

1959

# Howard B. Cahoon v. Robert P. Felton : Brief of Respondent

Utah Supreme Court

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McBroom & Hanni; Attorneys for Plaintiff and Respondent;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

FILED  
- 1959

HOWARD B. CAHOON,  
*Plaintiff and Respondent,*

- vs -

ROBERT P. PELTON,  
*Defendant and Appellant.*

Clerk, Supreme Court, Utah

Case  
No. 8976

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BRIEF OF RESPONDENT

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McBROOM & HANNI,  
*Attorneys for Plaintiff  
and Respondent.*

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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HOWARD B. CAHOON,  
*Plaintiff and Respondent,*

- vs -

ROBERT P. PELTON,  
*Defendant and Appellant.*

} Case  
No. 8976

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## BRIEF OF RESPONDENT

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### STATEMENT OF FACTS

Plaintiff, Howard B. Cahoon, married his wife, Dorothy Cahoon, in Salt Lake City, Utah, on June 28, 1947. (Exhibit P-2). He met his wife approximately a year before the marriage while she was working as a waitress at the Hotel Utah. (R. 185, 188, 446, 480). Mrs. Cahoon had two daughters by a previous marriage. Plaintiff adopted the two girls in about 1953. (R. 157, 456).

Plaintiff, his wife and the two girls lived in Salt Lake until about 1950. During this time plaintiff and his wife worked together in the Jiffy Dog business. She would get up early in the morning, make and package

sandwiches, and then he would take the family car and deliver them to the various places in Salt Lake. Mrs. Cahoon worked on an average of five or six hours per day. (R. 163, 164, 460). This was plaintiff's first marriage. (R. 156). Plaintiff and his wife loved each other very much. While living in Salt Lake City they visited their relatives, attended screenings together, took trips together and enjoyed each others company. Mrs. Cahoon was an excellent mother and wife. (R. 164, 165, 459 and 460). After moving to Las Vegas in about 1950, the relationship between plaintiff and his wife continued good. They attended conventions together, worked together in the drive-in theaters, took trips together, went picnicking, horseback riding and swimming with the children. (R. 166-171, 466-471). Because of the nature of their business plaintiff and his wife were together a great deal.

Plaintiff and his wife had two children, "Andra" and "Brit". Dr. A. A. Anderson of Salt Lake City, Utah, took care of Mrs. Cahoon at the time of the delivery of Andra. The doctor in August of 1949, took a blood sample from Mr. and Mrs. Cahoon and found that they had blood types that might cause trouble with future pregnancies. The doctor called both Mr. and Mrs. Cahoon into his office and advised them of the danger of having a second child and also of having a third child because of their blood types. (R. 292-299, 684-690). Mrs. Cahoon at times would complain to plaintiff that they were not having sexual relations as often as perhaps they should. (R. 192). On one occasion soon after Mrs. Cahoon became pregnant with Brit the matter of not enough sexual intercourse came up during the conversation. Plaintiff in a burst of



anger stated to his wife that if they didn't have enough sexual intercourse then the baby must not be his. He was immediately sorry. He knew there was no foundation for what he said and he apologized. (R. 201, 202, 616, 617 and 621-3). We call the court's attention to the article in Exhibit P-3 regarding plaintiff's son, Brit, and plaintiff's testimony on pages 201, 202, 204, 205 and 501 and 502 of the record concerning the paternity of his son. Plaintiff completely answers any claim that he ever denied paternity of his son.

Plaintiff and his wife were introduced to Mr. Pelton in November of 1954. Mrs. Cahoon came to Salt Lake in June or July of 1955 and stayed for a period of three or four weeks. Plaintiff and his wife came to Salt Lake during the Christmas holidays of 1955 and stayed one week. Mrs. Cahoon was in Salt Lake again for a period of four or five weeks in June or July of 1956. (R. 363, 472). The next time defendant saw Mrs. Cahoon after their introduction was in Salt Lake City in the summer of 1955. (R. 333, 584). That fall defendant saw Mrs. Cahoon in Las Vegas. (R. 334, 585). Defendant wrote two or three letters per month to Mrs. Cahoon and called her five or six times from Salt Lake City between June, 1955 and June, 1956. (R. 334, 335, 337, 588). Mr. Pelton went through Las Vegas quite often and tried to call her on each occasion. He took her for a ride in his airplane. He saw Mrs. Cahoon in her mother's home in Salt Lake in December, 1955, when her husband was not present. Mr. Pelton took a fishing trip to Lake Mead in January or February, 1956, and at that time took Mrs. Cahoon out to dinner. He met her while Mrs. Cahoon was riding in

a boat with her daughter on Lake Mead. Mrs. Cahoon got into Mr. Pelton's boat. (R. 336-340, 587-591). Mrs. Cahoon and defendant went horseback riding in Evanston, Wyoming. They were alone while driving from Salt Lake City to Evanston and returning. Defendant kissed Mrs. Cahoon on several occasions both while she was here in Salt Lake City in the summer of 1955 and in 1956 and when he saw her in Las Vegas. (R. 341, 357, 592). Defendant told Mrs. Cahoon he was fond of her and she said she was fond of him. (R. 345, 596). Mrs. Cahoon told Mr. Pelton she loved him and he let her know that he returned her feelings. (R. 351, 602). They danced. He sent her a Valentine card and a bathing suit for her birthday. (R. 344, 360, 595, 611). Roxanne, plaintiff's daughter, testified that she saw Mr. Pelton for the first time in the Cahoon home in Las Vegas; that he was in the Cahoon home on four or five occasions and most of the time that was in the evening. He stayed there as long as an hour to an hour and one-half. That Mr. Pelton kissed her mother while in the kitchen of the home in the presence of some of Roxanne's friends. That defendant borrowed a swimming suit from Roxanne's boy friend, and defendant and Mrs. Cahoon left the house about 10:00 o'clock at night and did not return until about 10:00 o'clock the next day. (R. 271-278, 519-524). On one occasion Roxanne took her mother to the Aqua Motel in Las Vegas and left her there with Mr. Pelton for about an hour and one-half. When Roxanne returned Mr. Pelton and her mother were alone in the motel and were having some drinks together (R. 276, 277, 524). Defendant kissed her while in the motel. (R. 353, 604). Roxanne picked up let-

ters from defendant on four or five occasions addressed to a Ginger Cameron. (R. 277, 526). Roxanne was about fifteen years old during this time.

Plaintiff's daughter, Sylvia, testified she met the defendant once in their home. (R. 262, 511). She also picked up letters three or four times at the post office.

Roxanne finally told her father about Mr. Pelton in about September of 1956. Plaintiff and his wife separated soon thereafter.

Sometime in December, 1956, Richard C. Cahoon, brother of the plaintiff, had a conversation with the defendant during which he asked the defendant if he was going to marry Dorothy. When he asked the defendant, "Why did you ever go to Howard's home in front of his children?", the defendant said, "He didn't. That he would call her and she would meet him at his hotel or in town". Richard Cahoon asked the defendant about the time when he borrowed the swimming suit, and why he kissed Dorothy in front of the children. The defendant shrugged his shoulders and said there was no harm in that. Mr. Cahoon asked the defendant during this conversation why he slept with Dorothy in Howard's home and the defendant replied, "I never slept with her in the home, when I slept with her it was in a hotel or in Salt Lake City when the children weren't around." The defendant also stated to Mr. Cahoon, "I'm not the first one to sleep with Mrs. Cahoon besides her husband". (R. 302-305, 540-541).

Wayne B. Thiriot, a close friend of plaintiff and his wife, in the summer of 1956 was visiting in Salt Lake and did see Mrs. Cahoon and the defendant together in the Variety Club in Salt Lake. Mr. Thiriot had stopped in the Club late at night to get a drink and while there he saw Mrs. Cahoon sitting on a couch with a gentleman. This gentleman had his arms around her and was kissing her for sometime. Mr. Thiriot watched them for several minutes before Mrs. Cahoon finally became aware of the fact that he was there. Mrs. Cahoon introduced the gentleman she was with as Mr. Pelton. (R. 242-247, 558-563).

Early in 1956 plaintiff first noticed a change in his wife's attitude toward him. She became indifferent to going out on Saturday night, was upset when plaintiff cancelled a fishing trip at the last minute, seemed happy when plaintiff left town on his film buying trips and did not want to attend a convention and engage in other activities that they had done before. (R. 169-174, 473-475).

## STATEMENT OF POINTS

### POINT I

THE MARRIAGE BETWEEN PLAINTIFF AND HIS WIFE WAS VALID.

