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Record No. **1534**

In the
Supreme Court of Appeals of Virginia
at Richmond

W. H. CAPELL

v.

GEORGIA LEE CAPELL

FROM THE HUSTINGS COURT OF THE CITY OF PORTSMOUTH

“The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements.”

The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

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IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 1534

W. H. CAPELL

vs.

GEORGIA LEE CAPELL.

PETITION.

To the Honorable Justices of said Court:

Petitioner, W. H. Capell, respectfully represents that he is aggrieved by a decree of the Court of Hustings for the City of Portsmouth, in a proceeding for contempt of court had against him by his former wife, Georgia Lee Capell, and by which decree, entered on the 15th day of March, 1934, he was held to be in contempt and sentenced to jail for 30 days, or until he paid \$45 and costs, a transcript of the record in which proceeding is herewith filed, to which reference is made.

The Facts are definite and undisputed, depending mostly upon documents, to-wit:

Petitioner's former wife, Georgie Lee Capell, procured an absolute divorce from him by decree of said Court of Hustings entered on the 25th day of February, 1924, and which decree awarded her \$125.00 per month as alimony, and for the support of the infant daughter of the parties "until the further order of this court", thus reserving the right in the future to apply to the court for an alteration of this allowance (R., p. 6).

Thereafter said infant daughter became of age and married; and the parties entered into a written agreement, with

their counsel as witnesses (R., p. 7), by which the agreement was by mutual consent, substituted for the decree for alimony and support of the infant, and under which agreement said former wife got advantages and placed burdens upon the petitioner not contained in that decree, to-wit: the agreement required petitioner to pay said former wife \$50 per month for two years, and thereafter \$45 per month, *for life, no matter whether his former wife should remarry, and with no right to reduce the payment because of circumstances nor by application to the court.* This agreement is clear-cut, made between competent parties, binds both, and reads as follows in full (R., p. 7):

“THIS AGREEMENT made and entered into this first day of March, 1930, between W. H. Capell, of the first part, and Georgia Lee Capell, party of the second part:

“Whereas the said W. H. Capell, by decree of the Court of Hustings of the City of Portsmouth, is now directed to pay to the said Georgia Capell, his former wife, the sum of One Hundred and Twenty-five Dollars (\$125.00) per month for the support of herself and her daughter, and whereas, her said daughter has married since the date of the said decree, and it is desired to modify the arrangement for the support of the said Georgia Capell alone;

“Now therefore, it is hereby agreed that the said W. H. Capell from the date of this contract shall pay to the said Georgia Capell for her support in satisfaction of the terms of the said decree the sum of Fifty Dollars (\$50.00) each month, beginning on the first day of March, 1930, for the term of two years, and thereafter, until the death of either party the sum of Forty-five Dollars (\$45.00) per month, in like monthly instalments. The said Georgia Capell hereby acknowledges receipt of first instalment of Fifty Dollars on this date, and agrees to accept the terms of this instrument in full satisfaction. All of the said instalments shall be mailed by said W. H. Capell to the said Georgia Capell at her present residence, 953 North Street, Portsmouth, Virginia, or to such future address as she shall indicate by writing.

Witness the following signatures and seals.

W. H. CAPELL (Seal)
MRS. GEORGIA CAPELL (Seal)”

Witnesses

A. A. BANGEL
R. B. ALBERTSON.

Petitioner kept up payments under this agreement until March, 1934. He did not pay for that month, and his former wife immediately had him before said court of Hustings on a rule *for contempt* upon the *charge of not complying with the decree for alimony and support entered by that court in the old divorce case*. In defence of the rule petitioner introduced said subsequent agreement between the parties, and took the position that he was not in contempt, that the parties had made a valid binding agreement releasing the decree for alimony and superseding it, and placing burdens upon petitioner not contained in the decree, and that any rights his former wife had, were civil rights under the agreement, and not rights enforceable by contempt proceedings under the old decree for alimony and support.

