dangerous consequence."

The same conclusion was reached in *Barnhart v. Martin*, 327 Ill. App. 551; 64 N. E. 2d 743, where an action was brought to recover for death resulting from an automobile accident. The Supreme Court of Illinois held that it was proper to sustain an objection to an inquiry, directed to defendant by plaintiff's counsel for the purpose of impeachment, as to whether defendant refused to testify at the coroner's inquest on the grounds of the privilege against self incrimination.

The same result was reached in *Fries v. Berberich*, 177 S. W. 2d 640. (No Missouri citation could be found.)

We are aware that some courts would permit such testimony in a criminal or civil case *for the sole purpose of impeaching a witness*. Thus, in a criminal case if a defendant took the stand and protested his innocence some courts would permit the prosecutor to ask him if he had not on a previous occasion claimed his privilege on the identical matter. This would go to the credibility of the witness and would be in the nature of impeachment. Even in such cases the court would not permit the prosecutor to introduce the testimony of a party not a defendant over whom the defendant had no control for the purpose of showing that such party had claimed the privilege. The general rule in this respect is stated in 24 A. L. R. 2d 896 as follows:

“According to the few cases in which the precise question with which this annotation is concerned was in issue, the general rule is that when a witness, other than the accused, declines to answer a question on the ground that his answer would tend to incriminate him, that refusal alone cannot be made the basis of any inference by the jury, either favorable to the prosecution or favorable to the defendant.”

The editor cites the following cases in support of this proposition. *Beach v. United States*, 14 Sawy 589, 46 Fed. 754, *People v. Glass*, 158 Calif. 650, 112 Pac. 281, *Billeci v. United States*, 184 F. 2d 394, *Powers v. State*, 75 Neb. 226, 106 N. W. 332, *State v. Harper*, 33 Ore. 524, 55 Pac. 1075. The editor then states:

“No case has been found expressing a view opposite to the general rule as stated above. Con-

sequently, despite the relative dearth of authority, such rule may be considered as well settled, especially since it is in accord with the general principles of criminal law as to the protection of the rights of an accused."

In a civil case it could be urged that where a defendant takes a stand and protests his innocence, the cross examiner could ask him if he had not on a prior occasion claimed his privilege. This is not what occurred in the instant case. Here plaintiff took the deposition of defendant placing him in the position where on the advice of counsel he claimed his privilege. At a subsequent time this testimony was read, not for the purpose of impeachment and not for the purpose of proving or disproving a fact but ostensibly and obviously for the purpose of prejudicing the jurors.

The only possible justification for reading the questions and answers eliciting the claim of privilege would be if the fact of claiming the privilege constituted substantive evidence of the guilt of the witness. We know of no court that has gone so far. The most that has been said is that such evidence is admissible for the purpose of impeachment.

Nor do we question the right of counsel to question a witness *on the witness stand* about matters which may result in a claim of privilege. It is quite another matter to read from a deposition the question and answer in which the privilege *has been claimed* and where the answer does not impeach.

POINT XI.

THE COURT COMMITTED PREJUDICIAL
ERROR IN REFUSING TO GIVE DEFEN-
DANT'S REQUESTED INSTRUCTION NOS.
24, 25 AND 26.

As stated in Point X *supra*, we believe that the deposition testimony of the defendant and the witness, Dorothy Shaw, former wife of plaintiff, wherein each claimed the privilege against self incrimination was inadmissible and reading the same to the jurors constituted reversible error. Defendant attempted to offset the effect of this error by the Requested Instructions Nos. 24, 25 and 26 which would have advised the jurors that no inference can be drawn from such refusal to answer. For the reasons stated in Point X, we believe failure to give these instructions constituted reversible error.

POINT XII.

THE COURT COMMITTED PREJUDICIAL
ERROR IN REFUSING TO GIVE DEFEN-
DANT'S REQUESTED INSTRUCTION NO. 20.

In Instruction No. 20 defendant requested that the jury be instructed that they could consider the evidence that plaintiff's "wife" had gone out with other men in mitigation of damages. The court erroneously noted in refusing this instruction, that it was given in substance.