### POINT II

AN ACTION FOR CRIMINAL CONVERSATION IS RECOGNIZED UNDER NEVADA LAW AND UTAH LAW AND PUNITIVE DAMAGES MAY BE RECOVERED IN SUCH ACTION. (SEE DEFENDANT'S POINTS II AND III)

### POINT III

THE COURT DID NOT ERR IN GRANTING A NEW TRIAL ON THE FIRST CAUSE OF ACTION.

- A. PLAINTIFF'S MOTION FOR A NEW TRIAL WAS TIMELY.
- B. THE EFFECT OF THE COURTS ORDER GRANTING DEFENDANT'S MOTION FOR NEW TRIAL WAS TO GRANT A NEW TRIAL ON BOTH CAUSES OF ACTION.
- C. THE EVIDENCE IS SUFFICIENT TO SHOW THAT MRS. CAHOON'S AFFECTIONS WERE ALIENATED OUTSIDE THE STATE OF NEVADA.

### POINT IV

IT WAS NOT ERROR TO GIVE INSTRUCTION NO. 11. (R. 124-125).

### POINT V

PLAINTIFF IS NOT BARRED FROM BRINGING THE ACTIONS IN QUESTION BECAUSE OF THE FACT THAT PLAINTIFF'S WIFE OBTAINED THE DIVORCE.

### POINT VI

PLAINTIFF WAS ENTITLED TO RECOVER DAMAGES FOR FUTURE OR PERMANENT LOSS OF HIS WIFE'S SERVICES, AFFECTION, CONSORTIUM AND SOCIETY. (SEE DEFENDANT'S POINT VII)

### POINT VII

IT WAS NOT ERROR FOR THE COURT TO INSTRUCT THE JURY ON THE LIFE EXPECTANCY TABLE NOR TO PERMIT COUNSEL TO ARGUE THE SAME TO THE JURY.

## POINT VIII

IF THE COST OF SUPPORT OF PLAINTIFF'S WIFE IS AN OFFSET AT ALL, IT MAY ONLY BE OFFSET AGAINST THE \$2,500 THAT WAS AWARDED ON THE CAUSE OF ACTION FOR ALIENATION OF AFFECTIONS.

## POINT IX

THE COURT CORRECTLY PERMITTED PLAINTIFF TO READ DEPOSITIONS OF WITNESSES IN WHICH THE WITNESSES CLAIMED THEIR PRIVILEGE AGAINST SELF-INCRIMINATION. (SEE DEFENDANT'S POINT X AND XI)

## POINT X

THE COURTS REFUSAL TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 20 WAS NOT PREJUDICIAL.

## POINT XI

THE GIVING OF INSTRUCTION NO. 13 WAS NOT PREJUDICIAL ERROR.

## POINT XII

THERE WAS NO ERROR IN REFUSING TO GRANT A NEW TRIAL ON GROUND THAT THE VERDICT WAS EXCESSIVE.

## ARGUMENT

### POINT I

THE MARRIAGE BETWEEN PLAINTIFF AND HIS WIFE WAS VALID.

Dorothy Cahoon obtained an interlocutory decree of divorce in the State of California on March 19, 1946. She married the plaintiff, Howard Cahoon, in Salt Lake City, Utah, on June 27, 1947. On June 23, 1948, the final judgment of divorce was entered by the California

court and was ordered entered nunc pro tunc as of June 1, 1947. Since the entry of the final decree of divorce Dorothy Cahoon and plaintiff, Howard Cahoon, have lived together as husband and wife in the States of Utah and Nevada. Two children were born as issue of that marriage.

Section 133 of the Civil Code of California is quoted at length on page 19 of defendant's brief. We will not quote it again.

The legal effect of the California statute has been determined by the California court in several cases. In *Macedo vs. Macedo*, 29 Cal.App.2nd, 387, 84 P.2d 552, the parties were married in February, 1932, and lived together until 1936 when they separated. The appellant in this case then brought an action to annul the marriage on the ground that at the time of the marriage, Mary Macedo had a husband who was living. Mary Macedo had commenced an action against her husband one Moreira and an interlocutory decree of divorce had been entered on September 10, 1930. The present action for annulment was filed on November 6, 1936. On November 16, 1936, Mary Macedo, the defendant in this case, procured the entry of the final decree in the Moreira case nunc pro tunc as of September 11, 1931.

The court held that the entry of the decree nunc pro tunc was valid and hence that the marriage between the appellant who is the plaintiff in this case was valid with the defendant, Mary Macedo. The trial court's action in dismissing plaintiff's complaint for annulment was affirmed.

For other California cases to the same effect see *Ringel vs. Superior Court of Alameda County*, 128 P.2d 558, 54 Cal.App.2d 34 (1942); *In Re Hughes Estate*, 182 P. 2d 253 80 Cal. App. 2d 550; *Hamrick vs. Hamrick*, 260 P. 2d 188, 119 Cal. App. 2d 839.

The courts of States other than California have had occasion to construe the California statute authorizing the entry of a final judgment of divorce nunc pro tunc. *Shippee vs. Shippee*, 66 A.2d 77, 95 N.H. 450 (1949) involved an action by the plaintiff husband to annul his marriage with the defendant. Plaintiff and defendant were married in New York on April 5, 1946. On October 18, 1944, the defendant was granted an interlocutory decree of divorce from her prior husband by a California court. On February 25, 1948, a final judgment of divorce was entered by the California court. Plaintiff's petition for annulment of the marriage was filed April 29, 1948. On May 13, 1948, the California court entered an order which directed the clerk to enter the final judgment of divorce nunc pro tunc as of October 24, 1945.

In discussing the legal effect of the nunc pro tunc entry of the final judgment of divorce, the New Hampshire court said, "The validity of the marriage ceremony performed in New York on April 1946, depends upon the law of that state."

The New Hampshire court went on to say,

"The judgment of the California court entered May 13, 1948, that the parties to that action were finally divorced as of October 24, 1945, is conclusive upon all other courts including those



of New York. \* \* \* A judgment previously entered nunc pro tunc must be everywhere received and enforced in the same manner as though entered at the proper time. (See I Freeman Judgments Fifth Edition, page 263; 49 C.J.S. Sec. 121, page 256).

The New Hampshire court then cites *Giuliano vs. Giuliano*, 163 Misc. 655, 297 N.Y.S. 238, which holds that it is not contrary to the public policy of New York to recognize a decree of divorce entered by a West Virginia court nunc pro tunc and that such decree is binding upon the courts of New York. A second marriage in the State of New York was held valid although a previous divorce in West Virginia was made final by a nunc pro tunc decree in the latter State that was not entered until three years after the divorce and one year after the second marriage in New York. The New York court in the *Giuliano* case said,

“It was entered in West Virginia in 1935 nunc pro tunc as of August, 1932, which was an adjudication of that court that the divorce should date as of 1932. We may not question the procedure of the West Virginia court. Its decree is binding as of the date it fixed.”

The New Hampshire court went on to say,

Since the judgment of the California court declaring the divorce of defendant to be effective as of October 24, 1945, is conclusive upon all other courts, it follows that the marriage of the parties on April 5, 1946, should be declared valid. There is no public policy in this state contrary to such result. The trial courts action in denying the petition for annulment was affirmed and the trial

courts action in granting the defendant a divorce was also affirmed."

*Bannister vs. Bannister*, 181 Md. 177, 29 A.2d 287 was an action by the plaintiff husband against his wife for annulment of their marriage. Plaintiff and defendant were married on March 10, 1935, in the State of California. The defendant on October 16, 1929, had obtained an interlocutory decree of divorce in the State of California from her previous husband. The final decree of divorce was entered in California on May 27, 1935. On April 4, 1942, the California court entered another order directing that the final decree of divorce be entered nunc pro tunc as of October 18, 1930.

The Maryland Supreme Court held that the nunc pro tunc entry by the California court was effective as of the date the final judgment was ordered entered by the California court so that the marriage of plaintiff and defendant was valid.

*In Re Kelley's Estate*, 210 Ore. 243, 310 P.2d 328. On June 2, 1950, the defendant in this case married John L. Kelley in the State of Washington. At the time of the marriage defendant and Kelley were residents of the State of Oregon. On March 18, 1949, the defendant's previous husband obtained an interlocutory decree of divorce from her in the State of Washington. The defendant in this case on September 8, 1950 obtained a final decree of divorce in the Washington court. On August 14, 1952, John Kelley died in the State of Oregon. On August 29, 1952, the defendant in this case obtained an amended final decree of divorce in the Washington court

which amended decree ordered that the final decree of divorce be entered nunc pro tunc as of September 19, 1949.

