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~~Original~~

IN THE SUPREME COURT OF THE STATE OF UTAH

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SHEILA MASON, :

Plaintiff-Respondent, :

vs. :

Case No. 16010

GEORGE STEPHEN MASON, :

Defendant-Appellant. :

---ooo0ooo---

BRIEF OF APPELLANT

Appeal from the renewal of a judgment of
the Third Judicial District Court in and
for Salt Lake County, Utah, the Honorable
G. Hal Taylor, presiding.

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FILED

JAN - 8 1979

Clk. Supreme Court, Utah

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TABLE OF CONTENTS

STATEMENT OF THE NATURE OF THE CASE.....1
DISPOSITION IN THE LOWER COURT.....1
RELIEF SOUGHT ON APPEAL.....
STATEMENT OF FACT
ARGUMENT:
 POINT I: INSTALLMENTS OF ALIMONY AND SUPPORT
 BECOME VESTED WHEN THEY BECOME DUE
 AND ARE RENEWED WHEN REDUCED TO
 JUDGMENT. ORDERS ALSO ARE THE SAME
 AS JUDGMENTS AND BOTH MAY BE ENFORCED
 AS THO JUDGMENTS BY THE FILING OF AN
 AFFIDAVIT THAT THEY ARE NOT PAYED.
 THE STATUTE OF LIMITATIONS OF ACTIONS OF
 EIGHT YEARS APPLIES FROM THE DATE THE
 INSTALLMENT BECOMES DUE AND MAY NOT
 BE RENEWED.....7
 POINT II: WHERE A JUDGE OF THE SAME COURT OR OF
 A COURT OF COMPETENT JURISDICTION HAS
 RULED UPON A QUESTION, THAT RULING
 SHOULD BE RES JUDICATA AND IS A VALID
 DEFENSE TO ANOTHER ACTION EXCEPT ON
 APPEAL.....10
CONCLUSION11

CASES CITED

American S.S. Co v. Wickwire Spencer Steel Co.....10
Bates v. Bates, 560 P. 2d 706..... 7
Cole v. Cole, 122 P 2d 201 7
Hunt v. Monroe, 91 P 269 7
Myers v. Myers, 218 P 123 7
Nielsen v. Hansen, No 14628 8
Martinez v. Romero, 558 P 2d 510 8

Scott v. Scott, 430 P 2d 580	7
Yergensen v. Ford, 402 P 2d 696	9
Youngdale v. Burton, 128 P 2d 1053	9

STATUTES CITED

UTAH CODE ANNOTATED	78-12-1	8
	78-12-22	8
	104-37-6	
	104-2-21	
	104-37-1	
	104-37-6.....	9
Utah Rules of Civil Procedure	8 (c)	10
	4 (e)	5
	60 (b) (1)	7

STATEMENT OF THE NATURE OF THE CASE

The issues are procedural as to matters of law and the exclusion of testimony. That is whether as a matter of law the Plaintiff is entitled to renew a series of judgments for past due support and whether the Court may refuse to set aside judgment or honor another Courts ruling on the issues there presented without receiving evidence.

DISPOSITION IN THE LOWER COURT

On July 6, 1978 Judge G. Hal Taylor refused to set aside a Default Judgment renewing a 1970 Judgment of \$11,705.00 against Defendant, in case No. - 241218.

On September 8, 1977 Judge Jay E. Banks entered an Order that no judgment should be granted on the prior judgments heretofore entered in case No. 117445, which was the divorce case in which the support was ordered and the 1970 judgment was granted.

STATEMENTS OF FACTS

On February 11, 1959 Plaintiff was granted a decree of divorce in case No. 117445 under the terms of which she was awarded custody of the two children one a baby and the other 1 year old. Defendant was ordered to pay \$50.00 per month per child and \$50.00 per month alimony. On May 5, 1966 Plaintiff received judgment for \$300.00 arrearages and alimony terminated. On November 14, 1966 Judgment for \$500 was entered for past due and owing support payments. On February 4, 1970 Judgment was entered for \$11,705.00 representing the total amount by which Defendant is delinquent in alimony and support payments since

commencement of this action in April, 1959 to and including December 31, 1969. On March 30, 1976 it was ruled that the Defendant still owed \$11,705.00 on the Judgment and was \$25 behind on current support and one child was self supporting so child support should terminate for her and increase to \$75.00 for the other. An Order to Show cause was served on Defendant for March 30, 1977 but service was quashed March 7, 1977. Plaintiff served another Order to Show Cause for April 25, 1977 bearing civil No 117445. Attached thereto without a different number was a summons and complaint on which No. 241218 was whited out asking for renewal of the \$11,705.00 judgment.

