

1964

# Pat M. Johnson French v. Phillip T. Johnson : Brief of Respondent

Utah Supreme Court

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W. R. Huntsman; Attorney for Respondent;

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# IN THE SUPREME COURT

## of the STATE OF UTAH

FILED  
APR 1 - 1964

PAT M. JOHNSON FRENCH,  
*Plaintiff and Appellant,*

vs.

PHILLIP T. JOHNSON,  
*Defendant and Respondent.*

Clerk, Supreme Court, Utah

No.  
10147

### RESPONDENT'S BRIEF

REPLY TO APPELLANT'S BRIEF FROM A JUDG-  
MENT IN THE THIRD DISTRICT COURT OF  
SALT LAKE COUNTY

HONORABLE ALDON J. ANDERSON, *District Judge*

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IN THE SUPREME COURT  
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STATE OF UTAH

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PAT M. JOHNSON FRENCH, <i>Plaintiff and Appellant,</i>	}	No.
vs.		10147
PHILLIP T. JOHNSON, <i>Defendant and Respondent.</i>		

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STATEMENT OF FACTS

I do not entirely agree with plaintiff's statement of the facts and make the following addition thereto.

This action arose from an order to show cause why the defendant should not be punished for contempt of court for failure to pay child support in the sum of \$50.00 per month, R-14, made by Judge David Lewis,

Judge of the Third District Court, under a reciprocal agreement from the District Court of Bonneville County, Idaho, where the divorce was obtained.

After hearing the evidence on the 10th of February, 1964, the court entered its order finding there wasn't any contempt and denied the right of the plaintiff to recover the accrued sum of \$5,300.00, as well as attorney's fees and costs (R. 23).

The plaintiff then filed her motion for a new trial, and the same was heard on the evidence previously submitted on March 9, 1964, and the court denied plaintiff's motion and made and entered its findings on the 7th day of April, 1964 (R. 52 to 56).

The decree entering the \$50.00 per month child support was made on the 18th day of March, 1954 (R. 14). The plaintiff was married to Mr. French on March 10, 1954, eight days before the decree was entered, (Tr. P. 88) on March 12th the plaintiff and her new husband left Idaho Falls, Idaho, for Connecticut, (Tr. P. 88) and that the husband petitioned the United States government for support money for the child. This mind you was in March, 1954, and payments from Mr. Johnson commenced March 25, 1954, and these payments continued during 1954 and part of 1955, and were received by the plaintiff, as well as the allotments received by plaintiff's husband for the support of the child, who has assumed his name (Tr. 91).

The record shows that the only effort by plaintiff to contact the defendant was April 20, 1956, and that the plaintiff received a letter from A. L. Smith, the attorney who secured the divorce decree in Idaho, on June 20, 1956, (R. p. 26) advising plaintiff to get in personal contact with the defendant, yet nothing was done by reason of that. However, on February 10, 1955, Edward M. Pike, Prosecuting Attorney of Bonneville County, Idaho, wrote the District Attorney of the Third Judicial District saying, "Mrs. Johnson is in dire circumstances."

The prosecuting attorney was not informed by the plaintiff that she had married a member of the armed forces of the United States by the name of French, and that all benefits and allotments due dependants under the Federal Act had been claimed by French as his own child, under the name of Vicki Lee French, who is now of the age of eleven and attends school under the name of French (Tr. 91).

The record further shows that in 1961—five years after Mr. French's discharge from the Navy—that the plaintiff and her family were again in Idaho Falls and they contacted the deputy prosecutor for Bonneville County, Idaho, regarding the support money (R. 30 to 36). From that time nothing was done until the plaintiff was contacted at her home in Idaho Falls by Horace J. Knowlton, an attorney of Salt Lake City, who instituted this action on an original order to show cause on February 10, 1964, before the Honorable Aldon J. Anderson,

a judge of the Third District Court for Salt Lake County. This covers the activities of the plaintiff over the past ten years.

## ARGUMENT

### POINT 1.

THE DECISION OF THE COURT WAS SOUNDLY BASED ON THE EVIDENCE WHICH JUSTIFIED A FINDINGS OF EQUITABLE ESTOPPEL AND LACHES, AS WELL AS A MATERIAL CHANGE IN CONDITIONS.

There is no representation here that the child has not been the beneficiary of equivalent support and education. She received allotments for the entire period of Mr. French's service in the Navy and in addition the mother received the payments from the defendant until the clerk of the court could not further relay the payments, due to the notation, "moved, no forwarding address," (Tr. 83 and 85) and the plaintiff utterly failed to ascertain the defendant's address for a period of nine years, though she knew the company which employed him when the marriage was executed (Tr. 79).

In the *Larsen vs. Larsen* case, 5 Utah 2nd, 224 - 300 Pac. 2 - 596, this court said, P. 228 - (3):

"It is the prerogative of the trial court to determine these facts and if he finds that facts exist to justify equitable estoppel, he should apply that doctrine and relieve the father from payment of the installments to the extent indicated. Of course, as to future payments, there is no question that she is entitled to collect from the time she made demand."

This defendant has been making the payments from the date of the order (R. 23).

This case is stronger by far than the *Larsen Case*, supra, and justly warrants the findings of the trial court on laches also.

The other cases cited by counsel for the appellant are not in point and should not be given the time of consideration.

## POINT 2.

THIS APPEAL IS BASED UPON THE COURT'S DENIAL OF PLAINTIFF'S MOTION FOR A NEW TRIAL.

The trial court, having heard all of the evidence in the Order to Show Cause hearing, saw the demeanor and action of the witnesses, and denied plaintiff's motion for a new trial and made its findings of fact, conclusions of law and judgment (R. 52 to 56).

Where in the law is justification for the filing of a motion for a new trial after the denial of an order to show cause has been made?

A new trial would constitute a trial of all of the issues which were settled in the hearing of March 5, 1954, in Idaho Falls, Idaho. If the plaintiff was aggrieved by the court's refusal to grant her order to show cause, she should have appealed that order.



The newly discovered evidence claimed in plaintiff's motion for a new trial is purely cumulative evidence which was testified to by the witnesses at the hearing of the motion for an order to show cause, and no valid reason was given at this hearing as to why the actual letters were not introduced at the original hearing.

There is also a material change in the status of the defendant. His health and earning power have lessened (Tr. 83) and he would not have permitted such a burden to accumulate, had it not been the failure of the plaintiff, over a period of years, to contact him.

### CONCLUSION

I submit that the lower court should be affirmed in its actions and orders in its entirety.

Respectfully submitted,

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