The defendant in September of 1952, was appointed administratrix of her husband's estate. Prior to defendant's marriage with Kelley, he had made a will leaving all of his property to his sons and he had neither changed that will nor executed a new one after his marriage to the defendant.

The plaintiffs in this action, children of Kelley, filed a petition against the defendant for the removal of defendant as administratrix on the ground that she was not the widow of the decedent. The trial court denied the petition for the removal of the defendant as administratrix and entered an order determining that the heirs of the decedent, John L. Kelley, were his widow, the defendant, Ruth M. Kelley, and his two sons by a prior marriage. From this order the plaintiffs appealed.

The principal question for determination was whether the entry on August 29, 1952, of a final decree of divorce between defendant and her prior husband by the Washington court nunc pro tunc as of September 19, 1949, pursuant to the Washington statute validated the marriage on June 2, 1950, of defendant and the decedent, John L. Kelley. If the marriage was valid, it revoked the will executed by the decedent prior to such marriage.

Washington in 1949 enacted substantially the same statute as had been enacted in California relative to entering final decrees of divorce nunc pro tunc.

It was argued by the plaintiffs in this case that they had acquired vested rights in their father's estate that should not be disturbed by permitting the divorce decree to be entered nunc pro tunc. The Oregon court said at page 336.

“In our opinion, the interest acquired by the plaintiffs in their father's estate upon his death was not the kind of vested right protected from the entry of a nunc pro tunc decree.”

The Oregon Supreme Court affirmed the trial court and held that the entry of the Washington divorce nunc pro tunc had the effect of validating the marriage of the defendant with the decedent, John Kelley. It also held that it had the effect of revoking the will of the decedent.

For other cases announcing the same principles, see *Abramson vs. Abramson*, App. D.C. 193; 49 F.2d 501 and *Mock vs. Chaney*, 36 Colo. 60, 87 P. 538.

For cases recognizing and upholding the power of a court to enter a final decree of divorce nunc pro tunc with out the aid of a statute such as that in effect in the State of California and the State of Washington, see *Snodgras vs. Snodgras*, 85 Ohio App. 285, 88 N.E.2d 616 (1948); *Perdew vs. Perdew*, 99 Colo. 544, 64 P.2d 602.

The Utah Supreme Court in the case of *Anderson vs. Anderson*, 121 U. 237, 240 P.2d 966 in considering the presumption of the validity of a second marriage said:

“The presumption of the validity of a second marriage is one of the strongest disputable presumptions known in law. It is not to be broken

in upon or shaken by a mere balance of probability. The court held that the evidence to overcome this presumption must be clear and convincing."

The validity of the marriage of Howard Cahoon and Dorothy Cahoon is to be determined by Utah law. In accordance with the authorities cited above the Utah law refers us to the California law to determine what the legal effect of the California decree of divorce was. Under the California law, entering the final decree nunc pro tunc had the effect of declaring that the status of Mrs. Cahoon was that of a single person at the time she married Howard Cahoon. The effect of that was to validate the marriage unless that by so doing it would be against the public policy of the State of Utah. As shown by the Anderson case cited above the policy of Utah law is to validate a marriage where that is possible. It is also the policy of Utah law to legitimate children and not to declare void a marriage and thereby bastardize the children. Under the facts of this case, there is no reason at all for the Utah law not to give the same effect to the entry of the California decree of divorce nunc pro tunc as it is given under California law and thereby give full faith and credit to the California decree.

Article IV Sec. 1 of the Constitution of the United States provides "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." 28 U.S.C.A. 1738 provides in substance that the judicial proceedings of a state shall have the same full

faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such state, territory, or possession from which they are taken.

We submit that under the cases cited above the marriage of Howard Cahoon and Dorothy Cahoon was valid.

## POINT II

AN ACTION FOR CRIMINAL CONVERSATION IS RECOGNIZED UNDER NEVADA LAW AND UTAH LAW AND PUNITIVE DAMAGES MAY BE RECOVERED IN SUCH ACTION. (SEE DEFENDANT'S POINTS II AND III)

The Nevada Supreme Court recognized that the action of criminal conversation exists under Nevada law in the case of *Rehling vs. Brainard*, 114 P. 167, 38 Nev. 16. The action of criminal conversation concededly has not been abolished in the State of Nevada.

The defendant claims that when the common law was adopted in Utah by statute in 1898 that such adoption meant the common law as it existed in England as of 1898. When we adopted the common law in 1898, did we mean the common law as it existed in England as of that time or did we mean the common law which generally prevailed in this country as of 1898? Our Supreme Court has held in the case of *Hatch v. Hatch*, 46 U. 116, 148 P. 1096 (1915) that the common law that was adopted in Utah was the common law that generally prevailed in this country and not necessarily as it existed in Great Britain. The Utah Court said at page 1100,

“Our conclusion, therefore, is that, while Congress, by extending over the territory of Utah the Constitution and Laws of the United States, put in force, in the language of the Supreme Court of the United States, ‘the system of common law and equity which *generally prevails in this country*’, yet did not so extend or transplant the *common law of England*, with all its rigor and harshness, but only so much of it as was and had been generally recognized and enforced in this country, and as is and was suitable to our conditions. There is much to support the view that when the colonists left Great Britain they brought with them and adopted, so far as suitable to their new conditions and surroundings, the usages and customs then prevailing in Great Britain. There is no good reason, however, for saying that as to those who migrated from the states and settled in territory never under the British dominion.”

The Utah Supreme Court in the Hatch case cited the decision of the United States Supreme Court in the case known as *Mormon Church vs. United States*, 136 U.S. 62, 10 S. Ct. 792, 34 L. Ed. 481, where the court said,

“But it is apparent from the language of the Organic Act, which was passed September 9, 1850, \* \* \* that it was the intention of Congress that the system of common law and equity which generally prevails in this country should be operative in the territory of Utah, except as it might be altered by legislation. \* \* \* In view of these significant provisions, we infer that the general system of common law and equity, as it prevails in this country, is the basis of the law of Utah.”

It should be noted that the Organic Act of 1850 declared that the Constitution and laws of the United States

extended over the territory of Utah. The Matrimonial Causes Act, that was adopted in England and upon which the defendant relies, was not enacted until 1857. Since the common law that was adopted in Utah was the common law that generally prevailed in this country it cannot be claimed that the Matrimonial Causes Act adopted in 1857 in England could have effect in this state.

It is conceded by defendant that virtually all of the States in the United States recognize the common law action for criminal conversation. The only states that do not recognize that action are the ones that have abolished it by statute.

The following is said in the footnotes of 27 Am. Jur. Sec. 535, page 135,

“In England although the common law action for criminal conversation was abolished by Section 59 of the Matrimonial Causes Act, yet by Section 28 and 33 of that Act the husband may, on a petition against the adulterer alone, or upon joining him as correspondent in a petition against his wife for dissolution of the marriage, recover damages assessed by a jury as in an action at law. There is, in other words, no obligation of the husband’s right of action against the adulterer, but only a change as to the form of remedy. It also leaves unaffected his cause of action for enticing his wife to abandon him, or to recover for loss of consortium when caused by physical injury to her person. *Nolin vs. Pierson*, 191 Mass, 283, 77 N. E. 890.”

“*Burnstein vs. Burnstein*, (1893) 12 Eng. Rul, Cas. 783, held that claims for damages against the correspondent in a divorce proceeding under the



Matrimonial Causes Act are to be tried on the same principles and in the same manner as common law actions for criminal conversation.”

The Utah Supreme Court has held in several cases, *Wilson v. Oldroyd*, 267 P.2d 759, 1 U.2d 362, *Sadleir v. Knapton*, 296 P.2d 278, 5 U.2d 33, that an action for alienation of affections is recognized in Utah. It certainly, therefore, would not be against the public policy of the State of Utah to recognize an action for criminal conversation. Many states, that have abolished by statute the action for alienation of affections have retained and refused to abolish the action for criminal conversation. Among such states are Pennsylvania and Nevada. The policy favoring the action of criminal conversation is well stated in 27 Am. Jur., Sec. 535, page 135, where it is stated,

“A fundamental right which flows from the relation of marriage, and one which the well being of society requires shall be maintained inviolate, is that of one spouse to have exclusive marital intercourse with the other, and whenever a third person commits adultery with either spouse, he or she commits a tortious invasion of the rights of the other spouse, from which a cause of action for criminal conversation arises.

