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In the Supreme Court of the State of Utah

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BYRON R. GRIFFITHS,

Plaintiff and Respondent,

vs.

SHIRLEY GRIFFITHS,

Defendant and Appellant.

Clerk, Supreme Court, Utah

Case No. 8154

BRIEF OF APPELLANT



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In the Supreme Court of the State of Utah

BYRON R. GRIFFITHS,

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BRIEF OF APPELLANT

STATEMENT OF FACTS

Byron R. Griffiths, the plaintiff and respondent, sued his wife, Shirley, the defendant and appellant herein, for a divorce. Trial was held June 24, 1953, before Marcellus K. Snow, sitting as Pro Tempore District Judge. Findings and Decree awarding plaintiff a divorce were filed July 7, 1953. Shirley filed a Motion for a New Trial and Motion to Amend the Findings and Judgment, on July 16, 1953, which were denied February 4, 1954 (R. 101).

The parties were married at Elko, Nevada, December 6, 1943 (R-14). They have no children and accumulated no property during the marriage.

They lived together as husband and wife, without benefit of ceremonial marriage, for at least six years prior to their formal marriage (R-5) and there is evidence that they had lived as man and wife since 1934 (R-35).

Plaintiff was drafted into the Army December 7, 1943, and claimed he married Shirley, the day before his induction, in order to protect her with an Army allotment and insurance (R-15, 16).

After induction, the parties spent a short time together at Camp Beal in 1944, where plaintiff was stationed before being sent overseas (R-16). They carried on their marriage by correspondence during the war years. In 1946, after 17 months overseas, plaintiff decided to ask defendant for a divorce, which he did in a letter (R-18). While he was overseas defendant corresponded with the plaintiff about twice each week in matters of love, affection and encouragement (R-17). Plaintiff's desire for a divorce was based on conditions he asserted existed prior to his marriage (R-18). Plaintiff left the service in March 1946 and for three months lived with Shirley as man and wife (R-19, 20). At the end of the three-month period, he re-enlisted in the army. During these three months plaintiff claimed the parties were in periods of constant bickering (R-21, 22 and 23). Defendant admits that there was some argument, but that she was merely trying to persuade Byron to keep better friends and associates, stop his drinking and cease vulgarity (R-37-42). On re-enlistment in June 1946, Byron went to Camp

Lee, Virginia (R-25), was stationed there for over three years. He went overseas again January 1951 (R-27). He filed his divorce complaint November 13, 1952 (R-1) asserting grounds of mental cruelty. He returned about one month before the trial date (R-28).

Plaintiff admitted in his "Answers to Interrogatories" (R-5) that among other things, defendant threw up to him the fact that she had contracted syphilis from the plaintiff prior to their marriage, and during the period in which she co-habited with him. This fact is further confirmed in defendant's "Answer" (Para. 5, R-9).*

Shirley Griffiths' Answer to her husband's Complaint specifically denies that he had any grounds for divorce and set forth his own misconduct by way of recrimination. She asserted that they had lived together for nine years prior to their marriage (R-8); that there were some quarrels occasioned by the plaintiff's laziness and habits with loose and immoral friends and "that she had provided for him during the first seven years of their life together (prior to their formal marriage ceremony), and that the plaintiff had impaired her health through a venereal disease." (R-9). Defendant alleged and testified (R-9) that Byron did not want her to go back with him to Camp Lee following re-enlistment in June 1946 (R-38), but that during this time, they wrote each other affectionately and planned for their future married life (R-39). The plaintiff in his correspondence explained how uneconomical it would be for his wife to be with him, suggesting that he would try to transfer to Hill Field in order to be to-

* Defendant is still being treated for this disease.

gether (R-40, Exhibits D-2). These exhibits indicate an intention to remain married during this time. At this time, plaintiff was actually living a dual life. He was living with another woman, defendant named as one LaVerne Burton (R-45) at Camp Lee, Virginia. Over strenuous objection (R-45), the facts developed in the trial were there (R-65):

“Q. What did you find when you got there? (Mrs. Griffiths)

A. It was about 10 after 7 in the morning, and I knocked on the door and I knocked and no-one answered, and I looked in the window and my husband was there in bed with this woman, and I knocked again and she said “who is it” and she came to the door in this bathrobe and I said “may I please see my husband, Byron Griffiths” and then she slammed the door in my face and when my husband came out he said “honey, you could cause us a lot of trouble coming here” and he pushed me down the street and we walked.

