

1960

Nick M. Vrontikis v. Dorothy Mae Jenson Vrontikis : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

— FILED

JUL 13 1960

NICK M. VRONTIKIS,
Plaintiff and Respondent,

— vs. —

DOROTHY MAE JENSON
VRONTIKIS,
Defendant and Appellant.

Clerk } Supreme Court, Utah

} Case
No. 9252

BRIEF OF APPELLANT

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IN THE SUPREME COURT OF THE STATE OF UTAH

NICK M. VRONTIKIS,
Plaintiff and Respondent,

— vs. —

DOROTHY MAE JENSON
VRONTIKIS,
Defendant and Appellant.

Case
No. 9252

BRIEF OF APPELLANT

STATEMENT OF FACTS

For purposes of this brief the parties will be referred to by their designation in the trial court. Plaintiff and defendant first met in Fort Worth, Texas, in 1946, and were married at Elko, Nevada on the 30th day of October, 1952. (R. 145, 146). The marriage had as a foundation an “antenuptial” agreement, executed between the parties on the day of the marriage, wherein the plaintiff agreed to pay the defendant in event of divorce, \$250.00 if he were plaintiff, and \$1,000.00 if he were defendant. (R. 29-33). The lower court held the

contract null and void as far as the divorce proceeding is concerned, it being a "contract for a divorce" at the pleasure of the plaintiff. (R. 64). The antenuptial agreement is not an issue before this Court, except as to the claim by the defendant that it was used to upset and coerce the defendant through threats of the plaintiff.

Plaintiff filed his action for divorce on January 23, 1959, (R. 1) and his amended action on March 11, 1959 (R. 20). Defendant answered and counterclaimed on February 10, 1959 (R. 4), and amended the same on March 23, 1959 (R. 34). Trial was held on October 22, 1959 (R. 135), following hospitalizations of the defendant for physical and mental illnesses. (R. 260.)

Plaintiff testified that the defendant cursed and swore at him during the two years preceding the action (R. 172); that they had sexual intercourse on two occasions during 1958 (R. 174); that defendant would not let plaintiff have sexual intercourse (R. 174); that the times when they did have intercourse was when the *plaintiff* thought they were going to have a reconciliation. (R. 174.)

Plaintiff testified that in May 1958 he and defendant had discussed adopting children, and that the defendant refused, and did not change her mind thereafter; (R. 156-160) that defendant refused to visit plaintiff's parents and brother, or invite them to her home. (R. 148-150.)

Defendant denied that she swore or cursed the plaintiff (R. 258-259); or that she had refused to have

sexual intercourse with him (R. 258); or refused to have children (R. 258); or that she had referred to the parents or brother of the plaintiff in vulgar or obscene language (R. 259). Defendant testified that the plaintiff's habits of arrival and departure resulted in his coming home at 4:00 o'clock in the morning, which he did for several months, without accounting for his absence. (R. 262-263); that during a discussion regarding the antenuptial agreement, plaintiff threatened to throw defendant out of the house if she did not do what he told her (R. 265); that she wanted to adopt children about two years after the marriage, but plaintiff treated her like a doormat. (R. 279.)

Plaintiff's annual income for the years 1956, 1957 and 1958 was \$8,185.56, \$11,510.57, and \$7,620.03, respectively. (R. 212). Property acquired by the parties includes an equity in real estate in the sum of \$9,500.00 (R. 287); corporate stock of Vrontikis Bros., Inc., with a par value of \$10,000 (R. 181); a note receivable in the sum of \$10,000 (R. 186); household furnishings and appliances (R. 227); Gunsite Butte Uranium Corporation stock valued at \$1,080, which the lower court found not to be property of the plaintiff, although held in his name. (R. 183-4; R. 121.)

Of this property and income defendant was awarded \$3,000 as her share of the property, \$150 per month alimony and support money for one year, household appliances, attorney fees, and costs. (R. 126). Plain-

tiff was awarded the remainder of the property, and the divorce. (R. 126.)