The legislature by enacting Section 78-7-4, U.C.A., 1953, has recognized that the action for criminal conversation does exist in the State of Utah. That statute provides,

“In an action of divorce, *criminal conversation*, seduction, abortion, rape or assault with intent to commit rape, the court may, in its discretion, exclude all persons who are not directly

interested therein, except jurors, witnesses and officers of the courts; and in any cause the court may in its discretion during the examination of the witness exclude any and all other witnesses in the case.”

See the discussion of the term “criminal conversation” as used in this statute in *State v. Beckstead*, 96 U. 528, 88 P. 2d 461.

We think that our discussion regarding defendant’s claim that the action of criminal conversation does not exist in the State of Utah pretty much disposes of the defendant’s claim that punitive damages are not recoverable in Utah in an action for criminal conversation. If the action is recognized in Utah, as we think it definitely is, and if punitive damages are recoverable in an action for alienation of affections as they definitely are, *Wilson v. Oldroyd*, supra, we can see no good reason why punitive damages should not be recoverable in an action for criminal conversation. Most states permit the recovery of punitive damages in an action for criminal conversation, 27 Am. Jur., Sec. 546, page 146. 31 A.L.R. 2d 725 states the rule as follows:

“It has generally been held in this country that punitive or exemplary damages are recoverable in an action for criminal conversation.”

27 Am. Jur., Sec. 552, page 153, states, “The law presumes malice from criminal conversation, in an action therefor.”

### POINT III

THE COURT DID NOT ERR IN GRANTING A NEW TRIAL ON THE FIRST CAUSE OF ACTION.

#### A. PLAINTIFF'S MOTION FOR A NEW TRIAL WAS TIMELY.

Judgment was entered after the first trial by the clerk in favor of the plaintiff for the sum of \$25,000 (R. 70). The court in its memorandum decision, dated May 20, 1958, ordered a remittitur or a new trial (R. 74, 75). Plaintiff refused to remit and the court on June 3, 1958, entered its order granting defendant a new trial. An examination of the judgment on the verdict dated April 17, 1958, shows that a judgment of no cause of action was not entered on the first cause of action for alienation of affections. On September 5, 1958, plaintiff, upon discovering that such a judgment had not been entered on the first cause of action, prepared such a judgment and with the approval of the court had it signed by the clerk. Immediately following the signing and the filing of that judgment, plaintiff filed a motion for a new trial on the cause of action for alienation of affections. That motion was argued on September 9, 1958, and an order granting a new trial on the first cause of action was entered on September 11, 1958. (R. 81). The Utah Supreme Court has considered two cases involving a "judgment on verdict" that was exactly the same as the April 17, 1958, judgment that was entered in this case. Those cases are *Kourbetis v. National Copper Bank*, 264 P. 724, 71 U. 232 and *Ellinwood v. Bennion*, 276 P. 159, 73 U. 563. The judgments in the two cases cited contained recitals of the jury verdict, but when they

got to the "wherefore clause" of the judgment or the "decretal" part they did not order adjudge and decree and settle the rights between the parties. The court in both the Kourbetis and Ellinwood case held the judgments were not final judgments from which an appeal would lie. 49 C.J.S., Sec. 71, page 190, states the rule as follows,

"While under code practice a recital of facts in a equitable decree is usual and proper, only the decretal part of the decree determines the rights of the parties and constitutes the final judgment in the case."

There having been no final judgment entered on April 17, 1958, and none having been entered until September 5, 1958, plaintiff's motion for new trial on the first cause of action for alienation of affections having been filed on September 5, 1958, immediately following the entry of the judgment was timely. See Rule 54(a) and 59(b) URCP.

**B. THE EFFECT OF THE COURTS ORDER GRANTING DEFENDANT'S MOTION FOR NEW TRIAL WAS TO GRANT A NEW TRIAL ON BOTH CAUSES OF ACTION.**

In any event the effect of the order of the trial court contained in its memorandum decision of May 20, 1958, and the order dated June 3, 1958, granting the new trial was to grant a new trial as to the entire case. See 66 C.J.S., Sec. 210, page 541 where the rule is stated:

"An order for a new trial in general terms, not expressly limited to particular issues or parties, opens up the whole case for further pro-

ceedings, even though the ground on which the new trial is based affects a part of the issues only, provided the order for the new trial does not restrict it to those issues and the presumption is against such restrictions.”

See *Cramer v. Bock*, 21 Wash. 2d 13, 149 P. 2d 525, where the court cites 3 Am. Jur., Appeal and Error, Sec. 1228 as follows,

“The right to limit the issues when ordering a new trial should be exercised only when it is clear that no injustice will result from so doing. As much more of the case must be retried as may be necessary in order to afford the parties a fair trial. Generally, it may be said before a partial new trial may properly be granted, it should clearly appear that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice and without danger of complication with other matters.”

In 66 C.J.S., Sec. 11, page 99, the rule is stated,

“Where there are distinct counts or causes of action and separate findings, there may be a new trial as to a part only of such counts or causes, where this can be done without danger of confusion or prejudice. On the other hand, where the two causes of action stated in the complaint arose out of the same transaction, it is within the discretion of the trial court to grant a new trial on the whole issue \* \* \* and a new trial as to all issues has been required where the verdicts on the several causes of action are inconsistent with one another and the evidence in support of all the causes is substantially similar.

C. THE EVIDENCE IS SUFFICIENT TO SHOW THAT  
MRS. CAHOON'S AFFECTIONS WERE ALIENATED  
OUTSIDE THE STATE OF NEVADA.

In so far as the activities of Mr. Pelton and Mrs. Cahoon in the State of Utah are concerned, the evidence shows the following. Mrs. Cahoon was in Salt Lake for three or four weeks in June or July, 1955, (R. 363, 472). Mrs. Cahoon was here in Salt Lake for one week during Christmas 1955 and was here for three or four weeks in June or July of 1956 which was just a month before plaintiff learned of the relationship between defendant and plaintiff's wife. (R. 363, 472, 473). Defendant went horseback riding with Mrs. Cahoon in Evanston, Wyoming, kissed her while she was here in the summer of 1955 and 1956. (R. 341, 342, 357, 592). Defendant took her to the Variety Club in Salt Lake in the summer of 1956 where he was observed with his arms around her, kissing her and having drinks with her. (R. 246, 561). Defendant wrote letters from Salt Lake addressed to Mrs. Cahoon, sent her a bathing suit for her birthday, a valentine card and called her on the telephone from Salt Lake. (R. 334-337, 588). Defendant refused to testify and claimed his privilege against self-incrimination when asked whether or not he had had sexual intercourse with Mrs. Cahoon while she was in Salt Lake in the summer of 1955, in December of 1955 and in the summer of 1956. (R. 342-344, 594). The evidence shows that the last time defendant and Mrs. Cahoon saw each other prior to the time Mrs. Cahoon and the plaintiff separated was while Mrs. Cahoon was here in the summer of 1956. We submit that under the circumstances of this case there is ample

evidence from which the jury could find that the acts that occurred outside the State of Nevada were a substantial factor in alienating the affections of plaintiff's wife.

#### POINT IV

IT WAS NOT ERROR TO GIVE INSTRUCTION NO. 11.  
(R. 124-125).

Defendant's exceptions to Instruction No. 11 are contained on pages 707 and 708 of the record. Defendant did not take exception to the instruction on any ground that is now raised by defendant in his Point No. V as being prejudicial error. Having failed to properly except to the instruction, the defendant cannot now claim it is erroneous. Furthermore an examination of instruction No. 11 as a whole shows the jury could not have been misled by it.

#### POINT V

PLAINTIFF IS NOT BARRED FROM BRINGING THE ACTIONS IN QUESTION BECAUSE OF THE FACT THAT PLAINTIFF'S WIFE OBTAINED THE DIVORCE.

Defendant claims that plaintiff is barred from bringing the actions in question because of the fact that plaintiff's wife obtained the divorce.

Defendant recognizes that the court in the case of *Sadlier v. Knapton*, 5 U. 2d 33, P. 2d 278, has held specifically that the fact that the wife obtains the divorce does not preclude the husband from maintaining an action against a third party for alienation of affections. That case is the law of this State.

## POINT VI

PLAINTIFF WAS ENTITLED TO RECOVER DAMAGES FOR FUTURE OR PERMANENT LOSS OF HIS WIFE'S SERVICES, AFFECTION, CONSORTIUM AND SOCIETY. (SEE DEFENDANT'S POINT VII)

Defendant claims that plaintiff could only recover for loss of services, affection, consortium, companionship and society of his wife down to the time of the divorce. It should be noted that the cases cited by defendant in support of that argument are extremely old cases.

