

1968

Celeste Bott v. Mary Turner Bott : Brief of Respondent

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IN THE SUPREME COURT OF THE

STATE OF UTAH

CELESTE BOTT, :

Plaintiff and Appellant, :

Case No. 11266

-vs- :

MARY TURNER BOTT, :

Defendant and Respondent. :

BRIEF OF RESPONDENT

An Appeal From the Judgment of the
District Court of the Third Judicial
District, the Honorable Joseph G.
Jeppson, Judge

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FILED

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State Supreme Court Clerk

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BRIEF OF RESPONDENT

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STATEMENT OF NATURE OF CASE

This matter arises out of an order of the court finding appellant in contempt of court for failing to comply with an order in a decree of divorce requiring the appellant to pay a certain sum in lieu of alimony.

DISPOSITION IN LOWER COURT

The Third Judicial District Court, the Honorable Joseph G. Jeppson, Judge, held appellant in contempt of court and sentenced him to 15 days in the Salt Lake County jail, for failing to obey the decree of divorce ordering appellant to pay respondent \$2400.00 at the rate of \$200.00 per month for one year. The court also enjoined appellant

from continuing an independent action against respondent for personal property claims which had been adjudicated by the Honorable D. F. Wilkins in an earlier hearing. This case was previously before this Court in Bott v. Bott, 20 Utah 2d 329, 437 P.2d 684 (1968).

RELIEF SOUGHT ON APPEAL

Respondent submits that the court should affirm the trial court's judgment finding appellant in contempt of court and sentencing him to 15 days in the county jail.

STATEMENT OF FACTS

This appeal is from an order of the Third District Court of Salt Lake County, State of Utah, Joseph G. Jeppson, Judge, dated May 2, 1968 (R. 82, 83). The appellant seeks reversal of the court's order finding him in contempt of court, and sentencing him to 15 days in the county jail therefor. Appellant also seeks reversal of the court's order restraining him from continuing Third District Court of Salt Lake County, State of Utah, Civil No. 178623, Celeste Bott, plaintiff, vs. Mary Turner Bott, defendant.

Appellant filed a complaint against respondent for divorce on April 7, 1966 (R. 1, 2) The respondent answered and counterclaimed against appellant for divorce on April 18, 1966. (R. 6, 9) The court granted appellant a divorce

on his complaint and also granted respondent a divorce on her counterclaim.

A decree signed by the Honorable Stewart M. Hanson was filed July 27, 1966 (R. 27, 28). The decree granted all of the real property of appellant to appellant free of all claims of respondent. Each party was awarded their own separate bank accounts. Respondent was awarded some specific items of personal property and all of her personal belongings remaining in the appellant's home. Upon respondent's motion (R. 34), the court filed a further memorandum decision dated September 23, 1966 (R. 32, 33), granting respondent additional items of personal property. The decree also ordered appellant to pay respondent "in lieu of alimony" \$2400.00 payable \$200.00 per month for one year without interest.

On June 7, 1967, respondent caused an order to show cause to be issued ordering appellant to appear and show cause why he should not be held in contempt of court for willfully failing to comply with the above decree and further memorandum decision. (R. 35) The court, Judge D. F. Wilkins presiding, filed its findings of fact, conclusions of law, and order on the order to show cause hearing July 6, 1967 (R. 37, 40). The court found as a matter of fact that appellant had \$45.00 worth of res-

pondent's personal property and that respondent had \$90.00 worth of appellant's personal property. The court after adjusting accounts between the parties granted appellant's claim of setoff to the extent of \$45.00. The court also found that the appellant had willfully refused to pay \$2000.00 of the alimony settlement and sentenced him to five days in the county jail for contempt of court. The court granted a four month stay of execution in which appellant could purge himself of the contempt.

Appellant appealed this decision to this court.

Bott v. Bott, 20 Utah 2d 329, 437 P.2d 684 (1968). This court held that the district court did not have jurisdiction to find appellant in contempt of court because a supporting affidavit had not been filed as required by 78-32-3, Utah Code Annotated (1953). The court also held that the district court did have jurisdiction over the parties to settle the personal property dispute and affirmed the district court's decision in this regard.

