

1959

# Richard H. Holder v. Ruth M. Holder : Brief of Appellant

Utah Supreme Court

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Robert E. Hansen; Attorney for Appellant;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

FILED

FEB 9 - 1959

RICHARD H. HOLDER,  
*Respondent and Plaintiff,*

— vs. —

RUTH M. HOLDER,  
*Appellant and Defendant.*

Clerk, Supreme Court, Utah

Case  
No. 8984

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BRIEF OF APPELLANT

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*Respondent and Plaintiff,*

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## BRIEF OF APPELLANT

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### STATEMENT OF FACTS

In the early part of 1956 the plaintiff, then 19, was going steady with defendant, then Ruth Ratcliffe, age 17, and in her junior year in high school (R. 86, lines 13-16, R. 45, line 29). The parties had discussed marriage. They were having sexual relations and had discussed this with a seminary teacher (R. 67, line 13; R. 69, line 25). In May of that year, plaintiff went to work in Alaska and expected to return in September (R. 30, lines 20-22). Defendant was in love with plaintiff and wanted to marry him (R. 30, lines 23, 24). Plaintiff's parents knew the parties were seriously interested in each other (R. 77, lines 5-10). Plaintiff did not return from Alaska until in December 1956. Plaintiff's parents took defend-

ant with them on a trip to California where they met plaintiff on December 24, 1956, at Monterey (R. 46, lines 1-5). Plaintiff and defendant had sexual intercourse that night (R. 46, lines 11-19) and many acts of intercourse between then and the return trip to Utah on December 29, 1956 (R. 29, lines 3-14). In the forepart of January of 1957, a rabbit test showed that defendant was pregnant (R. 24, lines 27-30). Plaintiff's mother urged him to marry defendant (R. 77, lines 2-4). On February 2, 1957, the parties were married at Salt Lake City, Utah (R. 45, lines 23-27). Thereafter the parties lived together with Mr. Holder's parents until May 4, 1957, when he left to work in Alaska again (R. 49, lines 4-6). Defendant had first consulted Dr. Juel E. Trowbridge of Bountiful where she was living prior to her marriage to plaintiff (R. 25, lines 4-10). On March 29, 1957, she went to see Dr. Von G. Holbrook who attended her thereafter since she had moved to Salt Lake City after her marriage (R. lines 12-14). The baby was expected, according to defendant, on September 15, 1957 (R. 49, lines 14-16), although Dr. Holbrook estimated she was farther along than that (R. 53, lines 3-6). Plaintiff wrote affectionate letters to defendant about three times a week after he left until the baby was born (R. 50, lines 9-17). Plaintiff planned to have defendant join him in Alaska after the baby was born (R. 50, lines 22-25). A female child named Debbie Holder was born on August 13, 1957, and weighed 6 pounds and 12 ounces (R. 22, line 7; R. 27, line 10). The birth was sooner than anticipated (R. 85, lines 17-28; R. 63, line 28—R. 64, line 5).

Plaintiff assumed right after the baby was born that the child was not his (R. 81, lines 1-27). Defendant made repeated efforts to discuss plaintiff's attitude with him but never was able to talk to him privately except for one instance two weeks before the trial (R. 82, lines 1-12). She voluntarily had blood tests taken (R. 82, lines 13-19). Plaintiff refused to resume the marital relationship and filed this action on January 22, 1958.

## STATEMENT OF POINTS

### POINT I

THE CHILD IN QUESTION WAS NOT A "FULL TERM" BABY.

### POINT II

DEFENDANT DID NOT TELL PLAINTIFF'S FATHER THAT SHE TOLD HER MOTHER SHE WAS GOING TO BE PREGNANT WHEN SHE RETURNED FROM CALIFORNIA.

### POINT III

DEFENDANT DID NOT TELL PLAINTIFF'S MOTHER AFTER THE BABY WAS BORN THAT SHE HAD MISSED A MENSTRUAL PERIOD PRIOR TO MEETING PLAINTIFF AND CONTACTED HER DOCTOR CONCERNING IT.

### POINT IV

DEFENDANT WAS NOT PREGNANT ON DECEMBER 24, 1956, AND PLAINTIFF IS THE FATHER OF THE CHILD IN QUESTION.

## POINT V

THE COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION FOR A NEW TRIAL.

## ARGUMENT

### POINT I

THE CHILD IN QUESTION WAS NOT A "FULL TERM" BABY.

According to plaintiff's own medical expert, Dr. Von G. Holbrook, who delivered the child, the baby was "near term" (R. 57, line 24). Additionally, the term "premature" and "term" are used in the medical profession to indicate stage of development of the baby rather than period of gestation (R. 66, lines 8-15). Thus, the evidence does not support Finding of Fact No. 8.