Said Hustings Court overruled petitioner's defences, held that the old decree was in force, not superseded by said contract, that petitioner was in contempt for not complying with said old decree, and sentenced him to jail for 30 days, or until he should pay \$45, and the costs of the proceedings for contempt.

Petitioner duly excepted to the ruling and decision, and gave his reasons fully so as to clearly comply with rule 22 of the Supreme Court of Appeals of Virginia (R., pp. 8, 9).

The Error Assigned Is: That said Court of Hustings erred in holding petitioner guilty of contempt and in punishing him therefor, and in holding that said decree for alimony and support was still in force and had been violated by petitioner, and in holding that said contract, dated March 1, 1930, did not release and supersede that decree.

The Argument will briefly concentrate on the said single assignment of error, to-wit:

The child of the parties having become of age and married, is out of the case, and the question is merely between the former husband and wife, both *sui juris* (R., p. 7).

On March 1, 1930, these parties by mutual consent entered into said written contract entirely changing the provisions of the old decree for alimony and support, and putting *a life-time burden upon the husband, no matter whether the wife remarried or not, and cutting him off from his former right allowed by the decree to apply to the court to reduce alimony*. In other words, this is a binding contract, superseding all former arrangements, and to that contract alone can the parties look. Any idea of contempt proceedings under the old

decree was ended by this contract. The contract was plain and lawful.

If the wife had seen fit to accept a lump sum, say \$500, in satisfaction and release of the judgment for alimony, that would be a binding release.

When she saw fit to accept a contract (and well she might with the advantages in this contract) she likewise released and satisfied the old decree for alimony.

The contract expressly stated (R., p. 7):

“The said Georgia Capell hereby acknowledges receipt of first instalment of Fifty Dollars on this date, *and agrees to accept the terms of this agreement in full satisfaction.*” (Italics added.)

She has never attacked the contract, never had it set aside, but holding to the contract, and binding her former husband for life, even if she remarried, under the contract, yet she seeks *also* to hold him under the old decree and punish him for contempt under the old decree. This, she cannot do. She cannot hold both under the decree and under the contract. If she desires to hold under the decree, she must first surrender the contract and have it cancelled by showing fraud or some other defect, if there be any.

A woman who is of age may release a decree for alimony by subsequent contract.

In 19 C. J. 305, it is said: “Under the law that a wife may release alimony, a reconciliation of the parties and release by the wife of alimony will constitute a sufficient answer to a citation for contempt. It has been held that a wife may waive her right to proceedings in contempt and allow her husband the common-law rights of defense by action.”

Thus in *VanNess vs. Ransom*, 150 N. Y. 251 (1914), a contract made the day after the decree for alimony was held a binding release of the decree, although the payments under the contract had not been fully made, and the contract superseded decree (p. 254). There is nothing in any Virginia statute to prevent an adult woman releasing a decree for alimony by a subsequent contract.

Petitioner adopts this petition as his opening brief, and a copy hereof was mailed to counsel for his said former wife on the 7th day of April, 1934, and oral argument on this petition is requested.

Petitioner prays that a writ of error, or appeal, and *super-*

sedeas may be granted, said decree holding him guilty of contempt reviewed and reversed, the rule for contempt dismissed, and such other and further relief granted as may be adapted to the nature of the case.

W. H. CAPELL,
By TOM E. GILMAN,
JAS. G. MARTIN, Counsel.

April 7th, 1934.

The undersigned, counsel practicing in the Supreme Court of Appeals of Virginia, certify that in my opinion sufficient matter of error appears in the proceedings and decree shown by the record accompanying the foregoing petition to make it proper for the same to be reviewed by this court.

JAS. G. MARTIN.

Received April 9, 1934.

M. B. WATTS, Clerk.

April 20, 1934. Appeal and *supersedeas*. Bond \$500.00.

LOUIS S. EPES.

Received April 20, 1934.

M. B. WATTS, Clerk.

RECORD

VIRGINIA:

At the Court of Hustings for the City of Portsmouth, held on the 5th day of March, 1934.