Defendant appeals from the property award as being inequitable and unjust, and from the lower court's refusal to make such amendment in its findings, conclusions and decree. The defendant also claims reversible error in excluding evidence at the trial material to her defense and counterclaim, and for the trial court's refusal to grant a new trial on that basis.

Reversible error is also claimed in denying to the defendant discovery rights. The defendant further submits that plaintiff failed to establish that he had the necessary residence requirements to obtain a divorce.

STATEMENT OF POINTS

POINT I.

REVERSIBLE ERROR WAS COMMITTED IN EXCLUDING EVIDENCE MATERIAL TO THE PROSECUTION OF DEFENDANT'S COUNTERCLAIM AND DEFENSE.

POINT II.

PREJUDICIAL ERROR WAS COMMITTED IN SUSTAINING PLAINTIFF'S OBJECTIONS TO DEFENDANT'S INTERROGATORIES OF MAY 21, 1959.

POINT III.

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT PLAINTIFF HAD THE REQUISITE RESIDENCE REQUIREMENTS FOR THE COURT TO AWARD HIM A DIVORCE.

POINT IV.

THE PROPERTY AWARD IS INEQUITABLE AND UNJUST TO THE DEFENDANT, AND SHOULD BE MODIFIED.

ARGUMENT

POINT I.

REVERSIBLE ERROR WAS COMMITTED IN EXCLUDING EVIDENCE MATERIAL TO THE PROSECUTION OF DEFENDANT'S COUNTERCLAIM AND DEFENSE.

The lower court committed reversible error in excluding testimony offered by the defendant (1) bearing upon plaintiff's conduct prior to the filing of plaintiff's amended complaint and defendant's counterclaim; and (2) bearing upon plaintiff's action in using the antenuptial agreement in such a way as to inflict mental suffering on the defendant.

(1) Defendant called plaintiff as a witness at the trial and attempted to examine him regarding his conduct prior to the date defendant filed her counterclaim, and also prior to the date of the filing of the Amended Complaint by the plaintiff. The trial proceeding follows:

“BY MR. GEE:

Q. Mr. Vrontikis, during the first of February, 1959, you went to Mexico.

MR. PAUL COTRO-MANES: Your Honor, we object to it, it is immaterial. The date of filing the complaint was January 1959, what he did subsequent is not a matter before the court.

MR. GEE: I would argue that, first, it was before the amended complaint was filed; second, it was before the defendant's counterclaim was filed.

MR. PAUL COTRO-MANES: The commencement of this action is the date of the filing of the action.

(Argument by counsel)

THE COURT: What do you claim for this, Mr. Gee? Are you going to show some infidelity or question of infidelity, is that your purpose?

MR. GEE: I want to ask the defendant his whereabouts.

MR. N. J. COTRO-MANES: Is that your purpose?

MR. GEE: Your Honor, I have—

THE COURT: I have asked you the question. You can answer me.

MR. GEE: Yes, Your Honor, I would ask and I want to know whether he was stepping out on his wife or not.

THE COURT: Since the filing of the complaint?

MR. GEE: Yes, I asked him yesterday.

THE COURT: I think the ruling will be the same. The objection will be sustained."
(R. 284-285)

See also R. 210-211.

It is clear that the objection of the plaintiff is specific and based upon the premise that any action of the plaintiff after the filing of his complaint is immaterial. The Court sustained the objection after specific-

ally asking if the inquired of conduct was after the complaint was filed.

“It is a rule of universal application that an objection is deemed to be limited to the ground or grounds specified and does not cover others not specified. Where specific grounds are stated the implication is that there are no others, or, if others, that they are waived.” 88 C.J.C., Trial, §125b; *Atherley v. MacDonald, Young and Nelson, Inc.*, (Calif.) 298 P. 2d 700; *Godding v. Swanson*, (Pa.) 98 A. 2d 210; *Spencer, et al., v. Burns, et al.*, (Ill.) 108 N.E. 2d 413; *Sewer and Waterworks Improvement Dist. No. 1 v. McClendon*, (Ark.) 60 S.W. 2d 920.