The question of the \$11,705 renewal was argued to Judge Banks between April and August of 1977 on case No. 117445 and a part of his order provided "No judgment is granted on judgments in arrears or heretofore entered." There were reviews of the case November 4, 1977 and May 4, 1978 at which last hearing Defendant was served with an order in supplemental proceedings for the \$11,705.00 judgment bearing case no 117445. and responded to with still no knowledge of the other case. On June 27th an answer, motion and affidavit were filed in No. 241218 to set aside the judgment under Rule 60 and Rule 4 of the Utah Rules of Civil procedure. On July 6, 1978 Judge Taylor refused to set aside the judgment ruling that as a matter of law the defenses raised were not sustainable.

A timely appeal was filed in case No. 241218 by the

Defendant.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the Default Judgment set aside in No. 241218 and a ruling that as a matter of law Judgments are barred after 8 years and cannot be renewed. And for an estoppel against the Plaintiff requiring that the Order of Judge Banks be honored and No 241218 be dismissed.

STATEMENT OF FACTS

There was no transcript prepared as no record was taken in the Motion Division of the Third District Court before G. Hal Taylor on July 6, 1978. All references to the record will refer first to the case number and then the page of the applicable pleadings.

All of the support obligation of the Defendant to plaintiff has terminated on her remarriage August 21, 1964. (117445 page 98 paragraph 3) All support obligation for the two children of the marriage has terminated, for Pamela March 30, 1976 (117445 page 109 paragraph 3) and for Penny December 1976. (117445 page 146 paragraph 5). The Defendant has payed all that was required of him and served 3 days in jail, except he has made no payments on the Judgment for \$11,705.00 and costs. Said judgment was entered on February 4, 1970 from a hearing of February 2, 1970 and represents the total amount by which Defendant was delinquent in alimony and support payments since the commencement of 117445 in April 1959 to and including December 31, 1969. (117445 page 84 paragraph 2) and included

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The prior judgments included alimony and support payments as they became due and as later reduced to judgments for \$300.00 on May 5, 1966 (No. 117445 page 16 paragraph 1) and for \$500.00 on November 14, 1966 which seems to include the prior \$300.00 judgment. (No. 117445 page 55 paragraph 1) The Order reads "...\$500.00 for past due and owing support payments,..."

Defendant was sentenced and served 3 days in jail for contempt for failure to make payments on the Judgment. (No. 117445 page 146 paragraph 6)

Defendant was served an Order to Show Cause set for hearing March 7, 1977 which was quashed for procedural defects. (No. 117445 page 135). He was served identical pleadings on April 18, 1977 (No. 117445 page 138) to which were appended summons and complaint on which the number 117445 was typed but which had been partially whited out with correction fluid and no new number showing written in as is on the summons and complaint in No 241218 pages 3 and 2. (No. 241218 Exhibit 1-D on page 16)

Defendant and his attorney believed they were trying the question of renewing again the \$11,705.00 judgment all throughout the proceedings of case No. 117445 and argued the question to the Honorable Jay E. Banks and entered an order accordingly on September 14, 1977 in which Findings of Fact were made about the \$11,905.00 (No 117445 page 147 paragraph 1) and the Conclusion of Law that "4. No judgment should be granted on the prior judgments heretofore entered..." (117445 Page 149 44)

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No objection was made to the September 8, 1977 Order of Judge Banks nor was an appeal taken from that ruling. The Plaintiff quietly took default on case No. 241218 on July 6 1977 for the same \$11,705.00. (No. 241218 page 7) making the same mistake throughout of appending the wrong case number under which he served the Defendant. No notice of the judgment was sent until an Order in Supplemental Proceedings again bearing No. 117445 was served upon Defendant April 4, 1978. (No. 117445 pages 152, 153, and 154) Objection thereto was filed May 11, 1978 still without understanding of the fact that there was a second action. (No. 117445 page 155)