The court in the case of *Wilson v. Oldroyd*, supra, has decided this point and in so doing used the following language,

“No one will gainsay that the task of placing a monetary value upon the affections of a wife is fraught with grave difficulty. The valuation is of course not on a strictly out of pocket basis and cannot be computed solely from contributions of money to be expected, nor the value of domestic services alone. There are other intangible but definite values in the comfort and society, love and companionship, and other privileges attendant upon the estate of marriage for which compensation can be awarded, *not only up to the time of divorce*, but for permanent loss of such conjugal rights.”

The Utah Court cites Restatement of Torts, Sec. 910, page 559 and *Riggs v. Smith*, 52 Idaho 43, 11 P. 2d 358 in support of that holding. The Idaho case states the rule as follows,

“The plaintiff is not limited to a recovery of damages measured by the loss of consortium



down to the date of the commencement of the action, but is entitled to damages measured by the permanent loss of the spouse's aid, comfort and companionship."

See also *Genness v. Simpson*, 78 A. 886, 84 Vt. 127; *Bryant v. Carrier*, 198 S.E. 619, 214 N.C. 191; 42 C.J.S., Sec. 706, page 361.

## POINT VII

IT WAS NOT ERROR FOR THE COURT TO INSTRUCT THE JURY ON THE LIFE EXPECTANCY TABLE NOR TO PERMIT COUNSEL TO ARGUE THE SAME TO THE JURY.

The defendant cites *Johnson v. Richards*, 50 Idaho 150, 294 P. 507, as authority for the argument that the mortality tables are inadmissible. The court in the case of *Fife v. Adair*, 47 P. 2d 145, 173 Okl. 234, in an action by a wife for the alienation of her husband's affections had occasion to consider the same question and in so doing discussed the Idaho case. After quoting that part of the Idaho case which is quoted verbatim in defendant's brief, page 45, the Oklahoma Court said,

"To follow this case would be to hold that the tables are not admissible in any kind of action for the loss of support. The court in the Johnson case says that to so hold would base a presumption upon a presumption. That is, that the marital relation once shown would continue to exist until death and that the love and affection would likewise continue until the death of one of them. This court has held in a number of cases that in an action for damages for the loss of support on account of personal injury the American Mortality Tables are competent evidence for the con-

sideration of the jury along with the other evidence for what ever probative value they may have. *City of Shawnee et al. v. Slankard*, 29 Okl. page 133, 116 P. 803, syllabus: 'The expectation of life of one injured by another's negligence may be shown as a basis for the estimation of damages in a case where the evidence tends to show the injury is permanent, and standard tables of mortality are admissible in evidence upon this question.'

"The loss of support is an element of damage in this case. To hold that the American Tables of Mortality are not admissible for the reason that it would base a presumption upon a presumption would overrule and set aside every case by this court wherein it has been held that such tables are admissible to prove expectation of life where loss of support was an element of damages. In a personal injury case, it would be contended with equal force that you would first have to presume marital relation would continue until death, and the further presumption of continuation of support. *Adair* was not a witness in this case; in determining the question of the amount plaintiff would be entitled to recover for the loss of the support of her husband, certainly the jury would be entitled to know something as to his age and condition of health. A larger sum should be allowed for the loss of a husband who is young and vigorous than an older one whose earning capacity would not be as great on account of his age and condition of health. These tables are not admitted in evidence as absolute guides to control the decision of the jury, but for whatever weight the jury may give them along with the other evidence in the case."

The Utah Supreme Court has held in a number of cases that the mortality tables are admissible. See *Ben-*

*nett v. The Denver and Rio Grande Western Railroad Company*, 213 P. 2d 325, 117 U. 57; *Shields v. Utah Light Traction Co.*, 99 U. 307, 105 P. 2d 327; *Schlatter v. McCarthy*, 113 U. 543, 196 P. 2d 968.

In view of the ruling by the Idaho Court in the later case of *Riggs v. Smith*, supra, to the effect that permanent loss of services are recoverable in an alienation of affections action, it is doubtful that the Idaho Court would follow the Johnson case again.

It has not been followed by any other court and has been rejected by the Oklahoma court.

The holding of the Johnson case to the effect that the mortality tables are inadmissible because it permits a presumption to be based upon a presumption is plainly wrong. As pointed out by the Oklahoma Supreme Court, exactly the same argument could be made to the admissibility of the tables in a wrongful death or personal injury action. As noted, Utah in a long line of decisions, has admitted the tables in wrongful death and personal injury actions.

As to defendant's claim that it was improper for plaintiff's counsel to argue the mortality tables to the jury, it should be noted first of all that during the argument defendant did not object to plaintiff's argument concerning the mortality tables. The only objection that was made was after the argument had been completed. Defendant did except, (R. 713, 714) to such argument by plaintiff, but did not object during the course of it. The cases cited by defendant to the effect that

such an argument may not be made are cases dealing with an argument concerning damages for pain, suffering and so forth on a per diem basis. Those cases have nothing to do with an argument involving the damages for loss of services.

*Wilson v. Oldroyd*, supra, holds that the husband, in an alienation of affections actions, may recover for permanent loss of services of his wife. There is no difference in permitting use of the mortality tables as an aid to the jury in estimating damages for loss of services in an alienation of affections action and a personal injury or death action. That such tables may be used under Utah law, see: *Mitchell v. Arrowhead Freight Lines, Ltd.*, 214 P. 2d 620, 117 U. 224.

#### POINT VIII

IF THE COST OF SUPPORT OF PLAINTIFF'S WIFE IS AN OFFSET AT ALL, IT MAY ONLY BE OFFSET AGAINST THE \$2,500 THAT WAS AWARDED ON THE CAUSE OF ACTION FOR ALIENATION OF AFFECTIONS.

The trial court offset the cost of support against only the \$2,500 awarded for alienation of affections on the theory that the value of the duty to support could be best offset only against the value of lost services, and that, loss of services was, by the instruction, 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.

Instruction No. 12 (R. 126) states the measure of damages for criminal conversation and it should be noted

from that instruction that the jury was permitted to take into account only the shame and ridicule which the husband would be subjected to and the mental anguish and distress which he would necessarily suffer by reason of said illicit conduct on the part of the one who had relations with his wife. Instruction No. 13 which pertains to alienation of affections specifically states that in fixing the amount of plaintiff's damages for that cause of action the jury may take into account loss of companionship, aid, society and services of the wife. Defendant did not take exception in any way to the court's Instruction No. 12 which pertains to the measure of damage for criminal conversation. (R. 707-710). It should also be noted that defendant took the position at trial that the value of the husband's duty to support would be deductible from the value of the lost services. On page 708 of the record the defendant's counsel took exception to Instruction No. 13 and in so doing said,

“On the ground that the instruction does not charge the jury that they must take into account in determining the value of lost services, if any, the value of the husband's duty to support. It is defendant's contention that the law is that the measure of damages is the value of the lost services less the value of the husband's duty to support.”

If there was any error in the court refusing to permit the jury to consider loss of services in arriving at its award of damages for criminal conversation, that error has been waived by defendant's failure to take exception to Instrument No. 12 and furthermore that error was an error in favor of the defendant of which he may not

now complain. If anyone was prejudiced by not permitting the jury to consider loss of services on the cause of action for criminal conversation, it was the plaintiff, not the defendant.

The defendant claims that it was the intention of the jury that the amount of \$17,000 support should be deducted from the entire verdict. During plaintiff's argument to the jury it was mentioned by plaintiff's counsel that the court wanted the jury to find the amount of the support and that it would be deducted from the award that was made. The court interrupted counsel for the plaintiff and stated that it did not know whether the cost of support would be deducted or not but that that would be a matter of law to be determined at a later date. The court told the jury that all he wanted it to do was to find the amount. (R. 714, 715).

For the defendant to now claim that the cost of support should be deducted from anything other than the award on the cause of action where the value of services was taken into account as an element of damage is as inconsistent as it is to now argue that the jury was in fact permitted to consider loss of services as an element of damage under Instruction No. 12 on the cause of action for criminal conversation.

The case of *Prettyman v. Williamson*, 39 A. 731 (Dela.) which has been cited at great length by defendant also states in substance that the value of a wife's services is to be reduced by the value of the performance of the husband's duty to support, cloth and care for her.

