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

Utah Supreme Court

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Van Cott, Bagley, Cornwall & McCarthy; Clifford L. Ashton; Leonard J. Lewis; Counsel for Appellant;

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In the

Supreme Court of the State of Utah

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HOWARD B. CAHOON,

Plaintiff and Respondent,

v.

ROBERT P. PELTON,

Defendant and Appellant.

Clerk, Supreme Court, Utah

Case No.
8976

REPLY BRIEF OF APPELLANT

VAN COTT, BAGLEY,
CORNWALL & McCARTHY,
Clifford L. Ashton,
Leonard J. Lewis,

Counsel for Appellant.

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REPLY BRIEF OF APPELLANT

STATEMENT OF POINTS

POINT I.

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

Respondent in answer to Point I in Appellant's brief
has cited several California cases holding that a marriage
performed in California before a final California divorce

decree has been entered is rendered valid by a retroactive order made after the marriage and dated back to a time prior to the marriage. This is made possible by reason of a California statute relied on by Respondent in the instant case. We, of course, cannot question these cases. The only question which could arise under the California decisions would be the constitutionality of such legislation. If, in the case now before this Court, the parties had been married in California, the Utah court would be bound to follow the California decisions—as the Maryland court did in Respondent's cited case of *Bannister v. Bannister*, 181 Md. 177, 29 A. 2d 287. There the marriage in question was performed in California and a *nunc pro tunc* decree was given under the California statute.

The same observation must be made with reference to the Oregon case *In Re Kelley's Estate*, 210 Ore. 243, 310 P. 2d 328. In that case, the Oregon court construed a Washington marriage rendered questionable by reason of a Washington *nunc pro tunc* decree. The State of Washington, as the Oregon court pointed out, has adopted the same statute as that in effect in California. It would, therefore, seem that the Oregon case adds nothing to the California cases cited by Respondent.

The other state decisions relied upon by Respondent with the exception of *Shippee v. Shippee*, 66 A. 2d 77, 95 N. H. 450, involve the traditional common law *nunc pro tunc* order which differs from the fictional California *nunc pro tunc* order in that the common law order simply confirms the record to show what actually happened. It does

not change a status. It clarifies a status. In the case of a common law *nunc pro tunc*, the order is in reality not retroactive at all. It is corrective by nature and its purpose is to conform the record to show the actual facts. In the instant case, the *nunc pro tunc* order did much more than this. It was not made to conform the record to what had occurred but to have the record show a fiction and to change a status by reason of the fiction.

The only state case which Respondent has cited which holds that a retroactive California *nunc pro tunc* order can be given extra territorial effect to validate a marriage performed in another jurisdiction is *Shippee v. Shippee*, supra. In that case, the New Hampshire court construed as valid a New York marriage performed at a time when a California divorce had not been finalized. A *nunc pro tunc* decree had been filed pursuant to the California statute after the performance of the marriage and made retroactive to a date prior to the marriage.

The New Hampshire court, after recognizing that the New York marriage depends upon the New York law, held that the retroactive California *nunc pro tunc* order validated an otherwise invalid marriage. The court strangely, we believe, cited as authority decisions based on the *nunc pro tunc* precedents found at common law. These decisions were from Colorado and New York. As herein indicated, we fail to see an analogy between the common law *nunc pro tunc* order and the retroactive *nunc pro tunc* order provided by the statutes of the States of California and Washington. The New Hampshire court in its decision referred to the New York case of *Merrick v. Merrick*, 266 N. Y. 120, 194 N.

E. 55 and distinguished that case from the *Shippee* case. The *Merrick* case is interesting because in it the New York court, we believe, took a different view of the effect of a *nunc pro tunc* order than that taken by the New Hampshire court. In the *Merrick* case, the marriage in question was performed during a period prohibited by the original decree, which prohibited remarriage for a period of three years. Suit was brought for annulment and while the suit was pending, a *nunc pro tunc* decree was obtained antedating the decree to a date prior to the questioned marriage. The New York court held that this could not be done saying:

“Irregularity in procedure may, of course, be corrected by orders *nunc pro tunc*. *Mishkind-Feinberg Realty Co. v. Sidorsky*, 189 N. Y. 402, 82 N. E. 448. When a ruling *has in fact been made* but is improperly evidenced by a defective mandate, or by no mandate at all, an appropriate and suitable order or judgment which manifests the existence of a determination may subsequently be granted to take effect *as of the date of such determination*. It cannot record a fact as of a prior date when the fact did not then exist. *Guarantee Trust & Safe Deposit Co. v. Philadelphia, Reading & N. E. R. Co.*, 160 N. Y. 1, 7, 54 N. E. 575. An order may not be made *nunc pro tunc* which will supply a jurisdictional defect by requiring something to be done which has not been done. *Stock v. Mann*, 255 N. Y. 100, 103, 174 N. E. 76.