All other grounds for objection having been waived, is the sole basis for objection by plaintiff, and the Court's sole reason for sustaining the objection, sound in law? Ample authority supports the principle that a cause of action of a defendant in a divorce action may be based upon facts occurring after the institution of the plaintiff's action, but prior to the filing of a counterclaim.

In the 1952 case of *Cameron v. Cameron* (N.C.), 68 S.E. 2d 796, the rule is stated as follows:

“It is well settled that in an action for divorce, either absolute or from bed and board, it is permissible for the defendant to set up a cause of action for divorce, either absolute or from bed and board, as a counterclaim or cross demand. * * * Such counterclaim or cross demand may even be based, in whole or in part, upon facts occurring after the institution of the action. * * * (citing cases.)”

The rationale underlying this rule is that the defendant could make her cause of action the subject matter of an independent suit, which suit would be separate and distinct from any claim of the plaintiff, and certainly not negated or controlled if or when the plaintiff files an action. The action of the defendant, as embraced in a counterclaim, asks independent relief and the Court should act upon it separately and apart from the plaintiff's action. *Pettigrew v. Pettigrew* (Ark.), 291 S.W. 90.

That appellant's action as embraced in a counterclaim may be based upon facts occurring after the institution of the suit by plaintiff and prior to the filing of the counterclaim is supported further by the following cases: *Roberts v. Roberts* (W. Va.), 128 S.E. 144; *Martin v. Martin*, 33 W. Va. 695, 11 S.E. 12; *Neddo v. Neddo*, 56 Kan. 507, 44 P. 1; *Heinemann v. Heinemann* (Wisc.), 233 N.W. 552; *VonBernuth v. VonBernuth* (N.J.), 74 A. 700; *Ames v. Ames*, 178 N.Y.S. 177; *Weiss v. Weiss*, 238 N.Y.S. 36.

All of this is not to lose sight of the fact that the inquired of conduct occurred before the filing of plaintiff's amended complaint, which we submit is the date of the institution of plaintiff's action.

Lest plaintiff now offer some other basis for his objection, we invite this Court's attention to the general rule that "if evidence is erroneously excluded on a certain ground, the ruling will not be sustained because the evidence might have been inadmissible on another ground, although such other grounds have been assigned by counsel objecting to the admission of the evidence

(not the case here!) but not adopted by the court as the basis for its decision.” 4 C.J.S., Appeal and Error, p. 894; See *Huntsman v. Huntsman* (Utah), 192 P. 368; *Ryals v. Wilson* (Ga.), 111 S.E. 414; *Bloodgood v. Lynch, et al.* (N.Y.), 56 N.E. 2d 718; *Chicago R. I. & P. Ry. Co. v. Hughes* (Okla.), 166 P. 411. The rationale behind the rule is that the objection must inform the court the point being argued by the objector and inform the opposite party the point of the objection so that he may have an opportunity to obviate the error if possible. Such we submit is the underlying rule of the *Huntsman* decision *supra*, wherein this Court refused to uphold a sustaining of an objection on grounds other than those specified, which were without merit, on the premise that the opposite party to the objector was “thrown off guard” by the lower court’s action in erroneously sustaining on the specific ground.

The lower court committed reversible error in excluding the aforementioned evidence, and in denying defendant’s motion for a new trial. That the error is prejudicial is apparent. Can justice and equity be done by the defendant if the foregoing evidence sought to be introduced is not weighed in considering defendant’s grounds for divorce? Or weighed in corroboration of defendant’s testimony regarding plaintiff’s habits of arrival and departure? The evidence also challenges plaintiff’s standing to ask for equitable relief; it bears directly on the questionable cleanliness of plaintiff’s hands as he stands before the Court. Is it not prejudicial to deny defendant the opportunity to refute the “fault-

less'' claim of plaintiff, whether as a defense or separate claim?

