In the

Supreme Court of the United States

WILLIAM HERBERT ORR,

APPELLANT,

V.

LILLIAN M. ORR,

APPELLEE.

No. 77-1119

Washington, D. C.
November 28, 1978

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM HERBERT ORR, Appellant,	:	
v.	:	No. 77-1119
LILLIAN M. ORR, Appellee.	:	

Washington, D.C.

Tuesday, November 28, 1978

The above-entitled matter came on for argument at 11:00 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOHN L. CAPELL, III, Esq., Post Office Box 2069, Montgomery, Alabama 36103; for the Appellant.

W. F. HORSLEY, Esq., Post Office Box 2345, Opelika, Alabama 36801; for the Appellee.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 1119, Orr against Orr.

Mr. Capell, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN L. CAPELL, III, ESQ.,

ON BEHALF OF THE APPELLANT

MR. CAPELL: Mr. Chief Justice, and may it please the Court:

William Orr has been required to pay alimony to his former wife under Alabama statutes, which require payment of alimony by husbands only. And so the question before you today is whether or not these statutes violate the Equal Protection Clause of the Fourteenth Amendment of our United States Constitution.

This Court's precedent establishes that laws classifying on the basis of sex are unconstitutional when routed in the role typing once routinely imposed on women and men. Two, when that notion that women are men's subordinates. And, three, overbroad gross ranking of men as dominant and independent, women as weak, inferior, and dependent. As appellee puts it, the law derives from a view of the married woman as a non-entity, a view maintained for centuries but now recognized as archaic, outmoded, and holy inconsistent with the equal status and dignity of all persons under our law.

Alabama's scheme, routed as it is in historic role typing, cannot be justified as remedial. Any attempt to dress the classification in a compensatory cloak is inevitably deceivable.

MR. CHIEF JUSTICE BURGER: Would you say there is something in the nature of role casting, stereotyping, in Kahn against Shevin?

MR. CAPELL: Kahn v. Shevin, sir, I am going to in a moment. Kahn v. Shevin, your Court came out and said that it was all right in that instance because we were dealing with a tax situation and, as pointed out in that case, the states are given great leeway in Kahn v. Shevin. However, under the Alabama statute, Your Honor, the situation is on a case by case method. Read in context with Alabama's alimony statute, its common law origin, the Alabama law was hardly designed with economic preference for women in mind, as was Kahn.

On the contrary, as the appellee's brief pointed out, the common law subordinated the wife to the husband. It declared the wife disabled, stripped her of her capacity to sustain herself.

Q This particular provision of Alabama's law was certainly designed to prefer women, was it not?

MR. CAPELL: It was designed to prefer women, sir, because there is no statute which prefers men at all. Men have to pay alimony for one reason--because the Alabama statute says

it does, period.

Q No, the real reason is that the court ordered your client to pay alimony.

MR. CAPELL: Based on an Alabama statute.

Q But there would not have been an order to pay alimony unless the court, under the circumstances of this case, thought that such an order was appropriate.

MR. CAPELL: That is true if the statute was held to be constitutional. Without this statute, sir, alimony could not even be questioned in the State of Alabama.

Q Did your client ask for alimony in the divorce proceedings?

MR. CAPELL: He would have had--

Q Did he? Did he?

MR. CAPELL: No, sir. No, sir, he did not, Your Honor.

Q He did not protest this alimony?

MR. CAPELL: He was not allowed to, Your Honor, at that time because the statute did not allow him to even request alimony.

Q But he did not.

MR. CAPELL: No, sir.

Q He did not file a piece of paper saying that, did he?

MR. CAPELL: No, sir, he did not.

Q The question on my mind--perhaps you can satisfy it, it did not seem to bother the court of your state--is, Why is this a case or controversy if your client did not ask for alimony?

MR. CAPELL: The appellate courts of Alabama said that the appeal was timely filed when we questioned the judgments that were trying to be obtained by the appellee wife against Mr. Orr. And at that point in time he questioned whether or not this would be a valid judgment base, because of the constitutional issue which we are presenting before you today.

Q But your claim is that, as I understand it, that this law of your state is unconstitutional because it authorizes a court to award alimony only to a wife at the expense of a husband.

MR. CAPELL: That is right, sir. It is on a general line strictly on sex.

Q Right. But there could be a law, a perfectly constitutional law, in your submission that authorized a court to order alimony to either party in a divorce. In any event, in this case the court ordered your client to pay alimony.