The cost of support of plaintiff's wife should not be an offset at all. The \$2,500 that was awarded on the cause of action for alienation of affections should be reinstated and in any event if the cost of support is held to be deductible it should only be offset against the \$2,500 awarded on the cause of action where loss of services were taken into account. The cases cited by defendant, *Rash v. Pratt*, 111 A. 225; *Allen v. Rossi*, 146 A. 692, so hold.

## POINT IX

THE COURT CORRECTLY PERMITTED PLAINTIFF TO READ DEPOSITIONS OF WITNESSES IN WHICH THE WITNESSES CLAIMED THEIR PRIVILEGE AGAINST SELF-INCRIMINATION. (SEE DEFENDANT'S POINT X AND XI)

During the first trial a conference took place in the judge's chambers resulting, after request of the defendant, in the plaintiff not being permitted to require the defendant to claim his privilege against self-incrimination while on the witness stand. (R. 320-330). Pursuant to direction of the trial court in chambers, it was understood if the defendant wanted to claim his privilege against self-incrimination that all that was necessary was for defendant's counsel to say in substance, "*I object on the grounds previously stated*" and that would let the court know that the defendant was claiming his privilege. The defendant does not complain of what took place at the first trial as well he cannot, with respect to the matter of the defendant claiming his privilege against self-incrimination. We believe the trial court was in error in not permitting plaintiff at the first trial

to ask the defendant questions on the stand and compel him to claim his privilege in so many words in the presence of the jury. However that was error that operated to the benefit of the defendant. We point it out only for the purpose of showing what occurred at the first trial as distinguished from what took place at the second trial. The defendant failed to appear at all at the second trial, and it was necessary for plaintiff to read the testimony of the defendant as it was given at the first trial. In addition to reading that testimony plaintiff read certain parts of defendant's deposition where the defendant claimed his privilege against self-incrimination.

It is not only proper to require a party to claim his privilege before the jury but in addition to that an inference may be drawn, from the fact that a party refuses to testify on the ground of privilege, adverse to the party so refusing. Many cases have been decided so holding. *In Re Vaughan*, 189 Cal. 491, 209 P. 353, *Fish v. State Bar of California*, 214 Cal. 215, 4 P. 2d 937, and *In Re Fenn*, 235 Mo. App. 24, 128 S.W. 2d 657, were cases involving disbarment proceedings against an attorney. The court in those cases held that a disbarment proceeding was not a criminal proceeding but was a special proceeding of a civil nature. Each court held that the constitutional privilege against self-incrimination did not extend to protect the attorney from being called as a witness. It was also held that while the attorney could be called as a witness and could be asked questions, he would be permitted to refuse to answer the questions on the ground that his testimony would tend to incriminate



him, but if he failed to testify an inference adverse to him could be drawn.

There are many other cases holding that when a party to a civil action claims his privilege an adverse inference may be drawn therefrom. See *Fross v. Wotton*, 3 Cal. 2d 384, 44 P. 2d 350; *Stillman Pond, Inc. v. Watson*, 115 Cal. App. 2d 440, 252 P. 2d 717; *Ikeda v. Curtis*, 43 Wash. 2d 449, 261 P. 2d 684.

The *Stillman Pond* case and the *Fross* case, both from California, are discussed in the Washington case. The Supreme Court of Washington in the *Ikeda* case in holding that an inference may be drawn against a party who claims the privilege against self-incrimination in a civil action, had the following to say,

“The purpose of the privilege against self-incrimination is to protect the witness from compulsory disclosure of criminal liability. When a witness in a civil suit refuses to answer a question on the ground that his answer might tend to incriminate him, the result sought to be achieved by invoking the constitutional privilege is accomplished. Such refusal cannot be used against him in a subsequent criminal proceeding. However, the trier of facts in a civil case is entitled to draw an inference from his refusal to so testify. *Fross v. Wotton*, 3 Cal. 2d 384, 44 P. 2d 350, 354, was a fraud case. The defendant claimed the privilege against self-incrimination, and refused to answer certain questions. The court, in ruling upon the question of whether or not an inference could be drawn from such refusal, said: ‘We are here met by the argument that it is a violation of the constitutional privilege to draw an inference from the refusal to testify when put upon the

ground of the privilege against self-incrimination. However, we do not think the inference here drawn constitutes a denial or invasion of that privilege.

\* \* \* \* \*

“\* \* \* The privilege is not for the benefit of the guilty nor to enable the claimant to prevail in civil suits by means of it. The privilege is to be protected from compulsory disclosure of criminal liability or facts connecting the claimant with the crime. See *In Re Berman*, 105 Cal. App. 37, 287 P. (125) 126. To hold that no inference could be drawn from the refusal of these witnesses to explain their dealings, in the face of so many suspicious circumstances, would be an unjustifiable extension of the privilege for a purpose it was never intended to fulfill.’

“*Stillman Pond, Inc. v. Watson*, 115 Cal. App. 2d 440, 252 P. 2d 717, 718, was an action for a writ of mandate to compel the real estate commission to vacate an order revoking a real estate broker’s license. In an appeal from an order revoking the license the court said:

“‘When Pond, as a witness on cross-examination, was asked what he did with the money he received as a deposit on the sale of the Rites, lot, he refused to answer on the ground that answering the question would tend to incriminate him. One of the issues was whether Pond commingled the deposit money with his money. The question which he refused to answer related directly to that issue. An inference could be drawn from his refusal to answer said question that he did not immediately place the deposit money in a neutral escrow depository or in the hands of principals or maintain a trust fund account with a bank or a recognized depository. See *Fross v. Wotton*, 3 Cal. 2d 384, 395, 44 P. 2d 350.’

“See also *McCoo vs. Dighton, S. & S. Street Railway Co.*, 173 Mass. 117, 53 N.E. 134, wherein the court said:

“\* \* \* In a civil case, if one of the parties insists upon his privilege to exclude testimony that would throw light upon the merits of the case and the truth of the testimony, we are of opinion that it is a proper subject for comment. *Andrews vs. Frye*, 104 Mass. 234, 236. See *Commonwealth vs. Smith*, 163 Mass. 411, 430 et seq., 40 N.E. 189. This being so, it was proper for the court to compel the plaintiff to take the full responsibility of the choice.’

“Appellant’s refusal to testify, taken alone, would not justify a finding that prostitution was practiced in the hotel from which she received a monetary benefit. However, an inference may be drawn from her refusal to so testify, which may be coupled with, and considered with, proper and relevant evidence to prove such fact.”

See the excellent discussion of “Consequences of Exercising the Privilege Against Self-Incrimination” in Volume 24 *Chicago Law Review*, page 472. At page 477 the rule is stated as follows:

“Therefore, if evidence is introduced in a civil action tending to indicate that one of the parties has been guilty of a criminal act, and that party, by exercising his self-incrimination privilege as a witness, refuses to refute or deny such evidence, the court or jury may infer that the adverse evidence and its implications are true, but it is the failure to contradict the adverse evidence, not the exercise of the privilege, that produces the inference.”

Defendant claims it was error for plaintiff to read the deposition of Mrs. Cahoon. Defendant as part of his defense read a substantial part from Mrs. Cahoon's deposition as is shown by the record beginning at page 624. Plaintiff read the deposition of Mrs. Cahoon where she claimed the privilege against self-incrimination beginning at page 644 of the record to page 648. Defendant did not object to the reading of Mrs. Cahoon's deposition. (R. 644). Likewise defendant did not make a motion to strike such testimony nor did defendant request an instruction to the effect that no adverse inference could be drawn against the defendant from the fact that Mrs. Cahoon claimed her privilege against self-incrimination or that she refused to answer certain questions. (R. 92-115). For these reasons alone the testimony read from the deposition of Mrs. Cahoon cannot be prejudicial error.