On May 25, 1978 a letter giving notice of the Judgment in 241218 was delivered to Defendants attorney. (Ex A appended) An answer, affidavit and motion to set aside the Judgment were filed and subsequently argued to Judge G. Hal Taylor on July 6, 1978. He denied the motion based upon a finding that;

1. Defendant admitted the allegations of the complaint in his answer.
2. The complaint asserts a cause of action.
3. The objection to the 1970 judgment that it was induced by threat and coercion without benefit of counsel should have been raised in 1970.
4. The bar of the statute of limitations 78-12-22 UCA and that no action to renew judgments is authorized by the Utah Code was denied as a matter of law.
5. The prior ruling by Judge Banks denying the renewal was denied as a matter of law as a defense and
6. The claim of double jeopardy of person or property was denied as a matter of law. Thus he said

that even if the Default were set aside on the basis of Rule 4 e

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JAMES BRUCE READING
JOHN SPENCER SNOW

May 25, 1978

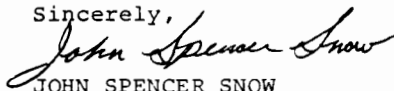
Don L. Bybee, Esq.
431 South 300 East, #202A
Salt Lake City, Utah 84111

Re: Mason v. Mason

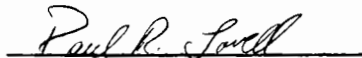
Dear Don:

I have personally served your client George Stephen Mason with a Motion for Order in Supplementary Proceedings. The civil number which was used on the face of the pleading was D-117445. You make the allegation that the Judgment of February 4, 1970 was not renewed within the period of eight years. Please be advised that your client was personally served with a Complaint and Summons for the renewal of this Judgment. A Judgment was entered renewing the former Judgment of February 4, 1970 on the 6th day of July, 1977. The civil number for the renewed Judgments is D-241218. The motion for Order in Supplementary Proceedings should have reflected civil number D-241218 rather than D-117445.

Sincerely,


JOHN SPENCER SNOWDELIVERY CERTIFICATE

I hereby certify that I delivered a true and exact copy of the foregoing letter, to Don L. Bybee, at 431 South 300 East #202A, Salt Lake City, Utah, on the 25th day of May, 1978.



or Rule 60 (b) (1) no viable defenses were asserted. (241218 p 17)

From this ruling the Defendant appealed.

POINT I

INSTALLMENTS OF ALIMONY AND SUPPORT BECOME VESTED WHEN THEY BECOME DUE AND ARE RENEWED WHEN REDUCED TO JUDGMENT. ORDERS ALSO ARE THE SAME AS JUDGMENTS AND BOTH MAY BE ENFORCED AS THO JUDGMENTS BY THE FILING OF AN AFFIDAVIT THAT THEY ARE NOT PAID. THE STATUTE OF LIMITATIONS OF ACTIONS OF EIGHT YEARS APPLIES FROM THE DATE THE INSTALLMENT BECOMES DUE.

The Defendant was ordered to pay installments of support and alimony from the period February 11, 1959 thru May 5, 1966 during which period he slipped \$300.00 behind. By November 14, 1966 he had fallen \$500.00 behind and by February 4, 1970 he had gotten behind by \$11,705.00 out of a total bill of \$23,225.00 to date. There is no dispute that the installments were all vested when they became due. See Bates v. Bates, 560 P.2d 706 in which the Utah Supreme Court stated

"(2) The law of this state is clear: Installments of alimony become vested when they become due, and the court has no power to modify the decree as to them. Therefore, interest accrues at the legal rate.

citing: Myers v. Myers, 62 Utah 90, 218 P. 123 (1923) and Cole v. Cole, 101 Utah 355, 122 P. 2d 201 (1942)

see also: Scott v. Scott, 430 P. 2d 580 to the effect that alimony and support payments become unalterable debts in Utah as they accrue even as to foreign orders.

By holding a hearing the Court is simply fixing the amount specifically due and payable in order that action can be brought in this state or another to enforce the vested amount.

Courts have been applying the eight year statute of limitation and not allowing an Order or Judgment for support accrued more than eight years before the Motion or Complaint is filed. If the accrued installments are not judgments then the 4 year statute of limitations for open accounts or the 6 year limitation for agreements in writing would apply. By some quirk of common practice the Utah Courts have then been recognizing the "new" Judgment or Order for an additional eight years. Section 78-12-1 Of the Judicial Code provides:

78-12-1 Time for commencement of actions generally. Civil actions can be commenced only within the periods prescribed in this chapter, after the cause of action shall have accrued, except where in special cases a different limitation is prescribed by statute.