Q. And then you two went down the street?

A. And you know the rest.

Q. Did you ask him anything about this lady who appeared at the door?

A. Yes.

Q. What did he say?

A. He said “just the girl I spent the night with.”

Q. Did he tell you her name?

A. Yes.

Q. What was it?

A. Well, at that time he didn't. He said it was Virginia Godsby who I found was the lady who was renting part of the house.

- Q. And did you later find out what her name was?
- A. Yes.
- Q. What was that?
- A. LaVerne Burton.
- Q. Was there anything else he said about this LaVerne Burton when you were walking around the block with him?
- A. Not at that time because we went down to get a hotel room. I still didn't know what it was all about.
- Q. Then what happened?
- A. Well, he got me a hotel room and then he sent a letter to my brother-in-law requesting that he request him so that he could be transferred right away and then he said he was on charge of quarters that night which I found out wasn't right, and then he took me to Washington, D. C. as fast as he could.
- Q. And then when you returned, where did you go to live?
- A. To Richmond, Virginia, on West Franklin Street.
- Q. How long did you stay there?
- A. I stayed there about a month before we had this apartment at Hokeville.
- Q. How long did you stay there?
- A. Until September the 14th.
- Q. What year?
- A. 1947.
- Q. And when did you go back there?
- A. June the 14th, 1947.
- Q. So you were back there for 90 days?

A. Yes.

Q. During that time did Mr. Griffiths ever take you over to Pittsburgh or Camp Lee?

A. Never.

Q. Did he tell you why?

A. He said he couldn't be seen on the streets because she was known as his wife?

Q. Who was "she"?

A. LaVerne Burton.

Q. Was there any discussion as to his relationship with this LaVerne Burton?

A. In what way?

Q. As to their relationship?

A. Well, he just said he had been living with her and that—well, I don't remember exactly what was said, to tell you the truth, about her.

Q. But there was a discussion about them having lived together?

A. Yes.

Q. And did you argue and quarrel while you were back there at Hokeville, or in Virginia?

A. I didn't argue or quarrel with him any time because he was like a person in dilemma. I didn't say a word because I was very ill and there's a doctor back there at Camp Lee that knows it. He lived in the same apartment where we lived.

Q. Did you go out with him and meet many of his friends?

A. No. When we went out, we got on the bus there and would go to Richmond because he couldn't be seen with me.

Q. When you say he couldn't be seen with you, how did you know that?

A. Because he told me.

Q. Did you argue and quarrel about this?

A. No. I didn't even have enough gumption to argue and quarrel.

Q. How did you feel when you found he was living with this other woman?

A. Well, I went down to skin and bones, and was so ill I couldn't hardly stand up.

Q. Why did you return to Salt Lake?

A. Because I felt like I was dying. That if I stayed there, I would die there.

Q. What was causing you to feel like that?

A. The pressure and the nervous strain that I was under.

Q. What was causing that pressure and nervous strain?

A. Well, just the fact of what I found and her being there, and you know how things are when something like that happens.

Q. And then did you return to Salt Lake?

A. Yes, I returned to Salt Lake. After I returned from back there, he had written me a letter requesting me to show I had been there so he couldn't bring in desertion against me.

Q. So you returned to Salt Lake at Mr. Griffiths' request?

A. That's right—I had the letter signed.

Q. And you have lived in Salt Lake ever since that time?

A. That's right.

Q. Since that time, has Mr. Griffiths ever provided you with living quarters so that you could be with him?

A. He has not.

Q. Have you requested him to?

A. I did.

Q. And do you feel that if he would get out of the army and live with you and resume your marriage, that you could make a go of this marriage?