MR. CAPELL: That is correct. The lower court ordered--

Q I do not see how this controversy arises unless or until there should be a case in which the divorcing husband

asked for alimony from the wife, and the court of your state said, "No. I would like to give it. It should be given in this case. But I cannot under the statute." Your case is not anything approaching that.

MR. CAPELL: Let us look at it this way, Your Honor. When a man comes into a court in Alabama in a divorce suit, the stature of justice is peeking at that point in time, Your Honor, to determine what sex he is; and they are tilted from the point in time when that man walks into court. Consequently, his ability--

Q Generally, the husband is of the male sex?

MR. CAPELL: Yes, sir.

And consequently, also, Your Honor, the scales are tilted in favor of the woman immediately. His bargaining power is solely gone from the very point he walks in.

Q Let us accept that, but in this case, in this particular case, what is it that your client was deprived of?

MR. CAPELL: My client was deprived, because of the alimony statute, with suffering financial burden based solely on an unconstitutional statute, Your Honor.

Q Did he say to the court, "I want $500 a month because the statute which we have had here is an unconstitutional statute. You must give me the same treatment that you give to the wives"?

MR. CAPELL: He did so in a subsequent hearing, Your

Honor, which is attached and made a part of the appendix of the record. He raised it when she tried to come in and say, "You have to pay me these many dollars."

And he said, "That judgment would be illegal because it was being based on a statute which is unconstitutional."

Had there been an alimony statute in Alabama which was sex neuter, where Mr. Orr could have come in and said, "I want alimony," he would have done so.

Q Is there any--

MR. CAPELL: Yes, Justice Marshall.

Q Is there any payer of alimony in Alabama today who would not have the same result if you win your case here now?

MR. CAPELL: Would you repeat the first part of that; I am sorry.

Q Could every man who had been divorced and who had paid alimony in Alabama today, would he have any redress?

MR. CAPELL: He could file what was called a petition to modify, Your Honor, in Alabama, based on the change of the law if this Court held the Alabama statutes unconstitutional. This would be held again, Your Honor, on a case-by-case basis.

Q And this man never litigated this point any place. He just comes in and says, "I want my money back."

MR. CAPELL: No, sir. He litigated it, Your Honor--

Q He never raised this point. You did.

MR. CAPELL: In the court of Lee County, yes, Your Honor.

Q Your case says that anybody who had not litigated this point can come in on a contempt purge and win: is that not what your case is?

MR. CAPELL: No, sir, not exactly, Your Honor.

Q Is it close?

MR. CAPELL: It was raised at this proceeding. It was raised in a contempt proceeding, this issue of the Alabama alimony statute. And it was raised for the first time at that particular point, sir.

Q May I ask you another question--

MR. CAPELL: Yes, sir.

Q --relating to your possible standing here? Your client agreed to pay this alimony.

MR. CAPELL: Yes, but my client signed an agreement which the court of Alabama says by its law, sir, that it goes in to be sure that the woman--not the man but that the woman--is protected. It is the Stanley case in Alabama. Mr. Orr, had he had the opportunity though of a sex neuter statute, Your Honor, at the time he walked into court, when he walked in the first time, it is our position that he would not have signed an agreement. But he did sign it because he is more vulnerable because of his sex.

Q Did you make any record at the time as to what he would have done had it not been for the statute?

MR. CAPELL: It was raised in the first time of my representation of Mr. Orr, Your Honor, which was at a contempt proceeding before the Circuit Court--

Q At the time he signed the agreement, he made no reservation whatever?

MR. CAPELL: No, sir.

Q And I ask you now, Why is he not bound by his agreement?

MR. CAPELL: Because of the wordings of our statutes, Your Honor.

Q The agreement does not say, "I hereby agree to pay alimony to my wife only because the statute of Alabama does not allow alimony to be paid to the husband." It is just a flat out agreement.

MR. CAPELL: Yes, sir, but it is an agreement that is incorporated into a final decree that is looked at by the court. And the lower court at that point in time looks to see what our Alabama cases require, that the woman is protected--nothing mentioned about the man.

Q But he undoubtedly gained something or perceived that he was gaining something from entering into that agreement. Normally one does not agree to something without some consideration flowing to him or her.

MR. CAPELL: In divorce proceedings, Your Honor, in Alabama there are three parties to every agreement. There is the man, there is the woman, and there is the State of Alabama. The State of Alabama, as the cases have pointed out, is the silent party looking to see that the women are protected. This case was cited. This is what Mr. Orr is contending, that had he come in, had he been allowed to come in on a sex neuter basis--and he is ready, willing, and able to go back and to fight on the basis of sex neuter battle, which would be up to the court of Alabama to hear.