After rendition of the court's prior decision, respondent caused another order to show cause to be issued (R. 76) this time supported by a proper affidavit. (R. 77) The appellant was ordered to appear and show cause why he should not be held in contempt of court for willful failure

to pay respondent \$2000.00 of her alimony settlement and why he should not be "enjoined from pursuing a suit filed against respondent in the district court for property claims adjusted herein on 7-6-68." The court filed it's finding of facts and order on May 2, 1968.(R. 82, 83) The district court found appellant in contempt of court for failure to obey the divorce decree, and sentenced him to 15 days in the county jail. The court also found as a matter of fact that the property claims involved in the appellant's independent suit against respondent were settled at the hearing held before Judge D. F. Wilkins on June 21, 1967, and restrained the appellant from continuing the suit.

ARGUMENT

POINT I

THE TRIAL COURT WAS NOT TRYING TO COLLECT A DEBT BY CONTEMPT PROCEEDING BUT WAS ENFORCING THE COURT'S ORDER TO PAY A SUM IN LIEU OF ALIMONY.

The appellant contends that the imposition of a jail sentence for contempt of court, because he refused to pay the award of \$2400.00 "in lieu of alimony," violated Utah Constitution, Article I, Section 16, forbidding imprisonment for debt. However, the appellant concedes that the court may enforce the payment of alimony and support money by contempt of court proceedings but contends that the \$2400.00 award "in lieu of alimony" was a property settlement and

therefore could not be enforced by contempt proceedings. The basis for a court's contempt power in alimony cases is explained in Browing, Enforcement of Divorce Decrees and Settlements by Contempt and Imprisonment in California, 9 Hast. L.J. 57 (1957) at P.60 as follows: "it would seem that the distinction between a 'debt' as alluded to in the state constitutional provision, and 'alimony' in that the former relates to business transactions, whereas alimony arises from the marital obligations of the husband."

Respondent submits that the trial court in awarding appellant \$2400.00 "in lieu of alimony" was not making a property settlement but was making a lump sum award in settlement of alimony. Judge Wilkins so recognized the award in his finding of fact dated July 6, 1967, on the first order to show cause hearing. Judge Wilkins there referred to the award as an "alimony settlement". A lump sum award in lieu of alimony has been recognized as proper in the following cases decided by this court: Pinion v. Pinion, 92 Utah 255, 67 P.2d 265 (1937); Bader v. Bader, 18 Utah 2d 407, 424 P.2d 150 (1967); Peters v. Peters, 15 Utah 2d 71 394 P.2d 71 (1964).

The court used the term "in lieu of alimony" in the Peters case and "in lieu of all claims for alimony" in the Pinion case to describe the lump sum alimony award. It is

apparent from those cases that the term "in lieu of alimony" is used to designate a lump sum alimony settlement, not a property settlement.

It should be pointed out that the authority cited by appellant in support of his position, Bradley v. Superior Court, 310 P.2d 634 (Cal. 1957) and Stone V. Stidhum, 96 Ariz. 235, 393 P.2d 923 (1964), involved property settlements and so would not be controlling in the present case.

In the divorce decree and the further memorandum decision, the court was specific in dividing the property between appellant and respondent. The appellant was awarded all of his real property free of all claims of respondent, each party was awarded their separate bank accounts, and respondent was awarded her personal belongings remaining in appellant's home. This was the property settlement not the award "in lieu of alimony". If the court would have meant the award of \$2400.00 to be part of the property settlement, this item would have been included in the award relating to the division of property.

The respondent also submits that the appellant was not being imprisoned for debt but was being imprisoned for failure to comply with a valid order of the court. In In Re Clift's Estate, 108 Utah 336 159 P.2d 872 (Utah 1945)

this court upheld a contempt conviction against an administrator of an estate for failure to comply with a valid order of the court requiring him to pay over money to his successor. It seems that the necessity for the court to enforce it's order to maintain respect for court processes, is present whether or not it is an order to pay money. The Supreme Courts of Washington and Colorado have both upheld contempt convictions for failure to comply with property settlements made in a divorce decree. Both decisions were based on the fact that the contempt was not for failure to pay a debt but was for failure to obey a valid order of the court. Harvey v. Harvey, 153 Colo. 15, 354 P.2d 265 (1963), Decker v. Decker, 52 Wash. 2d 456, 326 P.2d 332 (1958).

POINT II

THE APPELLANT'S CLAIM OF SETOFF WAS NOT A SUFFICIENT JUSTIFICATION FOR FAILURE TO OBEY THE COURT'S ORDER.