The excluded evidence also bears upon the credibility of plaintiff, who denied any infidelity. (R. 209-210). Furthermore, plaintiff claimed he suffered certain distress as a result of defendant's acts, which claim would have questionable foundation if the evidence sought to be introduced had not been excluded. We submit that as long as this Court considers relative fault as a factor in granting a divorce and awarding property to the parties, it should receive and weigh the evidence which was here excluded to the prejudice of the defendant.

(2) The Court denied the admission in evidence of a letter from an attorney purportedly representing the plaintiff, addressed to and received by the plaintiff, in late 1956 and alleging defendant's non-compliance with the terms of an antenuptial agreement, (R. 29) which allegation was groundless, as the agreement itself will show and caused the defendant to suffer mental distress. (R. 265). The letter so submitted would have further corroborated the claims of defendant that the agreement was the basis of threats, argument and discord.

The Court denied receipt of the Exhibit on the ground of hearsay:

“MR. GEE: Your Honor, I would like to submit this in evidence.

MR. N. J. COTRO-MANES: We object, Your Honor please, on the ground — I would like to ask her one question before I make my objection on the instrument.

THE COURT: Isn't it hearsay? This is not from the defendant, is it?

MR. GEE: It is a party representing to be attorney of the defendant. (sic)

THE COURT: It would still be hearsay, wouldn't it? It would be hearsay if it was from the plaintiff himself unless you brought it in in the admission against interest rule. You can't avoid the hearsay rule by submitting written communication through an agent.

MR. GEE: May we withhold the submission at this time?

THE COURT: All right, or you may reoffer it. It is denied at this time." (R. 256.)

In an attempt to show the agency relationship, and that the Exhibit was sent at the request and instance of plaintiff, and with malice, and that the antenuptial agreement was used by plaintiff as an instrument of coercion and duress, since by its terms the defendant would be left virtually penniless in event of divorce, plaintiff was asked the following by counsel for defendant:

"Q. Who was your attorney in the fall of 1956?

MR. N. J. COTRO-MANES: Just a minute, object to that, it is incompetent, irrelevant and immaterial and not within the issues of this case.

MR. GEE: It is preliminary, Your Honor.

MR. N. J. COTRO-MANES: I don't see the materiality.

MR. GEE: I will get to it.

MR. N. J. COTRO-MANES: State the purpose why you ask the question.

THE COURT: Why.

MR. GEE: It falls in the making of the antenuptial agreement, the attorney wrote letters to my client for her failure to abide with the terms of the antenuptial agreement. It is for the purpose of showing this lever that was used by the plaintiff.

THE COURT: To do what?

MR. GEE: To force his will, or obtain his way with the defendant.

THE COURT: How would asking who is attorney show that?

You don't have the attorney available, you would be stuck with his answer anyway, wouldn't you, whether he says he uses force or not.

MR. GEE: It is to ascertain whether upon his instigation or his attorney's and with his knowledge, his attorney contacted the defendant and told the defendant she was not abiding by the terms of the antenuptial agreement.

THE COURT: I think the objection should be sustained.'" (R. 290-291.)

In *Brookins v. Brookins* (Iowa), 300 N.W. 540, the court in admitting a letter from the secretary of the defendant to the defendant, although never received by him, held:

"The general rule is stated in 20 Am. Jur. 807, thus: 'Generally, correspondence of persons where offered as evidence of the facts stated therein must be excluded under the general principle respecting *res inter alios acta*, unless the party against whom the communications are tendered is in some way connected therewith or knew and approved their utterance. Letters of third

persons are receivable in evidence, however, when they are merely collateral, introductory, or incidental to, or in illustration of, the testimony which the witness gives, or are receivable to establish what one's intention was or where he was at a given time.' Here defendant was connected with the letters. They were addressed to him. They corroborated other evidence of his relations with his secretary. They tended to confirm plaintiff's suspicions. The statements of fact contained in them were obviously hearsay. In an action tried to a jury, their admissibility would be very doubtful. But, in an action in equity, tried to the court, with their weight as evidence limited by full appreciation of the narrow limits within which they might be considered, we think that the objection to their admission in evidence is not well taken."