The cases cited by defendant in support of the claim that it was improper to read from the deposition of Mrs. Cahoon where the privilege was claimed, are distinguishable. The Masterson case, the Barnhart case and the Frye case cited by defendant were all cases where the witness was asked if he had claimed his privilege against self-incrimination at a prior time, the sole purpose being to impeach the witness. In the case now before this court that was not done. The only thing that was done was to read the deposition of the witness, which plaintiff had a right to do, inasmuch as the witness was not present at trial and was not within the State of Utah, Rule 26(d) (3) URCP. The defendant on page 53 of his brief concedes that plaintiff has the right to question a witness on the witness stand about matters which may result in a claim

of privilege. That we are sure is correct. If the defendant or Mrs. Cahoon had been there, we certainly could have put both of them on the stand and could have asked them questions that would have resulted in the claim of privilege before the jury. Inasmuch as they were not there, we exercised our right to use their deposition at the trial. *Morris vs. McClellan*, 154 Ala. 639, 45 S. 641 (1908) is a case directly in point. That was an action to recover damages for assault and battery. In this case the plaintiff served interrogatories upon the defendant. Some of the questions were answered by the defendant and others he refused to answer on the ground that to answer them might incriminate him. At the trial of the case plaintiff read the interrogatories together with the answers to certain questions and the refusal to answer others to the jury. The defendant's refusal to answer certain questions was the subject of comment in argument by counsel to the jury. The court said,

“The question is now presented whether it was permissible for the plaintiff, over the defendant's objection to read to the jury those interrogatories which the defendant refused to answer, and the defendant's ground of refusal, and to comment on the same in argument. In criminal prosecution the failure or refusal of the defendant to testify cannot be commented on in argument; but we know of no authority applying this rule to civil actions, nor do we see any reason for so doing. The plaintiff in a civil action has rights, as well as the defendant; and one of these rights is to secure evidence to support his cause in court, even to calling upon the defendant as a witness to supply it. It has always been the rule in civil actions that the failure of a party to the suit, when

present at the trial, to testify as to a fact in issue, furnished legitimate ground of comment in argument to the jury by the opposite party. The defendant availed himself of his constitutional right of refusal to answer on the grounds stated, and he had his benefit and protection from prosecution in exercising his privilege; but he could not expect to extend this privilege to the deprivation of the plaintiff of his right to comment in argument on his silence, no matter upon what ground he might put it. We are of the opinion that the trial court committed no error in its rulings on this question."

*Morgan vs. Kendall*, 24 N.E. 143, 124 Ind. 454 (1890). In this case the court held that where in a civil action for assault and battery, the plaintiff calls the defendant as a witness, and asks him whether he committed the battery complained of, and defendant refuses to answer on the ground that his answer might tend to incriminate him, such refusal is a proper matter to be considered by the jury in connection with plaintiff's own testimony that defendant committed the battery.

The court also held that this did not compel the witness to give evidence against himself and in so doing the court said,

"Nor does this holding violate the well known rule that a party in a criminal case shall not be compelled to furnish evidence against himself; for as we have seen, when prosecuted criminally, his conduct in refusing to testify in the civil case cannot be given in evidence against him."

See also *United States ex rel Zapp v. District Director of Immigration*, 120 Fed.2d 762 (Second Circuit 1941).

Even if it is assumed that it might have been error, which we vigorously deny, to have read Mrs. Cahoon's testimony where she claimed the privilege, it still was not prejudicial. Mrs. Cahoon was the person with whom the defendant was charged with having had illicit sexual intercourse. The defendant had already claimed his privilege and refused to answer as to such intercourse, and as seen from the cases cited above an inference adverse to him could be drawn from the claiming of such privilege or from his refusal to testify. The evidence as to the adultery was overwhelming; admissions by both defendant and Mrs. Cahoon of being together and of kissing, evidence that they were alone, testimony of Richard Cahoon that defendant admitted the adultery, plus the adverse inference that could be drawn from defendant's refusal to testify based upon his claiming the privilege. The fact that Mrs. Cahoon also claimed the privilege adds little to the evidence of adultery. Stated differently would the result have been different as to the jury finding adultery if the questions had not been read where Mrs. Cahoon claimed her privilege. At the first trial the questions complained of now were not read (R. 415-422). The jury found adultery.

#### POINT X

THE COURTS REFUSAL TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 20 WAS NOT PREJUDICIAL.

Defendant claims it was error for the court not to specifically instruct the jury that the fact that plaintiff's wife may have gone out with other men could have been considered in mitigation of damages. Such an instruction

was given to the jury at the first trial (Instruction No. 9, R. 50). At the second trial the court in giving its Instruction No. 11 in substance covered the matters contained in defendant's requested Instruction No. 20. The court instructed the jury as follows,

"Therefore, before you can find that the defendant was guilty of alienation of the affections of the wife of Howard B. Cahoon, you must find from a preponderance of the evidence that the following are true:

a. That Dorothy Cahoon had affection for Howard B. Cahoon.

b. That the conduct of Robert P. Pelton was intentional and was likely to induce Dorothy W. Cahoon to lose her affection for Howard B. Cahoon.

c. That Dorothy W. Cahoon did lose her love and affection for Howard B. Cahoon.

b. That the conduct of Robert P. Pelton was the controlling cause which induced Dorothy W. Cahoon to lose some or all of her love and affection for Howard B. Cahoon and that without such conduct she would not have lost any of her affection and love for the said Howard B. Cahoon.

\* \* \*

If you believe and find from a preponderance of the evidence that there was affection between plaintiff and his wife, whether it was great or small, and that defendant intentionally interfered with, lessened, or destroyed such affection or interfered with, lessened or destroyed any chance of plaintiff and his wife overcoming any difficulties that existed between them (if you find any such difficulties did exist), then you must find that the defendant did alienate the affections of



Dorothy W. Cahoon from her husband, Howard B. Cahoon."

In Instruction No. 13 the court instructed the jury as follows,

"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 above instructions point out quite clearly that defendant is only liable for the damages that his own conduct has caused. This of necessity excludes any liability for loss of affection, companionship or anything else that may have been occasioned by Mrs. Cahoon going out with men other than the defendant. The instructions taken as a whole cover defendant's requested Instruction No. 20.

As will be observed from the record a good deal of the trial was taken up by defendant laboring the point that plaintiff's wife had gone out with other men. Defendant's final argument to the jury also stressed that fact at great length.

The jury could very well have found that Mrs. Cahoon did not go out with other men. See testimony of plaintiff's daughter, Sylvia (R. 515) and of Mrs. Cahoon's sister, Evelyn Fisher (R. 697). A careful reading of Rox-

anne's testimony (R. 281-291, 528) raises substantial doubt as to the accuracy of her observations.

It should be kept in mind that many things may be considered by a jury in actions such as are now before the court, in mitigation of damages. The defendant took every advantage of every mitigating circumstance, such as the claimed misconduct of the plaintiff toward Virginia Holt, plaintiff's wife's sister (R. 398, 670), the claim that plaintiff did not show affection to his wife and did not have sexual intercourse with her as often as he should. (R. 191-203), evidence that plaintiff punched his wife in the nose (R. 198, 497), and the claim that plaintiff denied paternity of his son (R. 201, 616-623). These factors, among others, defendant dwelled on at length all during the trial in addition to mentioning at every possible place the claim that plaintiff's wife was going out with other men. All of them could be and were considered by the jury in determining whether or not there was affection between plaintiff and his wife and all of them could be and were considered by the jury on the question of damages. We submit that it was not necessary for the court to go through and itemize all of the various factors that the jury might consider in determining whether affection existed and in determining the amount of damage that was caused by defendant's conduct. The instructions given correctly state the law and there was no error in refusing to single out and instruct on one of various factors that the jury could consider in computing damages.

## POINT XI

### THE GIVING OF INSTRUCTION NO. 13 WAS NOT PREJUDICIAL ERROR.

Defendant claims that it was improper to permit the jury to fix the value of the services, aid and society of the plaintiff's wife without any evidence as to that value. *Schwartz vs. Premium Products*, 221 P.2d 334, 98 Cal. App.2d 780, holds that in an action for the value of the mother's services it was not necessary to put in any evidence. The court in so holding said,

"Appellants argue that there is no evidence as to the value of the mother's services. There need not be. The jury may draw on its own knowledge of the value of services of that character."

We submit that the jury is in an excellent position to determine the value of services, aid, comfort, society and companionship of a wife. The Utah Supreme Court felt the same way in *Wilson v. Oldroyd*, supra, when it used the following language.

"The question of damages in such instance seems best addressed to the discretion of a jury; they have homes, spouses and children of their own, are experienced in practical affairs of daily life and have different points of view; and they are afforded the benefit of seeing and hearing the witnesses. Because of their advantaged position courts are extremely reluctant to interfere with their verdicts."

Defendant's exceptions to Instruction No. 13 appear on pages 708 and 709 of the record. Defendant did not except to that instruction upon any of the grounds that are now claimed as error in defendant's Point XIV.

## POINT XII

THERE WAS NO ERROR IN REFUSING TO GRANT A NEW TRIAL ON GROUND THAT THE VERDICT WAS EXCESSIVE.

A full and complete answer to defendant's claim that the verdict was excessive, without detailing all the evidence, lies in the fact that two juries have passed on the question of damages.