Appellant claims that the court had insufficient evidence upon which to base a contempt of court finding, because appellant claimed a setoff. Respondent submits that there was sufficient evidence upon which the court could and did reject appellant's claim of a setoff. There was evidence that the appellant's claim of setoff had been determined to be \$45.00 by Judge Wilkins in a previous hearing.

"Q. Now when we left Court that day do you remember the judge said:

'Mr. Bott, I find the value of the property she took from you was worth \$90.00, but I find the value of the property you owe her is \$45.00 so I give you a credit of \$45.00.'

Is that what the judge said?

A. Yes.

Q. You understood that at the time.

A. Yes."

In the court's findings of fact dated May 2, 1966, (R. 82, 83 Judge Jeppson acknowledged and took account of the \$45.00 setoff granted by Judge Wilkins. Judge Wilkins decision on the amount of the setoff is conclusive against Judge Jeppson in this case. Knight v. Flat Top Mining Co., 6 Utah 2d 51, 305 P.2d 503, (1957), National Finance Co. of Provo v. Daley, 14 Utah 2d 263, 382 P.2d 405 (1963). There was clearly evidence upon which the claim of setoff could be decided.

Respondent further submits that a claim of setoff is not sufficient justification for refusal to obey a valid order of the court. It is said in 2 Nelson Divorce and Annulment, 2 ed. (1961) 447:

"The husband cannot offset against his liability for alimony or support payments his wife's alleged indebtedness to him. In fact, it has been held that the husband cannot even setoff a judgment which he has obtained against his

wife, as the alimony decree is to provide for her support and offsetting a judgment against her claim would be no aid in this connection."

Keck v. Keck, 219 Cal. 316, 26 P.2d 300 (1933), and Wagner v. Wagner, (La. App.) 134 So. 2d 670 (1961) are cited in support of the above statement.

Respondent respectfully submits that the court properly denied appellant's defense of setoff.

POINT III

APPELLANT'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY WAS NOT VIOLATED BY THE SECOND CONTEMPT OF COURT FINDING.

Appellant contends that due to the fact that this court reversed appellant's June 1967 conviction for contempt of court, Utah Constitution Article I Section 12 prevents him from being tried again for the same contempt. Respondent submits that the appellant's rights under Article I Section 12 were not violated in this case.

The contempt of court finding on May 2, 1968, was not based on the same contempt of which appellant was convicted in June of 1967. The contempt is for refusal to obey a valid order of the court. There is a continuing violation until appellant obeys the order. The respondent's affidavit in support of the order to show cause (R. 77) makes it clear that this action was brought on the basis of different facts than those in the action in June of 1967.

The respondent stated "that the court June 21, 1967, adjudicated plaintiff's property claims against defendant and allowed him credit of \$45.00 therefore, but the plaintiff ever since said time has still willfully refused to pay defendant pursuant to the decree of divorce."

Appellant concedes that if this court based it's decision overturning the first contempt conviction, on lack of jurisdiction then double jeopardy does not apply. He cites State v. Empey, 65 U. 609, 239 P. 25 (1925). However, the appellant reasons that the court could not have jurisdiction for one reason but not for another and argued that this court held that the trial court did have jurisdiction to adjudicate the personal property claims. As a result, the court's decision was not based on lack of jurisdiction.

Respondent disagrees, there is no reason why the court could not have jurisdiction to modify a property settlement in a divorce decree under 30-3-5 Utah Code Annotated (1953), while at the same time it's jurisdiction to find contempt of court is limited for failure to file an affidavit under 78-32-3 Utah Code Annotated (1953). A reading of this court's decision Bott v. Bott, 20 Utah 2d, 329, 437 P.2d 684 (1968) and Robinson v. City Court, 112 Utah 36, 185 P.2d 258 (1947) relied on by the court, makes it clear that the court considers 78-32-3 Utah Code Annotated (1953)

a jurisdictional requirement.

POINT IV

THE TRIAL COURT HAD POWER TO ENJOIN APPELLANT FROM CONTINUING ANOTHER CIVIL ACTION NO. 178623 IN THE DISTRICT COURT OF SALT LAKE COUNTY AGAINST RESPONDENT.