A. Well, I think perhaps we could if he would cooperate with me, yes.

Q. Do you wish a divorce at this time?

A. I do not. (To the Court) May I say something, your Honor?

THE COURT: No.

Q. Now, did the affair with LaVerne Burton end at that time?

A. No, it did not.

Q. Now, when did you hear from her again?

A. Well, the first time I heard from her, she wrote my husband a letter when he came back from overseas."

Defendant's version of the Camp Lee incident as presented in his main case commences at Page 46 of the Record.

"Q. As a matter of fact, you were there with a girl by the name of LaVerne Burton, were you not?

A. Not alone.

Q. And she was there in a bathrobe, was she not? Clad in nothing but a bathrobe, is that right?

A. I would say that I believe she had a bathrobe on.

Q. And when she came to the door and Mrs. Griffiths announced who she was, LaVerne Burton slammed the door in her face, did she not, and wouldn't let her in?

A. No.

Q. Isn't that right?

A. No.

Q. And you got up and came out and dressed with just your trousers on, is that right?

A. I had a shirt on also.

Q. And then you went out and walked around the block, and Mrs. Griffiths asked you who that woman was?

MR. BOSONE: We object to all of this going in the record on the grounds heretofore made on all this testimony.

THE COURT: Objection overruled.

Q. To aid your memory, Mr. Griffiths, did you say "that's the woman I stayed with last night"?

A. I don't recollect that, no.

Q. Would you say you didn't say it?

A. I would say I didn't say it, yes.

Q. After that time, you went over to an adjoining town and got a room in the hotel for Mrs. Griffiths, did you not? You went to Pittsburgh and got a room in the hotel for her, isn't that right?

A. Yes.

Q. What did you quarrel about during those three months that she was back there?

A. I could probably name 100 different things. It was just about the same old thing.

Q. Did you quarrel about LaVerne Burton?

A. At times, probably.

Q. And who was LaVerne Burton?

MR. BOSONE: We object to that as being incompetent, irrelevant and immaterial and not within the issue of proper cross-examination.

THE COURT: Objection overruled.

A. Just a woman of my acquaintance.

Q. What else did you quarrel about besides LaVerne Burton?

A. I believe things that had happened here in Salt Lake—the same old things kept coming up all the time.

Q. You went to Hokeville after that to live, did you not?

A. Yes.

Q. Didn't you quarrel a great deal because you refused to take Mrs. Griffiths to Pittsburgh to any social activities?

A. Yes.

Q. And the reason you quarreled and wouldn't take her there was because you told her LaVerne Burton was known in Pittsburgh and in Camp Lee as your wife, isn't that a fact?

A. Yes.

After Camp Lee, Shirley returned home and neither of the parties lived with the other again as husband and wife.

Shirley Griffiths did not seek a divorce or counterclaim,

but prayed the plaintiff's Complaint be dismissed, "No cause of action." She desired the status of the marriage continue for reasons obvious to her.

STATEMENT OF POINTS

- I. THE TRIAL COURT'S DECISION WAS AGAINST THE LAW.
- II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING IN FAVOR OF THE PLAINTIFF.

ARGUMENT

I

THE TRIAL COURT'S DECISION WAS AGAINST THE LAW.

The basis of the Court's decision in this case seemed to be, since the husband proved minor acts of mental cruelty by his wife, and there was no desire on the husband's part for the marriage, a divorce should be granted the husband notwithstanding the wife had the substantial grounds for divorce, but did not desire a divorce.

Based on the evidence, the Trial Court's decision is shocking to one's sense of good conscience, justice and decency. It may be granted that some marriages are hopeless, impossible and serve no social good and ought to be resolved by divorce, nevertheless, the dissolution of such marriages ought not to

be granted upon the complaint of so guilty a spouse. That the wife herself desired no divorce and sought only to resist the case of her husband was no basis for the Trial Court to compel one, merely because the marriage seemed to the Court to be without worthy purpose and the husband proved nominal grounds of mental cruelty.