Q Mr. Capell--

MR. CAPELL: Yes, Justice Rehnquist.

Q --what are we to take from the procedural history in the appellate courts in Alabama in this case? I take it that the court of appeals, the intermediate appellate court, did pass on the constitutional question which you raise, and it ruled against you.

MR. CAPELL: That is, the court of civil appeals did, Your Honor. They did say that this issue that we were just discussing was timely filed.

Q Right. And then you petitioned the Supreme Court of Alabama for certiorari?

MR. CAPELL: That is correct.

Q And the majority of the Supreme Court of Alabama did not write an opinion. It simply held that the

petition for writ of certiorari was quashed as improvidently granted?

MR. CAPELL: Yes, sir.

Q Do we have any opinion of the highest court of the State of Alabama as to the constitutionality of the statute?

MR. CAPELL: Yes, sir. Following that statement of it being quashed, if you will look at Justice Almon's statement, which is a concurring opinion with the majority, you will see that it states--and I am quoting in essence--that any statute which favors women against men is constitutional.

Q But I take it he concurred specially because the majority did not agree with it. That is the experience we usually have here.

MR. CAPELL: Yes, sir.

Q And the majority is simply silent. And I am wondering, in view of our long established rule, that one must raise the constitutional issue at the very first point in any state proceeding and must renew it throughout, that if Justice Powell's question to you does not suggest that perhaps the Supreme Court of Alabama thought the Alabama appellate court was wrong in passing on the constitutionality of the issue, that the result was right but that it simply should not have opined on the constitutionality?

MR. CAPELL: I would like to respectfully state that that, in my opinion, would not be the reason, Your Honor. I would like to maintain before this Court that Mr. Orr does have standing, based on the facts of the Alabama statutes as we have specified.

Q I am not talking about standing, Mr. Capell. I am talking about whether or not the Supreme Court of Alabama, which is the highest court of Alabama, in fact did give a judgment on a constitutional question, which is properly now before this Court. I realize the intermediate appellate court did.

MR. CAPELL: And I have no answer to that question, Your Honor.

Read in context with its common law origin, the Alabama law was hardly designed with economic preference--

Q Excuse me--

MR. CAPELL: Yes, sir.

Q --Mr. Capell. I am sorry to interrupt you again. But just so that I will understand, my Brother Rehnquist in his question referred to the order of the Supreme Court of Alabama quashing the writ of certiorari as improvidently granted. And then Justice Almon says, "I concur in affirming the Court of Civil Appeals." Is the effect of a quashing of a writ of certiorari as improvidently granted in your state the same as affirming the Court of Appeals?

MR. CAPELL: In my opinion, in this instance that answer is correct, sir.

Q Of course that is quite alien to the tradition and practice and rule in this Court.

MR. CAPELL: That is correct, sir, and I would be happy to brief that point and submit a subsequent brief to you on that point, Your Honor.

Q Why is not the posture just the same as though they had denied review in the first instance?

Q That was my question--Justice Almon, concurring in the quashing of the writ as improvidently granted, says, "I concur in affirming the Court of Civil Appeals." So, does that mean it was affirmed?

MR. CAPELL: It meant that the finding that alimony statutes were constitutional by the Court of Appeals that they are affirming the statutes of Alabama concerning alimony statutes, sir.

Q They are affirming a judgment of the court to which the writ of certiorari is directed.

MR. CAPELL: Yes.

Are they affirming it or are they simply dismissing it or quashing it?

MR. CAPELL: Well, quashing means--

Q You are an Alabama lawyer, and you could presumably tell us what the practice is in your state. Or

perhaps it is not consistent.

MR. CAPELL: Quashing does mean to dismiss, in my opinion.

Q Rather than affirm.

MR. CAPELL: Yes, sir. However, Justice Almon said in his concurring opinion that he does affirm, he would affirm--

Q He said he concurs in affirming.

MR. CAPELL: Yes, sir.

Q Not that he individually would affirm.

MR. CAPELL: I do not know, Your Honor, if that is sleight of pen or what.

Q I see.

MR. CAPELL: I cannot answer you.

Q He cannot bind the other members of the court by any characterization that he puts on it in a single opinion, can he?

MR. CAPELL: No, sir, Your Honor.

Getting back to the question that was asked of us though, we read in context with this common law origin Alabama law was hardly designated with economic preference for women. On the contrary, as appellee's brief points out, this common law subordinated women to husbands, declared wives disabled, and stripped her of a capacity to sustain herself.