Appellant contends that the independent suit in question Civil No. 178623, District Court, Salt Lake County, involves matters not adjudicated at the hearing before the Honorable D. F. Wilkins in June of 1967. Appellant also contends that even if the property claims which are the subject of Civil No. 178623 were adjudicated by Judge Wilkins in June of 1967, res judicata must be plead in accordance with Rule 8(c) Utah Rules of Civil Procedure and not by enjoining appellant from bringing the suit.

Respondent respectfully submits that it is within the power of the district court to enjoin a party from bringing a suit based on the same factual issues which have or could have been litigated in a previous suit. Knight v. Flat Top Mining Co., supra.; National Finance Co. of Provo v. Daley, supra. The basis for such a power is well stated in Favorite v. Minneapolis Street Railway Company, 91 N.W. 2d 459 (S. Ct., Minn., 1958) at P. 463:

"Repeated litigation of a right which has been adjudicated with finality is without any legitimate purpose and constitutes a vexatious and oppressive harrassment of a litigant in contravention of his right to a speedy and efficient

administration of justice. If successive suits could be brought to litigate the same questions between the same parties or their privies as often as either should choose, remedial justice would soon become a mere mockery."

Rule 8(c) Utah Rules of Civil Procedure is no bar to the issuing of an injunction in this case. This Rule controls the point in the proceedings at which an affirmative defense must be brought up, it has nothing to do with enjoining the action completely.

Respondent further submits that the district court had adequate evidence on which to base a finding that the property claims in Civil No. 178623 were adjudicated or could have been adjudicated before Judge Wilkins in June of 1967. Appellant cannot contend that he did have an adequate chance to present evidence to Judge Jeppson that the property claims in Civil No. 178623 were not the same as those before Judge Wilkins in June, 1967. The appellant was ordered to show cause why the injunction should not issue, in the order dated April 12, 1968 (R. 76), and respondent stated in her supporting affidavit (R. 77) that the appellant has "contemptuously filed a suit in Third District Court against defendant claiming damages of \$2000.00 for said property already adjudicated." Yet, it must be noted that appellant did not even bring the file for Civil No. 178623 which could have easily settled the whole matter. The

appellant's attorney admitted that the property which was the subject of Civil No. 178623 had been taken before June of 1967.

"THE COURT: Prior to that date--were they taken prior to the date of the hearing?

MR. COTRO-MANES: Yes, not brought out, so no res adjudicata on those goods." (R. 109, 110)

It was upon the appellant to bring out evidence if any there was justifying why the claim was not made before Judge Wilkins. If there was not justification for failure to make the claim, appellant will now be barred from bringing the claim up. Knight v. Flat Top Mining Co., supra; National Finance Company of Provo v. Daley, supra. From this it is clear that there was sufficient basis for a finding that the property claims were or could have been adjudicated before Judge Wilkins in June 1967.

POINT V

IT WAS WITHIN THE COURT'S POWER TO INCREASE THE SENTENCE TO FIFTEEN DAYS IN JAIL.

Appellant contends that the court cannot increase punishment at a second trial where the first conviction has been reversed on appeal. Appellant reasons that such an increase in punishment would have a chilling effect on appellant's assertion of his constitutional right to an appeal. He cites United States v. Jackson, __ U.S. __ 20 L.ed.

2d 138, 88 S.Ct. ____ (1968) for the general rule that a court should not penalize those who exercise their constitutional rights.

Respondent agrees that the court cannot penalize those who exercise their constitutional rights. However, there is no reason to think the court has violated this rule in the present case. The contempt in this case was a continuing contempt and the court very well could have determined that a greater jail term had become necessary in order to force appellant to obey the orders of the court. The court very well could have determined that other factors were much more important than the slight chilling effect involved in this case. There is no evidence that it was the court's purpose to penalize appellant for exercising his right of appeal. See Rice v. Simpson, (USDC Ala., 9-26-67), 2 Criminal Law Reporter. 2068; State v. Jacques, (N.J. Sup. Ct., 10-7-68) 4 Criminal Law Reporter 2075; cf Palko v. Connecticut, 302 U.S. 319 (1937).

CONCLUSION

It is respectfully submitted to the Honorable Court that the trial court properly held appellant in contempt of court and sentenced him to 15 days in the county jail

for failure to obey the divorce decree. It is also respectfully submitted that the trial court properly enjoined appellant from continuing a suit involving facts that had already been decided in the present case.

Respectfully submitted,

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