The simple point raised by this appeal is, shall a husband guilty of serious marital misconduct, be able to force a divorce, on proof of mental cruelty, where the wife has the substantial grounds, but elects to maintain the marriage status?

It is a rare situation in divorce actions where each spouse is not frequently guilty to some degree. Where each party claims mental cruelty or other minor grounds of incompatibility on the other, the Courts wisely have adopted the doctrine that the party least at fault should be awarded the divorce.

It has been held in *Allredge vs. Allredge*, 229 Pac. 2d 681, that acts and conduct on the part of a husband may well constitute cruelty to the wife when similar acts and conduct on her part may not constitute cruelty to him. In *Doe vs. Doe*, 158 Pac. 781, the Court said:

“Before a decree is granted the husband on such ground, it ought to be somewhat of an aggravated case.”

This holding has been approved also in *Cordner vs. Cordner*, 61 Pac. 2d 601.

The fact that both parties are frequently guilty of grounds for divorce has led this Court to recognize the doctrine of “comparative rectitude.”

In *Hendricks vs. Hendricks*, 257 Pac. 2d 366, this Court

held:

“To affirm that a guilty spouse is never entitled to a divorce is a position difficult to apply to the facts of life. It is seldom, perhaps never, that any wholly innocent party seeks a divorce against one who is wholly guilty. Awareness of this fact and the giving of attention to the social implications of divorce has given rise to various exceptions and limitations on the doctrine of recrimination. A realistic approach is indicated by the Court in the case of *Dearth vs. Dearth*, 15 At 2nd 37, wherein it concluded that where mutual delinquencies of husband and wife made further living intolerable, a divorce should be granted and the Court was not called to balance such delinquencies, but only to determine which party was least at fault in causing the bad situation. This is based upon the doctrine of ‘comparative rectitude’ which is often used and has been given tacit recognition by this Court.”

Thus the rationale of the *Hendricks* decision seems to be, grant a divorce to the party least at fault, where they are mutually delinquent and where there appears to be no good purpose for tolerating the marriage. However, the doctrine of *Hendricks* should not be extended to aid the spouse guilty of committing the serious misconduct.

In *Hendricks* this Court further said:

“In view of the fact that neither spouse is accused of the commission of a felony, adultery, or any other heinous offense, but the reciprocal claims rest upon various acts and commissions alleged to constitute cruelty to the other, the trial court would best perform its function in the administration of justice by determining which party was least at fault . . . ”

Bad conduct and poor taste produce bad decisions. An objective review of Byron Griffiths' performance and record here must find him guilty of the most serious misconduct. While the record is sketchy, the implications are clear that Shirley Griffiths supported and provided for Byron for some 6 years prior to their formal marriage, during the time they lived as common law man and wife. She contracted a dread social disease which he admitted having (R-36). Shirley desired to be his wife and wanted to follow him to army camps where possible. Byron didn't want her there (R-38). Although Byron was at Camp Lee for three years, he kept company with the "other woman" since he arrived at Camp Lee (R-83). He actually held out the "other woman" as his wife to the community. Why Shirley Griffiths should want to preserve her marriage to this person is entirely up to her. The effect of the Trial Court's decision is to compel her to accept a divorce she does not want, to reward the guilty spouse with divorce because Shirley refused to ask for divorce on her own grounds.

Whatever the basis of the doctrine of "comparative recititude," the simple equitable rule of "clean hands" should bar Byron Griffiths' action for divorce here.

In an interesting decision, *Clark vs. Clark*, 225 Pac. 2d 147, the New Mexico Supreme Court answers the question, "does recrimination afford a valid defense in a suit for divorce sought on the ground of incompatibility?" There, the husband sought divorce on grounds of incompatibility. The wife plead recrimination, but asked no affirmative relief. At the trial, the wife offered to prove that plaintiff had committed repeated

acts of adultery with a named co-respondent. The trial court refused to allow her to present evidence of recrimination and awarded the husband the divorce. In reversing the decision, the New Mexico Supreme Court held:

“It would be absurd to say that incompatibility itself could be pleaded by way of recrimination as a defense to a divorce sought on the ground of incompatibility, but as to other defenses traditionally employed by way of recrimination, if plead, established and found to have resulted from acts of plaintiff, there resides in the Trial Judge the discretion to see whether, notwithstanding such incompatibility, it shocks the conscience to hold such plaintiff is entitled to a divorce by reason thereof.”