We have carefully examined all the court's instructions and are unable to detect any indication that this matter

was referred to or even slightly touched upon. In fact the court's instruction as given eliminated this consideration. In Instruction No. 11, the court said:

* * * *

“* * * Even though there may be difficulties between a husband and wife and there may be unhappiness, the law recognizes that there is always a chance that such difficulties or unhappiness may be overcome or eliminated, and for that reason the law prohibits a third person from intentionally doing any act or engaging in any conduct that tends to interfere with, lessen, or destroy the chance that exists to overcome or eliminate any such difficulties or unhappiness. * * *”

The prevailing view is that, although previous conduct on the part of a spouse may not constitute a defense to an action of this type, it should be considered in mitigating damages.

Smith v. Hockenberry, 138 Mich. 129; 101 N. W. 207.

Frank v. Berry, 128 Iowa 223, 103 N. W. 358.

Allen v. Rossi, *supra*.

Matusak v. Kukzewski, 295 Pa. 208, 145 Atl. 94.

The evidence in this case is undisputed that plaintiff's wife had been out with other men. This was the testimony of plaintiff's daughter, Roxanne, as well as the sister of Mrs. Shaw. This evidence and the mitigating effect thereof was a vital part of defendant's defense, yet nowhere in the instructions was the jury charged that this evidence could be considered in mitigating damages.

It is of course well settled that a party is entitled to have his theory of the case presented to the jury.

Morrison v. Perry, 104 Utah 151, 140 Pac. (2d) 772.

POINT XIII.

THE COURT COMMITTED PREJUDICIAL ERROR IN ITS INSTRUCTION NO. 12.

This instruction permits the jury to award damages for mental anguish and distress, past, present and future. Appellant submits that there is no competent evidence to support this element of damages. In no event should this element of damages have been considered by the jury after the date upon which plaintiff's former wife was awarded a decree of divorce.

POINT XIV.

THE COURT COMMITTED PREJUDICIAL ERROR IN ITS INSTRUCTION NO. 13.

This instruction permits recovery for loss of companionship, aid, society, services and other elements of damages therein set forth.

No evidence was offered or received with respect to the value, if any, of the services, aid and society of plaintiff's former wife. In permitting the jury to award damages for these elements, the Court permitted the jury to speculate without any limitation or guide with respect thereto. One can search the record without finding any substantial or concrete evidence upon which to make a

determination as to damages for lost aid, society and services.

This instruction also permitted the jury to consider the services which the wife had rendered in the rearing of the children in the home and the assistance the wife had given in the management of plaintiff's business. Plaintiff, obviously, sustained no damage relating to the rearing of the said children, inasmuch as his said wife was awarded custody of the said children and has continued to rear the children. There is no evidence that the plaintiff's said wife had rendered any assistance in the management of plaintiff's business for a number of years, nor that there was any intention or contemplation that she would render such assistance in the future. To permit the jury to consider the services of the wife in rearing the children and assistance in the management of the business was to give it a roving commission by which it could further magnify the damages, without any real or substantial evidence or basis therefor.

POINT XV.

THE TRIAL COURT ERRED IN REFUSING TO GRANT A NEW TRIAL ON THE GROUNDS THAT THE VERDICT WAS GROSSLY EXCESSIVE AND UNWARRANTED BY THE EVIDENCE.

That the verdict in this case was grossly excessive and unwarranted by the evidence, both as to compensatory and punitive damages, is so apparent as to require only brief consideration herein.

The evidence was considered by the trial court in the first trial and determined not to warrant a judgment in favor of plaintiff in excess of \$5,000 compensatory damages. Judge Stewart M. Hanson ordered a remission of the verdict to \$5,000 compensatory damages or a new trial. There was little difference in the evidence presented on the second trial, and no material difference in the evidence relating to the issue of damages.

Appellant is aware that the court must read and consider the entire transcript in determining whether there is merit to this point. It would serve no useful purpose for appellant to set out the evidence relating to damages. It is sufficient to say that a careful consideration of the entire record will compel the conclusion that the evidence does not justify nor support the judgment.

CONCLUSION

It is respectfully submitted that the judgment should be reversed and the actions dismissed. In the event that the Court determines that the actions should not be dismissed, the judgment should be reversed and the action remanded for new trial, in accordance with the opinion of the Court prescribing the rules which apply to the many questions of first impression involved herein.

Respectfully submitted,

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