“The validity of a marriage by respondent with appellant in November, 1925, depended upon a previous modification by the Supreme Court of the decree in *Merrick v. Merrick*, and no such modification had been made. New rights, arising out of a matrimonial relationship, cannot be created by a judicial declaration in 1933 concerning an assumed fact

which concededly did not exist in 1925 and the existence of which was an essential element of a lawful marriage.” (Emphasis added.)

We submit that the California and Washington statutes, as construed by the courts in those jurisdictions, provide for a retroactive order which is fundamentally and clearly distinguishable from the common law *nunc pro tunc* order which officially recognizes a status already created by a judicial act. The importance of the distinction is readily apparent if it is applied to the case at bar. On June 27, 1947 when Mrs. Shaw married Respondent, *she was not divorced*. If she had been in fact divorced because of a judicial act but no formal entry had been made, a common law *nunc pro tunc* entry could have been made to conform the record to show her true status. In the instant case, no judicial act had been performed, therefore, her status on June 27, 1947 was clearly established. In that status of an undivorced woman, she did not have the capacity under the Utah law to perform a valid marriage. It, therefore, seems clear that unless this court is prepared to say that she could render her marriage valid by her subsequent acts aided by a retroactive order from a court of another state, she is still unmarried. If this is so, then it seems *Jenkins v. Jenkins*, 107 Utah 239, 153 P. 2d 262, cited in Appellant's brief at page 17 is wrong. There the court held that a marriage performed before a decree becomes final is *void ab initio*. *In Re Miller's and Manufacturers Insurance Company*, 106 N. W. 485, 97 Minn. 98, the court held that a contract "*void ab initio*" is one that never went into effect.

One of the cases cited by Respondent in his brief, *Abramson v. Abramson*, 49 F. 2d 501, apparently rules contra to the Supreme Court of the State of Utah on this question. In that case the Federal District Court for the District of Columbia held that the provision of an Illinois statute which provides that if a divorced party shall marry within a year, said marriage shall be held absolutely void does not mean what it says but means that it may be void. The Federal court said:

“Again, the language of the Illinois statute, that, if a divorced party shall marry within a year, ‘said marriage shall be held absolutely void,’ may be regarded as contemplating a judicial proceeding in which it should be so declared, and does not go so far as a language of our Code regarding prohibited marriages which ‘shall be absolutely void ab initio, without being so decreed, and their nullity may be shown in any collateral proceedings.’”

The Utah courts as indicated in Appellant’s brief have clearly held contra to the District Court of Columbia on this question as indicated in *Jenkins v. Jenkins*, supra and as indicated in *Sanders v. Industrial Commission*, 64 Utah 372, 230 Pac. 1026 and *In Re Dalton’s Estate*, 109 Utah 503, 167 P. 2d 690.

POINT II.

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

We submit that whether or not Nevada recognizes that an action for criminal conversation exists, as pointed out by the Respondent in his brief, does not bear upon the ar-

gument made by Appellant under Point II of his brief to the effect that the cause of action does not exist in the State of Utah.

Respondent in arguing against Point II of Appellant's brief relies on *Hatch v. Hatch*, 46 Utah 116, 148 Pac. 1096 (1915) and *Mormon Church v. United States*, 136 U. S. 62, 10 Sup. Ct. 792, 34 L. Ed. 481. *Mormon Church v. United States* was decided by the United States Supreme Court in 1889, nine years before the State of Utah adopted the English common law pursuant to Chapter 3, 63-3-1, Utah Code Annotated, 1953. It is difficult to understand how this decision can assist this Court. A decision by the United States Supreme Court determining Federal law applicable to a territory under an Organic Act is not authority for the State Supreme Court to apply to construction of a statute passed nine years later. It might even be argued that the State Legislature of Utah enacted the foregoing statute having in mind the decision of the United States Supreme Court in *Mormon Church v. United States*, supra.

The *Hatch* case was decided after statehood. Nevertheless it construed the rights of a wife which arose *prior to statehood*. Because of this, the court was primarily concerned with the same question which concerned the United States Supreme Court in the *Mormon Church* case, supra. This concern involved the construction of the Organic Act and the acts of the Territorial Assembly. The court observed this when it stated:

"This is far from asserting that the common law of England was intended to be extended over or was transplanted into the territory."