### POINT II

DEFENDANT DID NOT TELL PLAINTIFF'S FATHER THAT SHE TOLD HER MOTHER SHE WAS GOING TO BE PREGNANT WHEN SHE RETURNED FROM CALIFORNIA.

It is hardly likely that a single girl would in effect tell a young man's father that she planned to become pregnant by the son. Defendant emphatically denied such testimony of plaintiff's father (R. 23, lines 26-30).

If defendant in fact had made such a statement, it is hardly likely that the father would not warn his single son before such might occur and yet plaintiff's father admitted he did not do so (R. 41, lines 7-10). Plaintiff's

mother goes even further and says she discussed defendant's desire to become pregnant by her son before leaving for California yet made no attempt to warn her son or properly chaperon these young people (R. 76, line 1—R. 77, line 1). Yet despite her positive testimony of a plan to trap her son, she nevertheless urged the boy to marry defendant against his will (R. 77, lines 2, 3). Such testimony of naturally biased witnesses ought to be considered cautiously. When it is so contrary to the course of conduct one would normally expect, it ought not to form the basis of a decision so important and drastic as is this case. Additional evidence on this point will be discussed under Point V. Thus, the evidence does not support Finding of Fact No. 9. Even if it did, that would hardly prove that plaintiff did not become the father thereafter.

### POINT III

DEFENDANT DID NOT TELL PLAINTIFF'S MOTHER AFTER THE BABY WAS BORN THAT SHE HAD MISSED A MENSTRUAL PERIOD PRIOR TO MEETING PLAINTIFF AND CONTACTED HER DOCTOR CONCERNING IT.

Defendant vigorously denied plaintiff's mother's testimony of such an admission (R. 89, lines 2-7). One who desired to continue her marriage after having a child born before the due date of a premarital conception certainly would not admit missing a menstrual period just prior to possible conception date with the husband, especially not to the husband's mother. The occasion on which plaintiff's mother claimed this occurred was at the very



time defendant was discussing with her mother-in-law her plans to rejoin her husband (R. 74, lines 5, 6). According to plaintiff's witness, defendant had just been placed on guard that the mother-in-law suspected the child was not her son's (R. 74, lines 17-19). If such testimony were true and the doctor could be required to testify as to its actuality, then plaintiff's case would definitely be proved and the matter settled. In order to make it possible for the case to be settled on this one crucial point, defendant through her counsel (R. 77, lines 19-25) gave plaintiff that opportunity. Not having availed himself of the best possible evidence to prove this point, and for obvious reasons since plaintiff knew, according to Dr. Trowbridge, what this doctor's testimony would be, the presumption must be drawn that such evidence would be adverse. It is significant that no mention is made of this testimony in the Court's Memorandum Decision (R. 106). Evidence from Dr. Juel E. Trowbridge on this aspect of the case will be discussed under Point V.

#### POINT IV

DEFENDANT WAS NOT PREGNANT ON DECEMBER 24, 1956, AND PLAINTIFF IS THE FATHER OF THE CHILD IN QUESTION.

This, of course, is the crucial issue. Was defendant with another man who might be the father of this child? No. She swore she was not (R. 30, lines 12-17). Were there any special reasons for defendant not going out with other fellows during the possible conception period? Yes. Ruth Ratcliffe was in love with Richard Holder. She

wanted to marry him (R. 67, line 13—R. 69, line 25). She had been expecting him to return from Alaska since September of that year (R. 30, line 20-22).

There is no proof in the record that anyone else had an opportunity to be the father of the child. In order to eliminate any temptation, however, to read between the lines from plaintiff's assertions in Answers to Interrogatories and questions relating to one Max Jones (R. 36, line 23), defendant respectfully represents that blood tests taken on Max Jones subsequent to the time for presenting new evidence exclude him as a possible father of this baby. At the time of defendant's Motion for a New Trial, a letter from the Blood Grouping Laboratory of the Salt Lake General Hospital so stating was presented to the trial judge, and he stated that his decision was not in any way affected by any possibility relating to Max Jones.

Do the medical facts require the conclusion that defendant was pregnant on December 24, 1956, so that plaintiff could not have been the father of Debbie Holder?

Dr. Von G. Holbrook (plaintiff's witness) testified that while it was not probable, it was possible that this child was as much as six weeks short of term (R. 58, line 5). Also he reiterated his testimony in a prior deposition in which he said, "We have all seen many cases where the baby can be premature and weigh as much as twelve pounds — or six pounds, twelve ounces. I have had many cases myself where the baby may be six months,

permatute, and weigh six pounds and twelve ounces.”  
(R. 65, lines 25-29)

Dr. Lyman M. Horne stated he had a few cases each year during the last twenty years in which he detected the fetal heartbeat in the fifteenth or sixteenth week of pregnancy (R. 92, line 15). The 1938 work of Dr. Williams on *Obstetrics* (6th Edition) states that the fetal heartbeat has been heard as early as the twelfth week (R. 97, lines 1-6). Today modern instruments make it possible to hear the heartbeat even earlier than in 1938 (R. 63, lines 6-15).