In the case before this Court, the defendant attempted to not only prove an agency relationship through admissions of the principal, but that the principal, Nick Vrontikis, had his attorney contact the defendant regarding alleged conduct that had no foundation in fact; that the action of the plaintiff in this regard, in light of the mental and emotional state of the defendant was malicious and an act of extreme cruelty. In sustaining the objection to the preliminary question set forth above, the Court stated: "You don't have the attorney available, you would be stuck with his answer anyway, wouldn't you, whether he says he uses force or not." (R. 291.)

By what rule of law is a party precluded from asking a question because he is going to be stuck with the

answer? Can not this be said about all questions, and of all witnesses? The Court apparently considered the question one of trial technique, rather than one of the rules and principles governing evidence.

In the case of *Whitaker v. Keogh* (Neb.), 14 N.W. 2d 596, the court held:

“The plaintiff complains of the ruling of the trial court in excluding a statement made by the chauffeur of defendant’s car immediately after the collision. Plaintiff offered to show that the chauffeur said: ‘Lady, I am sorry. I just saw you the instant I collided with you.’ We think the evidence was properly receivable as an admission against interest. Whatever an agent or employee does in the lawful exercise of his authority is imputable to the principal, and where the acts of an agent or employee will bind the principal, his representations, declarations and admissions respecting the subject matter will also bind him, if made at the same time and constitute a part of the same transaction. Wigmore, Evidence, sec. 1078. The question is one of substantive law, the law of agency. It is not a question of *res gestae* as is often supposed. Wigmore, Evidence, sec. 1797.”

See also *Myrick v. Lloyd* (Fla.), 27 So. 2d 615.

In view of the foregoing authority and reasoning, we submit that the trial court committed reversible error in excluding the evidence aforementioned, and not granting defendant’s motion for a new trial.

Evidence of the effect of the antenuptial agreement, and the use made by the plaintiff thereof, should have

been received by the court, in its consideration of the claim and defense of the defendant. The excluded evidence (1) bore directly on defendant's grounds for divorce; (2) would have corroborated defendant's testimony as to plaintiff's use of the agreement to coerce her; (3) was material in considering plaintiff's standing for equitable relief; (4) should have been weighed in any property award where relative fault was a factor in determining the award.

POINT II.

PREJUDICIAL ERROR WAS COMMITTED IN SUSTAINING PLAINTIFF'S OBJECTIONS TO DEFENDANT'S INTERROGATORIES OF MAY 21, 1959.

On May 21, 1959, defendant submitted to the plaintiff interrogatories under the Utah Rules of Civil Procedure (R. 59). Plaintiff objected to numbers 2, 4, 5 and 6 thereof (R. 61), and the Court sustained the objection (R. 65). The action of the Court is prejudicial error.

Rule 33, Utah Rules of Civil Procedure, provides in part:

“Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party.

* * *,”

“Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and

the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. * * *

Rule 26(b), Utah Rules of Civil Procedure, provides:

“Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party, or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.”

Question 2 under the interrogatories is typical of the information sought, and reads as follows:

“2. What was the net worth of Vrontikis Bros., Inc. at the conclusion of the years 1956, 1957 and 1958? What is the present net worth and book value of Vrontikis Bros., Inc.?”

Since the plaintiff is a stockholder in Vrontikis Bros., Inc., the question was relevant to the subject matter involved in the action, and was calculated to lead to the discovery of admissible evidence. The net worth and book value of the corporation are essential infor-

mation in ascertaining the value of plaintiff's stock in the corporation.

