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Howard B. Cahoon v. Robert P. Felton : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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In the

Clark, Supreme Court, Utah

Supreme Court of the State of Utah

HOWARD B. CAHOON,
Plaintiff and Respondent.

v.

ROBERT P. PELTON,
Defendant and Appellant.

Case No.
8976

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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

*Counsel for Appellant
and Defendant.*

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In the
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HOWARD B. CAHOON,
Plaintiff and Respondent.

v.

ROBERT P. PELTON,
Defendant and Appellant.

Case No.
8976

PETITION FOR REHEARING AND
BRIEF IN SUPPORT THEREOF

PRELIMINARY STATEMENT

The Appellant respectfully petitions for a rehearing herein on the grounds discussed in detail hereinafter. In addition to the detailed treatment of points as set forth herein and in Appellant's other briefs, one general observation is made.

The appeal involves several questions of first impression, and authorities from other jurisdictions have been cited by Appellant in support of Appellant's contentions thereon. Despite the novelty of these questions and the

authorities cited in support of Appellant's position, the Court has brushed these points off with the statement that they are without merit and will not be discussed in detail. Appellant submits that the said points are valid, that Appellant's contentions thereon are correct, and that said points deserve full and detailed treatment by the Court. Appellant has the impression that he has failed to direct the Court's full attention to these points and that they represent a part of the briefs which has not received full and critical treatment. Appellant urges the Court to reconsider the said points, giving to each such point the same full and careful consideration which has distinguished the Court's decisions in the past.

ARGUMENT

POINT I.

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

POINT II.

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

POINT III.

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

WEALTH TO BE INTRODUCED ON THE ISSUE OF PUNITIVE DAMAGES.

POINT IV.

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

The majority opinion states the law which we believe is applicable to the instant case. It is as follows:

“California, the same as Utah, and all other states, holds that a second marriage is void if at any time one of the parties has an undivorced husband or wife living. Generally, the laws of the state where the marriage is consummated determine its validity.”

The only question properly before the Court respecting this point is whether or not the marriage performed between Mrs. Shaw and Howard B. Cahoon was a valid marriage at the time it was performed. We believe that the Utah Supreme Court in *Jenkins v. Jenkins*, 107 Utah 239, 153 P. 2d 262; *Sanders v. Industrial Commission*, 64 Utah 372, 230 Pac. 1026; and *In Re Dalton's Estate*, 109 Utah 503, 167 P. 2d 690, holds it was not. Justice Henriod in a dissenting opinion in the instant case says it was not. Justice Wade and Keller say it was a valid marriage for all purposes. Justice Crockett says it was a valid marriage in the instant case but may not have been a valid marriage if the equities had been different. Justice McDonough concurs in the result. Whether or not he concurred with the two majority Justices on the issue of the validity of the Cahoon marriage is, of course, impossible to determine. We thus

have an opinion which may hold that marriages performed in Utah involving a party who has not been finally divorced in California may or may not be valid depending on the equities of each case. The opinion of Justice Crockett opens the question as to whether a common law marriage may, in Utah, provide the basis for an action for alienation of affections and criminal conversation. Wouldn't a common law marriage confer a "color of title?"

We submit that a determination of the validity of a marriage depending on each individual case violates the constitution of the State of Utah which in Article I, Section 24 provides:

"All laws of a general nature shall have uniform operation."

Certainly, lawyers advising their clients on the question of marriage should be able to give them a definite opinion as to their status at the time of the marriage. They should not be required to advise them that they are married or not married depending on what occurs in the future.

POINT V.

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

This instruction without question inconsistently advises the jury. In one part of the instruction the jurors were correctly told that plaintiff could not recover if his wife's affections were alienated in Nevada. Near the end

of the instruction, the jurors were told that plaintiff could recover if "Robert P. Pelton was not in Nevada at the time he caused her to lose her affections for Howard B. Cahoon." This, of course, was wrong. The Court did not choose to discuss this error, apparently concluding it was not prejudicial.

POINT VI.

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

The question raised in Point VI had previously been decided by a three to two court in *Sadlier v. Knapton*, 5 Utah 2d 33, 296 P. 2d 278. Inasmuch as the Court deciding the instant case consisted of a new member, we felt the Court might want to reconsider the effect of the *Sadlier* case. It apparently did not care to do so and we have nothing to add to the argument made in Point VI of the brief of appellant on file herein.

POINT VII.

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

Point VII, we believe, raised an important question which merited some discussion. The effect of the instruc-

tion was to permit the jury to award damages to the plaintiff beyond the time of divorce which his wife obtained from him on December 4, 1956 in the Nevada courts. This marriage terminated plaintiff's legal right to any services from his former wife. The jury was permitted to award damages to him for this right which had been forfeited. This goes far beyond the *Sadlier* case *supra* and is contrary to the cases cited by the appellant in his brief on file herein. The only law which we have found which in any way supports the Court's position is in dicta contained in the *Oldroyd* case. In *Beach v. Brown*, 20 Wash. 266, 43 L. R. A. 114, 72 Am. St. Rep. 98, 5 Pac. 46, the Court categorically stated: "Of course, the damages could not be calculated after the time when the decree of divorce was obtained."