The trial court recognized that the strongest presumptions exist in favor of legitimacy under our rules of law (R. 107) but was of the opinion that the gestation period was 48 days less than normal and such variation was sufficient to overcome the presumption (R. 107). The normal period of 280 days is computed not from the date of conception but from the first day of the last monthly period (R. 95, lines 21 - 27). The period of 232 days used by the trial court, however, was computed from the date of first contact of the parties on December 24, 1956 (R. 22, line 21) rather than from the beginning of the monthly period, which was November 25, 1956 (R. 23, line 2). Considerable confusion has resulted from the failure to recognize the difference between the two different periods. The best explanation of this which appellant has found is in the case of *Dazey v. Dazey*, 122 P. 2d 308, in which the California court stated:

“What is meant by the words ‘period of gestation’? Here we have an apparent misnomer. The

word 'gestation' is defined by the dictionary as being the period of time in which a woman carries a fetus in her womb, from conception to birth. But, as used in all medical authorities this phrase does not mean the actual number of days from conception to birth. One cannot take the date of birth as a starting point and count backwards so many days and say that a child was conceived on any particular date, even within limitations of as much as sixty days. The average period of gestation which the medical term connotes is from 270 to 290 days from the last menstrual period of the mother. As a medico-legal term this phrase does not mean now, nor has it ever meant, that 'length of gestation' is from 270 to 290 days from the date of conception to the date of birth of a child.

“ ‘The actual duration of pregnancy is not yet known, but ordinarily two hundred and eighty days, or ten lunar months, elapse between the commencement of the last menstrual flow and the onset of labor, though a considerable number of children are born shortly before or after the expiration of that period.’ Williams’ *Obstetrics*, Sixth Edition, page 163.

“In the case at bar, in considering the possible natural length of gestation of this child, we must take the 225 days alleged in the complaint as elapsing from the date of marriage to the date of birth, and we must add an additional 25 days at least, making a total possible and natural period of gestation of 250 days. This is so because we must assume that conception of the child took place on the night of the marriage. (Estate of McNamara, supra, 181 Cal. at page 88, 183 P. 552, 7 A.L.R. 313); we must also assume that this child was conceived just before the end of the mother’s recurrent monthly menstrual period of 28 days.

‘But,’ says someone, ‘you are computing from a time 25 days before marriage of this mother. How can that be?’ The answer is that we are applying an empirical measure of time, and it is the measure which we are using which extends the possible and natural number of days, to a time before the date of the marriage. To illustrate: If this lady, believing she was pregnant, had gone to her doctor to inquire the probable date of birth of the child, the doctor would have used 280 days from her last menstrual period, regardless of the date of the marriage, and he would (if it were 25 days before the marriage) have computed from that earlier date. The whole matter is discussed in DeLee’s Principles and Practice of Obstetrics, Fourth Edition, page 25:

“ ‘It is important to know the time pregnancy begins, but unfortunately, we are in a position as yet only to guess at the exact date. The knowledge is wanted in order to determine the day of confinement and the actual length of human gestation for practical reasons, for the scientific study of the development of the ovum in the uterus, and for medico-legal processes in the question of legitimacy of a child or its paternity. All the points on which such a determination could rest are uncertain, as: (1) The date of the fruitful coitus (the woman’s word must be accepted); (2) the date the ovum left the ovary, and whether it was fertilizable or not; (3) how long it takes the ovum to reach the tube and uterus; (4) how long it takes the spermatozoids to reach the ovum; (5) how long the fertilized ovum rests before it begins to germinate — all unknown factors.’

\* \* \* \* \*

“This author also plainly states that if we compute the period from fruitful coition to birth,

it varies from 220 days to 330 days (*Principles and Practice of Obstetrics*, Sixth Edition, chapter 5, page 120, by Joseph B. DeLee, A. M., M. D., Professor of Obstetrics and Gynecology, Eberitus, University of Chicago, Consultant in Obstetrics, Chicago Lying-In Hospital and Dispensary; Consultant in Obstetrics, Chicago Maternity Center): 'The most reliable datum from which to estimate the beginning is the date of fruitful coition, and, reckoning from this day, pregnancy has been found to vary from two hundred and twenty to three hundred and thirty days, the average being two hundred and seventy days. \* \* \* From time immemorial women have reckoned two hundred and eighty days, ten lunar months, or nine calendar months, from the first day of the last period as the length of normal gestation, and for practical purposes this may be accepted, because in the majority of cases it holds true, but one must remember and admit the exceptions. No doubt some children require a longer time in the uterus for full development than others. Some seeds in favorable soil grow faster than others. The writer has delivered children that were carried eight months that were as matured as full-term infants, and also in one case, he delivered a child weighing three and one-half pounds which was fully three weeks over term. Heyn had a case of two hundred and twenty-nine days' pregnancy, with child of 2980 gm. and 50 cm. length.' (About 6½ pounds).''