The defendant, denied this discovery right, was at the mercy of plaintiff at trial, who in his dual role of husband and corporate president gave testimony adverse to the defendant on the subject of corporate income and worth (R. 190); yet defendant was denied the same information prior to trial.

The lower court provided a "haven" for plaintiff in sustaining his objections to defendant's interrogatories of May 21, 1959, although the information sought was material and relevant. Certainly this action was prejudicial to defendant and is ground for reversal.

POINT III.

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT PLAINTIFF HAD THE REQUISITE RESIDENCE REQUIREMENTS FOR THE COURT TO AWARD HIM A DIVORCE.

The defendant did not challenge the allegation of the plaintiff that he was an actual and bona fide resident of Salt Lake County, State of Utah, and had been for more than three months prior to the commencement of the action. Nevertheless, such residence requirement is required by statute and is jurisdictional. See Section 30-3-1, U.C.A. 1953, as amended; *Weiss v. Weiss* (Utah), 179 P. 2d 1005; Annotation, Length of Domicil as a Jurisdictional Matter in Divorce Action, subparagraph Question Arising Upon Appeal, and cases cited therein,

2 A.L.R. 2d 301. Furthermore, the Court must make a finding as to residence based upon evidence. See Section 30-3-4, U.C.A. 1953, as amended.

The record fails to show evidence supporting the finding that plaintiff was a resident of Salt Lake County for the three months prior to the filing of the action. The lower court, therefore, had no jurisdiction to grant plaintiff a divorce; and in any event committed error in awarding a divorce to the plaintiff when the evidence did not bear out his residency as required by the Utah law.

POINT IV.

THE PROPERTY AWARD IS INEQUITABLE AND UNJUST TO THE DEFENDANT, AND SHOULD BE MODIFIED.

The property division award of the lower court was unfair and unjust in denying to the defendant an equitable distribution of the property owned by the parties. This Court has heretofore considered one-third of the property as being a fair proportion to be awarded to the wife when a divorce decree is awarded the husband. *Woolley v. Woolley*, 113 Utah 391, 195 P. 2d 743. Granted that this must vary with the facts of a particular case, three elements present in this instance justify an award even in excess of the one-third rule set forth in the *Woolley* decision. These elements are (1) the financial condition and necessities of the defendant; (2) her ability and opportunity to earn money, and (3) the health

of the defendant, all of which are to be considered by the Court in making a property distribution. *Pinion v. Pinion*, 92 Utah 255, 67 P. 2d 265.

The defendant was not employed, had no separate property or estate (R. 262), had suffered recent physical and mental illness (R. 69, R. 260), and by virtue of her mental condition will be limited in her future employment. (R. 122). The finding by the Court in relation to the health of the defendant follows:

“15. The court observes and finds that the defendant is competent to handle her ordinary affairs; that she has apparently suffered serious mental illness and by reason of the same she must still be restricted and controlled in her activities; that a continuance of those stresses which had previously been a danger to her condition would limit her future employment; that her continued mental health will require continued control and restriction of activity.” (R. 122.)

This Court is requested to take judicial notice of the case, “In the Matter of the Mental Condition of Dorothy Mae Vrontikis,” No. 8533, Third Judicial District, and findings therein.

The lower court had before it the following property for distribution:

(1) A residence, the equity of which was \$9500. (R. 121.)

(2) A note in the amount of \$10,000 due and owing in favor of the plaintiff (R. 121); no evidence was intro-

duced to show the payor, Vrontikis Bros., Inc., could not pay the obligation.

(3) Household furnishings and appliances. (R. 121.)

(4) 10,000 shares of stock of Vrontikis Bros., Inc., par value of \$1.00 per share. (R. 181).