Georgia Lee Capell, Complainant,

vs.

W. H. Capell, 1618 Prentis Ave., Defendant.

In Chancery.

This day came the complainant, Georgia Lee Capell, and upon her motion it is ordered that the defendant, W. H.

Capell, do appear before this court on the 14th day of March, 1934, at 10 o'clock A. M., to show cause, if any he can, why he should not be adjudged in contempt of this court for his failure and refusal to comply with the order of this court entered in this cause on the 25th day of February, 1924, requiring him to pay to Georgia Capell support money; which said requirement was modified by an agreement between the said parties entered into on March 1st, 1930, reducing the said allowance to the sum of \$45 per month, in the payment of which he is still delinquent.

RULE.

The Commonwealth of Virginia,
To The Sergeant of the City of Portsmouth, Greeting:

You are hereby commanded to summon W. H. Capell, 1618 Prentis Ave., to appear before The Court of Hustings for the City of Portsmouth, on the 14th day of March, 1934, at ten o'clock, A. M., to show cause, if any he can, why he should not be Adjudged in Contempt and dealt with
page 2 } accordingly for his failure and refusal to comply with an order of this Court, heretofore entered, on the 25th day of February, 1924, in the Chancery Suit, of Georgia Lee Capell, Plaintiff against W. H. Capell, Defendant, ordering the said W. H. Capell, to pay to his wife, Georgia Lee Capell, on the 15th day of each month, so long as they both shall live, or until the further order of this Court, the sum of One Hundred and Twenty-five Dollars (\$125.00), for the maintenance of the said Georgia Lee Capell, and her daughter, Margaret, which said requirement was modified by an agreement between the said parties entered into on the 1st day of March, 1930, reducing the said allowance to the sum of Forty-five (\$45.00) per month, in the payment of which he is still delinquent, and have then and there this summons.

Witness, Wm. Hodges Baker, Clerk of our said Court, at his office, this 5th day of March, 1934, in the 158th year of the Commonwealth.

WM. HODGES BAKER,
Clerk of The Court of Hustings for the City of
Portsmouth, Virginia,
By NELLIE M. CALVERT, D. C.

Virginia:

At the Court of Hustings for the City of Portsmouth, held on the 14th day of March, 1934.

Georgia Lee Capell, Plaintiff,

vs.

W. H. Capell, Defendant.

In Chancery.

This day came the parties in person, and by counsel, on the rule for contempt returnable this day, pursuant to decree of this Court entered February 25th, 1924, and the Court having heard the evidence *ore tenus*, and argument of counsel, doth adjudge, order and decree that said W. H. Capell is in contempt of this Court in not paying to the plaintiff an alimony allowance of Forty-five (\$45.00) Dollars for March, 1934, and doth adjudge, that said defendant be confined in the City Jail for said contempt for thirty days or until he pays said Forty Five (\$45.00) Dollars and the cost of this rule; to each of which rulings defendant duly excepted.

And said defendant desiring to appeal from this decree, the execution of this decree shall be suspended for ninety days from this date upon said defendant giving a suspending bond with surety deemed sufficient by this Court in the penalty of Two Hundred Dollars. And said defendant shall enter into a recognizance with proper surety to appear in this Court on the first day of the May term, 1934, in the penalty of three hundred dollars, to do and receive what the Court shall then consider.

And he is allowed sixty days from this date within which to file his certificate of exceptions.

NOTICE.

To Georgia Lee Capell:

TAKE NOTICE, that I will on the 22d day of March, 1934, at the hour of 10 o'clock, a. m., present to the Judge of the Court of Hustings for the City of Portsmouth, in his court room, my certificate of exceptions in your case against me, lately pending in that court.

FURTHER, TAKE NOTICE, that on the same day at noon, I shall apply to the Clerk of said Court in his office, for a transcript of the record, in order

to apply to the Supreme Court of Appeals of Virginia, for a *supersedeas* etc., in said case.