In that case it was held as a matter of law that a mature child born 225 days (7 days less than the period in the case at bar) after marriage was legitimate.

Dr. Lyman M. Horne testified in answer to hypothetical questions propounded to him by plaintiff's attorney

which included all the known factors indicating the period of gestation in this case that on March 29, 1957, the pregnancy would be between thirteen and eighteen weeks since date of conception (R. 99, line 6—R. 100, line 8). If conception took place on December 24, 1956, the date of first intercourse between the parties, defendant would have been pregnant 13 weeks plus 4 days).

If determination of legitimacy depends upon whether the conception date is not only within the range of medically possible limitations but also within the statistically more numerous group within that range as well, the presumption can hardly be denominated as strong. The best that can be said for plaintiff's medical evidence is that it shows that this is a rare case if plaintiff is the father (R. 57, lines 15, 16, also R. 59, line 30—R. 60, line 10).

In the later California case of *Gonzales v. Pacific Greyhound Lines*, 202 P. 2d 135, the decision of *Dazey v. Dazey* was cited with approval in holding that a fully developed child which was born 234 days after marriage would be conclusively presumed to be legitimate child of the marriage. The court there affirmed the rule as set forth in *In Estate of Walker*, 180 Cal. 478, 181 P. 792, as follows:

\* \* \* the true rule in America, as well as England, is, we believe, that if it is possible by the laws of nature for the husband to be the father (that is, if there was coition and no impotency), no inquiry will be permitted into the probabilities of the case one way or the other, but the presumption of legitimacy is conclusive; and, on the other hand, it is always permitted to show that it was

not possible by the laws of nature for the husband to be the father, as by showing impotency on his part, want of intercourse during the possible period of conception or that the child is of a race or color such that it could not have been conceived by the husband.”

The presumption of legitimacy is only conclusive in California where it is “probable,” “usual,” “average” or “normal” that the child was conceived in wedlock and does not apply where it is merely “possible” to have been so conceived. In the latter situation the presumption is a rebuttable one.

The cases cited above indicate that the period of 232 days in this case is not rare. Afortiori, the period is not one which indicates that the child is not plaintiff’s according to the laws of nature. In fact this is recognized by the trial judge in his Memorandum Decision (R. 107).

In view of the lack of evidence of any fraud committed by defendant, the dictum in the decision of the Utah Supreme Court in the case of *Bement v. Bement*, 172 P. 2d 996, is not applicable. If such fraud were established, the moral principle thus set forth there would apply to this case and the timing of the bubble pricking would not affect its application.

#### POINT V

#### THE COURT ERRED IN DENYING DEFENDANT’S MOTION FOR A NEW TRIAL.

The testimony of defendant’s mother in accordance with her affidavit in support of defendant’s motion for a



new trial (R. 118) certainly ought to be received in determining whether or not defendant made the statement to plaintiff's father as set forth in Finding of Fact No. 9.

The testimony of Dr. Juel E. Trowbridge in accordance with his affidavit in support of defendant's motion for a new trial (R. 117) should have been received to rebut hearsay statements attributed to defendant by plaintiff's mother concerning her possible pregnancy before going to California, particularly in light of defendant's waiver of privilege as to any communication with him (R. 77, lines 19-25) and plaintiff's failure to call him to prove such a fact. Dr. Trowbridge would have testified that it was not true that defendant had consulted with him about possibility of pregnancy prior to December 24, 1956, and furthermore that he had told plaintiff and his parents this before the trial.

One can only conclude that the court did not base its decision on such evidence, which is consistent with the fact no mention was made of it in the Memorandum Decision (R. 106) and would have ruled the same way despite the testimony of Dr. Trowbridge. Otherwise, the court surely would have received such direct evidence which was so conflicting with the hearsay evidence at trial in a case of such magnitude as this.

## CONCLUSION

The decree of annulment of the District Court of Salt Lake County should be vacated and the cause remanded to the District Court to ascertain the proper amount, if

any, for plaintiff to pay defendant for alimony, support money, and counsel fees, and to enter a decree of divorce in favor of defendant and against plaintiff accordingly.

Respectfully submitted,

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