The court erroneously valued this stock at \$1,000, upon plaintiff's testimony that its value "may be ten cents" a share. (R. 217). In answer to the question of whether the plaintiff had a balance sheet before him when he determined the book value as ten cents, plaintiff answered "No." (R. 217). In answer to the query of what he did have before him, and over the objection, but with the final assistance, of counsel, plaintiff said: "I don't know." (R. 217). No competent testimony of the plaintiff supports the finding of the court that the 10,000 shares of stock of Vrontikis Bros., Inc. is worth \$1,000. The court did err in so finding.

The court committed further error in not finding that the 10,000 shares of stock in question are worth the par value of \$10,000. In the absence of any other evidence of value, the par value of the stock is presumptively the value of the stock.

According to *Teris v. Ryan* (Ariz.), 108 P. 461, affirmed 233 U.S. 273:

"* * * There are various tests for determining the value of stock in a corporation. In the absence

of any other evidence of value, the par value is presumptively the value of the stock. * * *”

“The par value of a share of stock in a corporation is prima facie its actual value.” *Walker v. Bement*, (Ind.) 94 N.E. 339. See also *Brinkerhoff-Farris Trust and Savings Co. v. Home Lumber Co.*, (Mo.) 24 S.W. 129; *Williams v. Everett*, (Mo.) 200 S.W. 1045.

That par value is prima facie the actual value of stock is especially apparent in a jurisdiction such as Utah where the “true value” rule prevails. *Union Pacific R. Co. v. Blair, et al.*, 48 Utah 38, 156 P. 948; *Tintic Indian Chief Min. & Mill. Co. v. Clyde*, 79 Utah 337, 10 P. 2d 932. Under the foregoing authority it is apparent that a subscriber will be given credit for only the actual value of property given in payment of his subscription.

Article XII, Section 5 of the Utah Constitution provides:

“Corporations shall not issue stock, * * * except for money or property received, or labor done. * * *”

See also Section 16-2-7, U.C.A. 1953.

Since the true value rule prevails in this jurisdiction there can be no question that stock with par value, if issued, must be in exchange for property or money, the actual value of which, equals or exceeds the par value. And in the absence of competent evidence to the contrary, the par value of stock is prima facie its actual value. In the instant case there is no showing by competent

evidence that the stock in question had value other than the par value; the par value then must be prima facie the actual value.

This conclusion is supported further by the evidence that the corporation paid “bonuses” to the plaintiff during the years 1956, 1957, 1958. (R. 212.) The plaintiff claimed his “bonuses” were paid for services (R. 289), and that the corporation suffered a loss in 1958 (R. 288). Yet “bonuses” were paid to *all* stockholders of the corporation during 1958 (R. 288), and the plaintiff, a member of the Board of Directors, claimed ignorance as to a specific formula used to determine the amount paid (R. 290). The fact that “bonuses” were paid to all stockholders leads to the inescapable conclusion that the “bonuses” were in fact in the nature of dividends, and that the value of the stock was at least its par value.

According to Section 16-2-15, U.C.A. 1953:

“No corporation shall make or pay any dividend except from the surplus profits arising from the business of the corporation and in the cases and manner allowed by law; nor divide, withdraw, or in any manner except as provided by law pay to the stockholders or any of them, any part of the capital of the corporation. * * *”

There is a presumption in favor of legality and compliance with the law, 31 C.J.S., Evidence, p. 769; therefore, it is presumed that Vrontikis Bros., Inc. did not violate the law in its payments to stockholders in

1956, 1957 and 1958, and that the capital of the corporation was not invaded in making the disbursements to the stockholders.

The claimed loss of the corporation in 1958 by plaintiff is immaterial. A loss may or may not affect the capital structure of the corporation so as to prevent the payment of dividends. Surplus may be available for payment of dividends even though a loss occurs in a given year. This is not to concede that the loss claimed is a fact; rather, that even if there were a loss it does not follow that the capital is impaired, and the value of the stock less than par.

In view of the foregoing authority and analysis we submit the lower court should have found that plaintiff's ownership of stock in Vrontikis Bros., Inc. had a value of \$10,000, which was the par value thereof.