W. H. CAPELL,
By JAS. G. MARTIN,
Of Counsel.

Service of above notice accepted this 17th day of March, 1924:

ROBT. B. ALBERTSON,
Counsel for Georgia Lee Capell.

Virginia:

At the Court of Hustings for the City of Portsmouth, held on the 22nd day of March, 1934.

Georgia Lee Capell, Plaintiff,

vs.

W. H. Capell, Defendant.

In Chancery.

This day came again the parties by counsel and the defendant presented his certificate of exceptions No. 1, which was duly signed and made a part of the record in this cause.

The Certificate of Exceptions No. 1, referred to in the foregoing order is in the words and figures following, to-wit:

page 5 } BILL OF EXCEPTIONS NO. 1.

Virginia:

In the Court of Hustings for the City of Portsmouth.

Georgia Lee Capell, Plaintiff,

vs.

W. H. Capell, Defendant.

CERTIFICATE OF EXCEPTIONS NO. 1.

This certifies that the following evidence on behalf of the plaintiff and the defendant, respectively, as hereinafter denoted is all the evidence that was introduced on the trial of this cause, to-wit, on the trial of the rule for contempt heard on the 14th day of March, 1934, to-wit:

Georgia Lee Capell, sworn on her own behalf, testified that

this court had granted her a divorce and alimony, as shown by a certified copy of the decree introduced in evidence by her as follows, to-wit:

page 6 } Virginia:

At the Court of Hustings for the City of Portsmouth, held on the 25th day of February, 1924.

Georgia Lee Capell, Complainant,

vs.

W. H. Capell, Defendant.

In Chancery.

This cause in which the defendant has been personally served with process and who has failed to appear and plead, answer, or demur, came on this day to be heard upon the complainant's bill and the exhibit filed therewith, and the depositions of witnesses taken after due notice and filed on behalf of the complainant, and was argued by counsel. On consideration whereof, and it appearing to the Court independently of admissions of either party in the pleadings or otherwise, that the said parties were lawfully married in November, 1902; that the said defendant did in the month of September, 1923, commit adultery, and that the said plaintiff has not cohabited with him since obtaining knowledge of the same; and that the same was not committed with her connivance or by her procurement; that the said defendant has resided and been domiciled in this State for more than one year preceding the commencement of this suit, and now is and was at the time of the institution of this suit a resident of the City of Portsmouth, in the said State, the Court doth adjudge, order and decree that the said Georgia Lee Capell and W. H. Capell be divorced from the bond of matrimony which was created by the aforesaid marriage, and that the said marriage be and the same is hereby dissolved and annulled. And the said Court doth further adjudge, order and decree that the said W. H. Capell shall pay to the said Georgia Lee Capell monthly, on the 15th day of each month, so long as they both shall live, or until further ordered by this court, the sum of One Hundred and Twenty-five Dollars (\$125.00) for the maintenance of the said Georgia Lee Capell and her daughter, Margaret. And it is ordered that the said W. H. Capell shall pay unto the said Georgia Lee Capell her costs by her in this behalf expended, including a fee of \$75.00 as counsel's fee for conducting this suit. And it is further ordered that neither of

the parties shall marry again within a period of six months. This cause may now be removed from the docket.

A copy, Teste:

WM. HODGES BAKER, Clerk,
By ANGIE E. OTTAVIO,
Deputy Clerk.

page 7 } And said Georgia Lee Capell further testified that thereafter the daughter of the parties had become of age and married; and said Georgia Lee Capell and said W. H. Capell executed and delivered a paper writing as follows, to-wit:

“THIS AGREEMENT made and entered into this first day of March, 1930, between W. H. Capell, of the first part, and Georgia Capell, party of the second part:

Whereas the said W. H. Capell, by decree of the Court of Hustings of the City of Portsmouth, is now directed to pay to the said Georgia Capell, his former wife, the sum of One Hundred and Twenty-five Dollars (\$125.00) per month for the support of herself and her daughter, and whereas, her said daughter has married since the date of the said decree, and it is desired to modify the arrangement for the support of the said Georgia Capell alone;