The court announced what we believe is the rule followed in Utah when it said:

“* * * whenever, in this country, the English common law was adopted, it was adopted only so far as new conditions and surroundings made it applicable * * * But nowhere in this country, except by positive enactment was the English common law fixed and immutable; not even in England.”

After quoting to the same effect from Justice Story, the Utah Supreme Court further said:

“This is familiar doctrine. How often has it been applied to this western country to riparian rights; elsewhere to descent where the civil and not the English common law was followed; to ancient lights and property rights of a *feme covert* where partly the English common law and partly the civil law was followed.”

We do not urge that the common law of England is immutable or fixed but simply that it was adopted in so far as it is not repugnant to or conflict with the laws of the United States or inconsistent with our natural and physical conditions.

In this regard we note that the Legislative Assembly which in 1898 enacted into law the English common law was enacted 30-2-4, Utah Code Annotated, 1953, which provides in part as follows:

“A wife may * * * maintain an action * * * in her own name * * * *There shall be no right of recovery by the husband on account of personal injury or wrong to his wife * * **”
(Emphasis added.)

The foregoing legislation was in derogation of the English common law idea that a wife had no right of action; that she was in fact a chattel of her husband. It was this archaic idea which prohibited a wife from suing in her own name and which gave her husband a property right in her person which gave rise to the cause of action for criminal conversation in the first place. Thus, criminal conversation, as pointed out in Appellant's brief was initially considered a trespass *vi et armis*.

We submit if the archaic ideas which gave rise to the cause of action no longer exist there is no reason or sound policy why the unpopular action should be installed as a modern judicial fixture by the Supreme Court of Utah.

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.

What has been said in Point II is apropos of Appellant's position stated in Point III.

POINT IV.

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

Plaintiff argues that his Motion for a New Trial was timely inasmuch as it was filed within the permissive time

after the entry of an amended judgment which was prepared by plaintiff's counsel.

The fact is that at no time until September 5, 1958 did plaintiff make a Motion for a New Trial on the First Cause of Action (R. 76), notwithstanding that a judgment was entered on April 17, 1958. Plaintiff argues that the judgment entered on April 17, 1958 was not a judgment as to the First Cause of Action. The judgment must be read and considered as one whole instrument. When so read there can be no doubt that it constituted a judgment of no cause of action on the First Cause of Action, and that it gave notice to that effect to all parties.

Plaintiff also argues that the Order of the Trial Court for a new trial was as to both causes of action. This is contrary to the facts as shown by the record. Defendant's Motion for a New Trial was directed solely to the Second Cause of Action (R. 73). Arguments on the Motion for a New Trial were restricted to the Second Cause of Action. The Court's order of June 3, 1958 expressly states that *defendant's Motion for a New Trial is granted* (R. 76). The only Motion for a New Trial ever made by defendant was as to the Second Cause of Action.

POINT V.

THE COURT COMMITTED PREJUDICIAL ERROR AT THE SECOND TRIAL IN GIVING INSTRUCTION NO. 11.

Plaintiff's answer, and apparently only answer, to the argument made by defendant in Point V of his brief is

that defendant failed to make proper exception to Instruction No. 11. Defendant submits that a reading of the exceptions as a whole will show that sufficient exception was taken to the said Instruction.

A reading of Instruction No. 11 (R. 124), will show that the words "in Utah" were stricken after the instructions were typed, and the words "outside of Nevada" inserted in longhand in place thereof. Although these changes were made prior to the time that the jury was instructed and prior to the time that the jury retired for deliberation, the same were not shown on the copies of the instructions given to counsel for the parties, as a result of which some confusion resulted in the taking of exceptions.

In any event, this Court has the discretion, under Rule 51 of the Utah Rules of Civil Procedure, to review the error contained in this instruction.

POINT VII.

THE COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 22, AND IN GIVING INSTRUCTIONS NO. 13 AND NO. 15.

In answer to the argument made by defendant under Point VII of his brief, plaintiff notes that the cases cited by defendant are extremely old cases. Defendant concedes that the cases are old and that the principles of law stated therein are old. However, the said principles constitute basic law.

A husband is entitled, as one of the rights flowing from the marriage, to the services of his wife, including ordinary household duties, without compensation to her. So long as this right is possessed by the husband, he can recover damages for loss of services. However, the divorce decree made and entered on December 4, 1956 by the Nevada Court in *Cahoon v. Cahoon*, terminated the marriage relationship and terminated any right which the plaintiff had to the services of his said wife from the date of the entry of that decree. After the entry of that decree, plaintiff was no longer entitled to the services of his said wife. Likewise, he was not entitled to recover any damages for loss of services occurring thereafter. One cannot recover damages except for the invasion of some legal right. Plaintiff had no legal right to the services for which he was awarded damages after December 4, 1956.