## CROSS-APPEAL

### STATEMENT OF POINTS ON CROSS APPEAL

#### POINT A

THE TRIAL COURT COMMITTED ERROR AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN VACATING THE JURY'S AWARD OF \$12,000 PUNITIVE DAMAGES AND SUBSTITUTING \$1,000 THEREFOR. AS A MATTER OF LAW THE JURY'S AWARD OF PUNITIVE DAMAGES SHOULD BE REINSTATED.

#### POINT B

COST OF SUPPORT OF PLAINTIFF'S WIFE IS NOT DEDUCTIBLE AT ALL.

#### POINT C

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DISCRETION IN GRANTING A NEW TRIAL AT THE CLOSE OF THE FIRST TRIAL OF THIS ACTION.

The jury in the second trial returned a verdict of \$2,500 for alienation of affections, \$25,000 for criminal conversation and \$12,000 punitive damages. The jury

also found that the cost of supporting plaintiff's wife would have been \$17,000. It is plaintiff's position first that the cost of support of plaintiff's wife may not be deducted at all and if it is deductible that it may only be deducted as the trial court held, from the award that was made in the cause of action where the jury was permitted to take into account the value of the loss of plaintiff's wife's services, namely the cause of action for alienation of affections. It is also plaintiff's position that the trial court erroneously reduced the punitive damages from \$12,000 to \$1,000.

#### POINT A

THE TRIAL COURT COMMITTED ERROR AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN VACATING THE JURY'S AWARD OF \$12,000 PUNITIVE DAMAGES AND SUBSTITUTING \$1,000 THEREFOR. AS A MATTER OF LAW THE JURY'S AWARD OF PUNITIVE DAMAGES SHOULD BE REINSTATED.

Whether a trial court has abused its discretion in vacating the jury's award of punitive damages turns on the facts and circumstances of the particular case.. To cite other cases from our jurisdiction and other jurisdictions where trial courts have been reversed for vacating the juries' awards of punitive damages would serve no useful purpose.

The facts and circumstances of the case before this court and in particular the deliberate conduct of the defendant, extending over a period of in excess of twelve months, in going secretly to plaintiff's home, making love to plaintiff's wife in the sanctity of plaintiff's home

and in the presence of plaintiff's children, kissing plaintiff's wife in plaintiff's home and in the presence of plaintiff's children, drinking with plaintiff's wife in plaintiff's home and in the presence of plaintiff's children, taking plaintiff's wife openly to public dance halls, taking plaintiff's wife openly on excursions, and in debauching and defiling plaintiff's wife by having sexual intercourse with her on many occasions over a long period of time, and in making a deliberate conquest of plaintiff's wife, all in complete disregard of the moral standards of society and in complete disregard of the sanctity of plaintiff's home and marriage, amply supports the jury's award of \$12,000 punitive damages. The law permits the jury to award punitive damages for the purpose of setting a value on the moral standards of the community and the violation thereof, for the purpose of operating as a deterrent to like conduct by others, and for the purpose of punishing the defendant. The very purpose of permitting a jury to assess punitive damage is to permit a jury of eight representatives of the community rather than one trial judge, whose standard of morals and background may be different from that of the community, to determine the value of a deliberate and wilful violation of the standards of the community. To permit the trial judge on the facts and circumstances of this case to vacate the jury's award of \$12,000 punitive damages is to permit the trial judge to arbitrarily and capriciously substitute his standard of value of the morals of the community for that of the jury and thereby to deprive the plaintiff of his right to a trial by jury. See *Evans vs. Gaisford*, (1952) 122 U. 156, 247

P.2d 431 in which this court in discussing punitive damages said at 247 P.2d, page 435:

“Punitive or exemplary damages are awarded as a punishment to the defendant for malicious conduct and as a wholesome warning to defendant and others not to engage in similar transactions. \* \* \* Because there is no method of precise calculation as to the quantum of such damages, the amount thereof must necessarily be left to the sound discretion of the jury as related to the facts and circumstances in each individual case. The only limitation thereon is that they must not be so disproportionate to the injury and the actual damage as to plainly manifest that they were the result of passion and prejudice rather than reason and justice applied to the existing facts.”

All that one needs to do in order to determine whether or not the jury's award of \$12,000 punitive damages was “disproportionate to the injuries” sustained by the plaintiff in the case before this court is to contemplate the situation of an innocent man whose wife has been deliberately defiled and debauched and the sanctity of whose home and family has been violated by the deliberate, malicious and persistent conquest of a wrongdoer.

To permit the trial judge in this case to substitute his judgment for the judgment of the jury is to permit the trial judge to, “usurp judicial power and prostitute the constitutional trial by jury”. *Uptown Appliance vs. Flint* (1952) 122 U. 298, 249 P.2d 826.

#### POINT B

COST OF SUPPORT OF PLAINTIFF'S WIFE IS NOT DEDUCTIBLE AT ALL.

All of the cases cited by defendant in support of the proposition that the cost of supporting the wife is deductible are old cases. *Lankford vs. Tombari*, 35 Wash.2d 412, 213 P.2d 627, involved an action for alienation of affections and criminal conversation. In that case the defendant requested the following instruction,

“You are further instructed that in the event you find for the plaintiff on the first cause of action that the plaintiff is entitled to only one recovery for loss of consortium which is made up generally of the loss of company, the loss of services and plaintiff’s mental agony, lacerated feeling, wounded sensibilities and love.

You are further instructed, however, that as to any loss of services there shall be a deduction because of the plaintiff’s duty to cloth, support and care for his wife.”

The Washington Supreme Court said,

“The requested instruction is not the law and it was not error to refuse it.”

We think the late Washington case correctly states the law in holding that a deduction for cost of support should not be permitted. It should also be noted that defendant has not cited one late case that holds the cost of support may be deducted. The Washington case cited above is the only case that plaintiff through diligent research has been able to find involving the question of whether or not cost of supporting a wife is deductible. The fact that that issue is not involved in any of the later alienation of affections or criminal conversation cases is somewhat significant. It is also significant that the only late



case that either defendant or plaintiff has apparently been able to find, namely the Washington case cited above, holds that the cost of support is not deductible at all.

27 Am. Jur., Sec. 545, page 146 states,

“There is disagreement as to whether there should be a deduction from a husband’s recovery for loss of his wife’s services because of his duty to cloth, support and care for her.”

Restatement of Torts, Vol. 3 Sec. 683 (k) states the various elements that may be considered in fixing damages where the husband sues for alienation of his wife’s affections. Nothing is said about deducting the cost of support at all. If cost of support was deductible, the authors of the Restatement certainly would have said something about it. Section 685 (e) of the same volume of the Restatement in discussing the elements of damage in an action for criminal conversation is likewise silent as to the deductibility of cost of support.

### POINT C

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DISCRETION IN GRANTING A NEW TRIAL AT THE CLOSE OF THE FIRST TRIAL OF THIS ACTION.

If, but only if, the court should determine that prejudicial error of some kind was committed at the second trial that would require a reversal, then plaintiff urges the court to reinstate the verdict of the jury that was returned in the amount of \$25,000 at the first trial, and

that the Supreme Court order judgment entered with interest thereon from the date of the verdict on the first trial. That interest should be allowed from date of verdict see, *Hewitt vs. General Tire and Rubber Co.*, 5 U.2d 379, 302 P.2d 712. It should be noted that defendant does not claim that any error was committed at the first trial. If such a claim is made, it has not been argued in defendant's brief. We submit that there was no error and we submit in view of the verdict that has been returned by two separate juries in this matter and in view of the evidence adduced at both trials, that the trial court abused its discretion on the first trial in granting a new trial on grounds of excessive damages, and if the court should find there is reversible error on the second trial then we very sincerely urge the Supreme Court to reinstate the verdict that was returned on the first trial.

## CONCLUSION

Plaintiff urges the Supreme Court to make the following alternative rulings:

First: Hold that the cost of support of plaintiff's wife is not deductible at all and to reinstate all of the punitive damages that were awarded at the second trial and to order the entry of judgment in favor of the plaintiff for the sum of \$39,500 with interest thereon from the date of the second verdict.

Second: To affirm the judgment entered after the second trial.

Third: If, but only if, reversible error should be found to have been committed at the second trial, that the Supreme Court reinstate the verdict that was returned at the first trial and order entry of judgment in favor of the plaintiff for the sum of \$25,000 with interest thereon from the date of the first verdict.

Respectfully submitted,

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and Respondent.*