78-12-22 Within eight years - Within eight years: An action upon a judgment or decree of any court of the United States. or of any state or territory within the United States.

An action to enforce any liability due or to become due, for failure to provide support or maintenance for dependent children.

The Utah Supreme Court in construing the phrase "to become due" in the Edwena Nielsen v. Steven Hansen case No 14628 said "The meaning of the phrase "to become due" is that when an amount is to become due in the future, suit must be begun within eight years after it accrues. The statute of limitations thus applies equally to a liability which will accrue in the future as it does to one which is now due. see Martinez v. Romero 558 P. 2d 510.

As Justice Maughan so clearly stated then "Succinctly stated, the statute and Martinez clearly state: if eight

POINT II

WHERE A JUDGE OF THE SAME COURT OR OF A COURT OF COMPETENT JURISDICTION HAS RULED UPON A QUESTION THAT RULING SHOULD BE RES JUDICATA AND IS A VALID DEFENSE TO ANOTHER ACTION EXCEPT ON APPEAL

In the Instant case the Defendant raised the ruling of Judge Banks that action on the Judgments is barred as an affirmative defense as is provided in the Utah Rules of Civil Procedure Rule 8 (c). The record in case No 117445 was presented to Judge Taylor and he read the September 8, 1977 Order of non suit on renewing of the 1970 Judgment. He then ruled as a matter of Law that the Order did not say what it purported to say and that as a matter of Law it was not a valid defense and thus there was no reason to reach the questions of excusable neglect or fraud raised in the motion to set aside the judgment.

The term Res judicata means that the matter has been adjudged, or is a thing judicially acted upon or decided; and is a rule that a final decree or judgment on the merits by a court of competent jurisdiction is conclusive or rights of parties or their privies in all later suits on points and matters determined in the former suit. American S.S. Co. v. Wickwire Spencer Steel Co., D.C.N.Y., 8 F. Supp. 562. To be applicable it requires identity in the thing sued for as well as identity of cause of action, of persons and parties to the action and of quality in persons for or against whom the claim is brought.

The sum and substance of the whole rule is that a matter once judicially decided is finally decided and if plaintiff

attached a complaint bearing the same case designation to 117445

and the same parties as in this case argued that point and Plaintiff quietly sat on her affirmative defense that she had a default judgment and Judge Banks ruled that no judgment would be granted on the \$11,705.00 1970 judgment then that ruling would be an affirmative defense in a subsequent hearing on case no 241218 if the Judgment were set aside and Judge Taylor committed error in not looking to the fraud or excusable neglect and setting aside the default judgment.


CONCLUSION

The Plaintiff inadvertently misled the Defendant in not having the correct number on the summons and complaint in case number 241218 and consequently misled his attorney by attaching them to the back of an Order to Show Cause which was a duplicate of one already in the file and previously argued and clearly labeled 117445. The parties fought case 117445 with great vigor yet nowhere in the proceedings did Plaintiff advise defendant of the default even during arguments on the propriety of renewing again for the 3rd or fourth time the old judgment for attorney fees and \$11,705.00. That would be grounds for setting aside the judgment and reaching the affirmative defenses that the matter had already been ruled upon in an adversary proceeding involving the same parties or that the statute of limitations barred further action on the claim. Both of which defenses would justify this court in setting aside the judgment in case 241218 and ruling as a matter of law that that complaint be dismissed with prejudice. The other affirmative defenses would require some proof of facts and

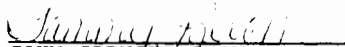
hence are not argued in this brief to the Court.

Counsel for Defendant is aware that this Court must make all presumptions in favor of the prevailing party in the lower proceedings and will only overturn a ruling where there is a clear abuse of discretion. However it is urged in this case that there has been such a clear abuse and that Defendant is entitled to have complaint in case 241218 dismissed or remanded for dismissal after the default judgment is set aside.

Respectfully submitted


DON L. BYBEE
Attorney for Appellant

RECEIVED 3 copies this
5th day of January, 1979.


JOHN SPENCER SNOW
Attorney for Respondent