Defendant submits that it was not the intention of the Utah Supreme Court in the case of *Wilson v. Oldroyd*, cited by plaintiff at page 26 of his brief, to permit the recovery of damages without a legal right. Any statement by the Court in that case suggesting that damages might be recovered for loss of services after the date of a divorce decree is dicta. Moreover, the Court does not state, in its opinion in the *Oldroyd* case, that recovery might be had for *loss of services* after the time of the divorce.

Whatever the situation may have been in the *Oldroyd* case, the undisputed fact here is that plaintiff's former wife was granted a decree of divorce on grounds of extreme mental cruelty. This fact is undisputed and the Court cannot go behind the Nevada decree.

POINT VIII.

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

What has been said in connection with Point VII applies with equal force to Point VIII. The Trial Court's Instruction No. 15 (R. 128 on Life Expectancy Tables) permitted the jury to award damages for loss of services and other elements of damage from the divorce on December 4, 1956 for and during the life expectancy of the plaintiff and his former spouse, notwithstanding the fact that plaintiff has had no legal right to the services of said spouse since December 4, 1956.

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.

In answer to the argument made by defendant under Point IX of his brief, plaintiff argues that Instruction No. 12 (R. 126) related to damages for criminal conversation and that Instruction No. 13 (R. 126-127) was confined to elements of damage for alienation of affections. This is not correct. There is no statement contained in the said Instruction No. 13 that it relates solely or is restricted to the cause of action for alienation of affections. Defendant, at all times assumed that Instruction No. 13 related to both

causes of action and because of that assumption defendant took exception to Instruction No. 13 on the grounds that it did not require a diminution of the value of lost services by reason of the value of the husband's duty to support. As stated under Point IX in defendant's brief, loss of the value of services is a proper element of damages in both causes of action. Plaintiff recognized this, as shown by plaintiff's Requested Instruction A (R. 86). At no time has plaintiff argued, either in the proceedings in the Trial Court or in its brief, that loss of services is not an element of damages in the action for criminal conversation.

Defendant submits that the instructions permitted the jury to find, and that the jury did find, loss of services as an element of damages with respect to the cause of action for criminal conversation. That being the case, defendant was entitled to have the value of lost services reduced by the value of the plaintiff's duty to support. The jury fully intended that the \$17,000.00 determined by them to be the value of the duty to support be offset against both awards.

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.

In answer to the argument made by defendant under Point X of his brief, plaintiff states at page 38 of plain-

tiff's brief, that defendant did not request instructions to the effect that no adverse inference could be drawn against defendant from the fact that Mrs. Cahoon claimed her privilege or that she refused to answer certain questions. This statement is incorrect. In his Requested Instructions 24, 25, and 26, defendant requested that the jury be charged that no finding or inference of guilt could be drawn from the fact that Mrs. Cahoon or other witnesses declined to answer questions.

A full consideration of the authorities cited in Defendant's brief will show that the Trial Court committed prejudicial error in permitting counsel to read to the jurors questions and answers from depositions in which the witnesses claimed their privilege. The authorities cited by plaintiff can be readily distinguished.

POINT XII.

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

In answer to the argument made by defendant under Point XII of Defendant's brief, plaintiff states that the requested instruction was given to the jury at the first trial. Obviously, the giving of said instruction at the first trial could not obviate the error of a failure to give same at the second trial.

Plaintiff also argues that the substance of the requested instruction was given to the jury. This argument ignores the well established rule that a party is entitled to have

his theory of the case presented to the jury in the form of an instruction.

Plaintiff also argues that the substance of the said Instruction was labored by the defendant in the evidence and in arguments to the jury. This is correct, but the evidence and oral arguments to the jury do not constitute an acceptable substitute for an instruction to the jury from the Court.

CONCLUSION

Appellant has endeavored in the foregoing Reply Brief to consider points raised by the Respondent's brief which may not have been fully covered in Appellant's brief. No effort has been made to reiterate arguments which have already been made. With respect to Respondent's cross-appeal, Appellant submits that no prejudicial error was committed by the Trial Court in favor of the Respondent. Appellant respectfully submits that the judgment should be reversed.

Respectfully submitted,

VAN COTT, BAGLEY,
CORNWALL & McCARTHY,
Clifford L. Ashton,
Leonard J. Lewis,

Counsel for Appellant.