This Court without discussing any of the cases cited by the appellant in support of the proposition stated in Point VII simply dismisses the question by stating that the point is without merit and will not be discussed in detail.

POINT VIII.

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

We cited *Johnson v. Richards*, 50 Idaho 150, 294 Pac. 507, wherein the Idaho court explicitly held that it was

error to instruct a jury on life expectancy tables in a case involving alienation of affections. We thought the case was directly in point and particularly applicable because counsel at great length, as the records will show, argued from the life expectancy tables.

This is a case of first impression on the question of life expectancy tables in alienation of affections and criminal conversation cases in the State of Utah. We sincerely submit that the point should have been reviewed by the court, particularly inasmuch as these recent alienation of affections cases are paving the way for numerous more of the same kind which will be filed in the courts in the near future.

We believe that the point is especially important, because counsel for the plaintiff especially emphasized the life expectancy feature in his argument to the jury. We cited cases from several jurisdictions wherein this practice, aside from the question of admissibility of life expectancy tables, was held error. The court considered none of these cases.

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 urging a reconsideration of Point IX, we can only add to what has already been stated in Appellant's Brief that the jury never intended the result achieved by the trial

court, i. e., allowing the offset of \$17,000.00 to be applied only against the alienation of affections judgment. The jurors obviously intended the \$17,000.00 to be applied against the whole judgment. That this was their intention was recognized by the trial Judge in his Memorandum Decision. He nevertheless confined the offset to the alienation of affections action, thus reducing the jurors' intended set off by \$13,500.00 We submit that by doing so the trial court reached a result which was radically different than the result intended by the jury.

POINT X.

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

POINT XI.

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

The foregoing points are related and are therefore discussed together herein.

We believe that the legal questions raised under Points X and XI are of great constitutional importance and of

first impression in this State. Whether or not a claim of privilege is admissible as a basis for an inference is the subject of an annotation in 24 A. L. R. 2d 896. There the editors note that the courts which have decided the question uniformly hold that "refusal alone cannot be made a basis of any inference by the jury."

The editors further note "No case has been found expressing a view opposite to the general rule as stated above."

The Utah trial court held *contra* to the general rule stated herein. We sincerely submit that the trial court should be reviewed on the question. It is very frustrating and discouraging to cite cases declaring a unanimous viewpoint contrary to what a trial court has held and on a very material and current constitutional question and have the reviewing court review in silence. We submit that the question merits a decision.

POINT XII.

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

Perhaps the most important "fact" defense the defendant had in the instant case was the conduct of the plaintiff's wife in going out with other men; in fact, it was the only fact defense offered. Consistent with this defense, defendant requested the Court to instruct the jury with reference to the law applicable thereto which is that the jurors may and should consider this fact in mitigation of damages. The Court did not so instruct; in fact, the Court eliminated a consideration of the issue by advising the

jurors in the Court's Instruction No. 11 that they were in effect to disregard such matters. Certainly, this Court has held often enough that each party is entitled to have a jury instructed on its theory of the case. In the instant case, the jury was not so instructed.

POINT XIII.

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

POINT XIV.

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

What has been said with reference to Point VII is equally applicable to Points XIII and XIV. The instructions excepted to enabled the jurors to find damages for mental anguish and distress, past, present and future and for loss of companionship, aid, society and services not only before plaintiff obtained a divorce from his wife but in perpetuity thereafter so long as plaintiff or his wife should live. We believe that no Appellate Court would write an opinion in which it would specifically hold that such damages are allowable even after a wife has obtained a divorce from her husband because of extreme mental cruelty. The trial court so held, and this Court by its silence has approved. Of course, it goes without saying that this was material and highly prejudicial to defendant.

POINT XV.

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

Counsel cannot add anything to what has already been stated in the Brief of Appellant on file herein with reference to point XV. We sincerely submit that the only way the Court can review this point properly is by reviewing the entire trial transcript.

CONCLUSION

We believe that the case before this Court has raised important and material questions which have not been decided by the Court. Some of these questions are of first impression, such as the admissibility of life expectancy tables in alienation of affections and criminal conversation; the right to damages for loss of services, mental anguish and companionship in the future when it affirmatively appears that the marriage has been terminated through the fault of the plaintiff; the admissibility of a claim of privilege, and whether or not a claim of privilege may be considered by the jurors as in inference of guilt, first as to the defendant, and second as to a witness who is not a defendant. The Court also was asked to review the trial court's failure to instruct the jury on defendant's theory of the case. Some of these questions are of constitutional im-

portance. We feel that all of them were material, and that the error committed was prejudicial.

Finally, a judgment of this amount is disastrous to any individual. Mr. Pelton will suffer irreparably and far beyond any damage done to the plaintiff. We earnestly and sincerely submit that the Court should reconsider its ruling, particularly with reference to the last eleven points about which the Court remained silent in its opinion.

Respectfully submitted,

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