Judge Snow believed that mental cruelty once made out by the husband mandatorily required him to grant a divorce regardless of what had occasioned that mental cruelty, or how guilty the plaintiff himself was, so long as the defendant had not asked for affirmative relief and the marriage seemed hopeless. This may explain the Court’s observation at Page 31 of the Record.

“THE COURT: It appears to the Court, as far as the evidence thus far presented to the Court is concerned, that we have a plaintiff here who is asking for a divorce and the defendant is not contesting the divorce. There is no money involved. As the Court sees it at this point . . . ”

ARGUMENT

II

THE EVIDENCE WAS INSUFICIENT TO SUPPORT A FINDING IN FAVOR OF THE PLAINTIFF.

Divorce is an equitable action. A reviewing Court on appeal has the duty and power to determine the facts for itself. *Alldredge vs. Alldredge*, 229 Pac. 2d 681.

The Trial Court's findings should be upset when the record shows such findings are clearly against the weight of the evidence. *Doe vs. Doe*, 158 Pac. 781, *Cordner vs. Cordner*, 61 Pac. 2d 601.

Since divorce is an equitable action, the record may disclose conditions under which the court should exercise its sound discretion in either granting or withholding relief and in determining the extent thereof. *Anderson vs. Anderson*, 138 Pac. 2d 252.

This case presents a situation where, upon reviewing and weighing all the evidence, this Court should substitute its judgment for that of the Trial Court. One has only to read the findings of fact to recognize how thin is the basis of the plaintiff's Complaint and how vainly his pleadors strain to ground a basis for support of the Court's judgment.

Consider paragraph 9 of the Findings of Fact (R-95):

"The Court finds that any condonation the plaintiff may have extended to the defendant was nullified by defendant's subsequent acts and conduct of cruelty."

This finding implies that Shirley Griffiths' guilt, if any, was not erased by the parties living together for the 90 days after the Camp Lee incident because of Shirley's actions during those 90 days. Such a finding is clearly against the law, and insufficient in evidence where the plaintiff's own guilt is so apparent and where the plaintiff's own misconduct obviously caused defendant's attitude toward her husband during that period.

Paragraph 10 of the Findings (R-95) alleges:

"The Court finds that any acts of cruelty or otherwise on behalf of the plaintiff toward defendant up to the time the parties resumed living together in Virginia (Camp Lee) in 1947 were fully condoned by defendant and not thereafter revived."

In view of the evidence, such a finding is totally unsupported and completely inconsistent with the record.

Paragraph 11 of the Findings (R-95) further recites:

"The Court finds that the defendant was given the opportunity before the Court to amend her pleadings and counterclaim for a divorce, but the defendant refused to so amend the pleadings and seek a divorce, even after all the evidence was in and she was again afforded said opportunity by the Court."

In effect, plaintiff's findings concede that on the basis of all the evidence, the *defendant* was the one who was entitled to divorce, but since she refused to seek a divorce, that in itself becomes some grounds to grant a guilty husband the divorce. This concept raises for the first time a doctrine by default that although a divorce is contested by the party who has the substantial grounds, she must nevertheless be compelled

to take a divorce she does not wish, if having grounds she refuses to counterclaim on her own behalf.

CONCLUSION

It is submitted that the Trial Court's decision was against the law and founded upon insufficient and inconsistent evidence and findings. Defendant respectfully urges this Court to reverse the decision and enter judgment in favor of the defendant and against the plaintiff, no cause of action on plaintiff's Complaint. Defendant further prays that she be awarded the sum of \$350.00, a reasonable attorney's fee and her costs in order to pursue this appeal.

Respectfully submitted this 8th day of May, 1954.

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