Now therefore, it is hereby agreed that the said W. H. Capell from the date of this contract shall pay to the said Georgia Capell for her support in satisfaction of the terms of the said decree the sum of Fifty Dollars (\$50.00) each month, beginning on the first day of March, 1930, for the term of two years, and thereafter, until the death of either party the sum of Forty-five Dollars (\$45.00) per month, in like monthly instalments. The said Georgia Capell hereby acknowledges receipt of first instalment of Fifty Dollars on this date, and agrees to accept the terms of this instrument in full satisfaction. All of the said instalments shall be mailed by said W. H. Capell to the said Georgia Capell at her present residence, 953 North Street, Portsmouth, Virginia, or to such future address as she shall indicate by writing.

Witness the following signatures and seals.

W. H. CAPELL (Seal)
MRS. GEORGIA CAPELL (Seal)”

Witnesses

A. A. BANGEL
R. B. ALBERTSON

page 8 } That said W. H. Capell had kept up all payments paying \$50.00 per month, as stipulated in the next foregoing paper for two years from March 1, 1930, and thereafter \$45.00 per month, as stipulated in that paper, until March, 1934, but that for March, 1934, he had failed and refused to pay anything, although he was earning as pay approximately \$270.00 a month as an engineer with the Seaboard Air Line Railroad; and that she had no other means of support.

And said W. H. Capell, sworn on his own behalf testified that he is an *an* engineer of the Seaboard Air Line Railroad, earning approximately \$240.00 a month, that since his divorce from Georgia Lee Capell, he has married again and has one child by his present wife, and that he has not paid said Georgia Lee Capell anything for March, 1934, and that the said contract put in evidence dated March 1, 1930, was duly executed and delivered by the parties, and has been acted under ever since.

And said W. H. Capell, claimed that there was no contempt of court, and that the said contract had superseded the original decree for alimony, and that this contract put burdens upon the husband in addition to what the decree for alimony had put, this contract running for the life of the parties, even though Georgia Lee Capell should again be married, and also was binding upon the parties and excluded the husband from applying to the court to reduce the payments, although the decree for alimony had permitted such application. And said W. H. Capell, maintained that no contempt proceedings could be brought against him under these facts, but that any rights of Georgia Lee Capell were under said contract as a mere civil contract to be enforced as other civil contracts page 9 } and not by contempt proceedings.

But the court being of opinion that said W. H. Capell was in contempt of this court and that contempt proceedings were proper against him under the circumstances, and that said agreement did not supersede nor wipe out said decree for alimony, adjudged him in contempt and ordered him to be punished for his contempt by confinement in the City Jail for 30 days, or until he should pay said \$45.00 due for the month of March, 1934, and the costs of this rule, as more fully appears from the order of the court entered in this cause on March 14, 1934, to which reference is made.

And said W. H. Capell, at the time, by counsel, duly excepted to each of the rulings of the court on the grounds above stated and fully argued to the court, and prays that this his certificate of exceptions, may be signed and made a part of the record, which is accordingly done in due time,

after plaintiff had been given proper notice in writing of the time and place of presenting the certificate of exceptions.

Teste: this 22nd day of March, 1934.

K. A. BAIN, Judge.

page 10 } State of Virginia,
 } City of Portsmouth, to-wit:

I, Wm. Hodges Baker, Clerk of the Court of Hustings for the City of Portsmouth, in the State of Virginia, do hereby certify that the foregoing is a true transcript of the record in the foregoing cause; and I further certify that the notice required by Section 6339, Code of 1919, was duly given in accordance with said section.

Given under my hand this 27th day of March, 1934.

WM. HODGES BAKER, Clerk,
By NELLIE M. CALVERT, D. C.

A Copy—Teste:

M. B. WATTS, C. C.

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