The court further found that 36,000 shares of Gunsite Butte Uranium Corporation stock, valued at \$1080, did not belong to the plaintiff although held in his name (R. 121). Utah law requires that incorporators and directors be stockholders. Sections 16-2-5 and 21, U.C.A. 1953. Plaintiff was one of the organizers (R. 183) and *directors* of the Gunsite Butte Uranium Corporation (R. 213). Therefore, the Court should have found that the plaintiff owned the stock held in his name and valued at \$1,080.00, and committed error in not doing so. On this point this Court is requested to take judicial notice of the incorporation of the Gunsite Butte Uranium Corpo-

ration, as filed with the Utah Secretary of State. Defendant submits that in addition to the property set forth above as being owned by plaintiff, the Gunsite stock in the value of \$1080 should have also been included as property of the parties.

Defendant moved this Court to amend its findings, conclusions and decree so that she would be awarded \$10,000 as her share of the property of the parties. (R. 96-98.) The motion was based upon the conviction that the property of the parties was equal to at least \$30,580, as set forth above, and that defendant should share in at least one-third thereof. *Woolley v. Woolley*, *supra*.

The case of *MacDonald v. MacDonald* (Utah), 236 P. 2d 1066, is persuasive authority that defendant in this case should receive a greater and more equitable distribution of property. The MacDonald decision upheld a property distribution which awarded the defendant wife “much the larger share of the family assets”, although the divorce was granted the husband.

In this case, as in MacDonald, certain elements were present for evaluation. (1) The health of the plaintiff Vrontikis is good (R. 196), while the defendant’s physical and mental health is poor (R. 69, 122, 260). (2) The income of the plaintiff is good, having income in the years 1956, 1957, and 1958, of \$8,185.56, \$11,510.57, and \$7,620.03 respectively (R. 212), and in addition his employer makes available automobiles, boats, and appliances for his personal use (R. 220, 223); the defendant has no separate source of income or estate (R. 262).

(3) Plaintiff is a University graduate (R. 145), corporate president (R. 211), while the defendant has no peculiar training and limited work experience (R. 270).

Unlike *MacDonald*, however, the Vrontikis decision gave the husband the lion's share of the property, despite the obvious difficulty of the defendant to provide for herself. The adjustment of property rights to best serve the social needs of the parties involved seems to be the test set forth in the *MacDonald* case, wherein the party at fault was in greater need of outside assistance. Dorothy Mae Jenson Vrontikis is suffering from a disability which impairs her capacity to readjust her life, seek gainful employment, and assist in sustaining herself.

Equity inspires that this court modify the findings, conclusions and decree of the lower court to award defendant \$10,000 as her share of the property settlement, for the reason that the total property of the parties equals at least \$30,580, and/or the reason that the condition and status of the defendant warrant and justify an award in that sum. Defendant so moved the lower court to amend its findings, conclusions, and decree, and the motion was erroneously denied. The award of the lower court is grossly inadequate and an abuse of its discretion.

CONCLUSION

The lower court committed reversible error in:

(1) excluding evidence bearing upon plaintiff's

conduct prior to the filing of defendant's counterclaim and plaintiff's amended complaint;

(2) excluding evidence which bore upon plaintiff's coercion of defendant through use of an antenuptial agreement of the parties;

(3) sustaining plaintiff's objections to defendant's interrogatories of May 21, 1959.

A new trial should have been granted by the lower court upon motion of the defendant, and was erroneously denied.

The court also erred in awarding plaintiff a divorce without evidence of his residence in Salt Lake County for three months prior to the action.

In the event that this Court should conclude there is no reversible error, defendant submits that the property award should have been modified by the lower court in all respects set forth in defendant's motion to amend the Court's findings, conclusions and decree; and that this Court should so amend and modify the award as set forth in Point IV herein.

Defendant prays further for an award of a reasonable attorney's fee for the prosecution of this appeal and costs.

Respectfully submitted,

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