In essence, appellee's argument that the very legal

regime, if it discriminates against a woman, can be salvaged if that regime throws the woman a bone after placing her in the cage. And this argument cannot withstand actual reflection and reasoned analysis.

You asked me about Kahn. Support for one-way alimony statutes is a scheme now maintained by a rapidly dwindling number of states. This Court's decision in Kahn v. Shevin can be distinguished--subsequent decisions are Wiesenfeld and Goldfarb--to make it apparent that Kahn will not bear the weight the appellee would place upon it because we know Kahn upheld a property tax exemption for $15 annually, granted to widows but not to widowers. A key factor in Kahn was the utter impracticability of awarding the $15 dispensation on a case-by-case basis. In sharp contrast, alimony in Alabama is never awarded categorically. The individual case, one's ability to pay, the length of the marriage, the other person's need, all these and other factors determine how much should be paid and for how long a period of time.

But given that fact that Alabama has chosen to make alimony awards on a case-by-case basis, there is no necessity whatsoever for classification by sex.

Tax classification, because of the impracticability of individualized adjudications, is an area in which states have large leeway. But there is no warrant for such leeway in an area such as the one at bar where adjudication must be

made again on a case-by-case basis. Thus the administrative convenience--the prime consideration in Kahn--is not a tenable argument to our case before us.

Sparing the public purse is not a consideration here as it was in Kahn. And, in addition, the $15 favor in Kahn was no slight. It was so slight it could not be expected to affect the behavior of men and women. However, our one-way alimony statute is a large and capricious reminder and reinforcement of society's traditional type-casting.

Q Mr. Capell--

MR. CAPELL: Yes, Justice Marshall.

Q --let us get back to the present day. You said there was an opinion of the court of appeals; I cannot find it. There is just an order. So, where is the opinion that declares this statute constitutional?

MR. CAPELL: All right, sir, if you will look at the Court Appendix...

Q That is what I am looking at.

MR. CAPELL: Look at page number 10a, if you will, Your Honor, of the Jurisdictional Statement.

Q The opinion by Judge Holmes, is that what you are referring to?

MR. CAPELL: Yes, sir.

Q Is that it?

MR. CAPELL: That is it, Your Honor.

Q Oh, this is the order on 15a. That is the order on 15a. I see. Thank you.

MR. CAPELL: Yes, sir.

Putting Kahn in perspective with Wiesenfeld and Goldfarb clarified that the Court follows no reject rule. Women litigants win and men, males, lose because we know both in Wiesenfeld and Goldfarb men were the complainants, men in both cases, as in the instant case. Gender type-casting frozen in legislation was the target which was successfully attacked.

In Califano v. Webster this Court carefully distinguished historic knee-jerk engendered by this characterization for more modern law passed in direct response to a wage and job placement bias against women. The Webster per curiam makes it clear that the Court will uphold a gender classification alleged to be compensatory only if the law in fact was an act to check adverse discrimination women encounter and not out of prejudice about women's weakness, inferiority, and dependency.

Further, such general compensation classifications must truly match their remedial end. Therefore, the differential at bar surely does not fit the Webster bill. It rests on the traditional way of thinking about females. It plainly was not enacted to remedy or to reduce hostility to women in the labor market.

In summation, the gender classification at issue as a means to allocate maintenance responsibility post-divorce is patently unfair and does not relate substantially to the state objective. Functional sex-neutral classification is the fair means readily available to request rights and obligations between spouses because one-way alimony is a historical hangover that discriminates against men and stigmatizes women; the decision below cannot survive reasoned review. And, consequently, we respectfully request that the Alabama alimony statute be held unconstitutional.

Q Mr. Capell, before you sit down--

MR. CAPELL: Yes, Justice Stevens.

Q --is there any case that is inconsistent with your opponent's theory that discrimination against men is permissible if it is economic discrimination? That is the heart of their whole argument.

MR. CAPELL: Yes, it is on economics. And I think we have to differentiate, sir, again between Kahn with Goldfarb and Wiesenfeld. Goldfarb and Wiesenfeld--the men did attack this statute that favored women and were successful before this Court.

Q But cannot one argue that both of those cases were discriminations--well, let us see, were those discriminations against men or women, as you view them?

MR. CAPELL: I view them as discrimination against

men.

Q There is an argument that the female wage earner was the victim of the discrimination because she got less for her Social Security tax. If you view them that way, is there any case that is inconsistent with that theory?

MR. CAPELL: No, if you cast the case of Orr in a standpoint of economic considerations only, where you have a gender type role casting. So, my answer would be it would be a determination of how you look at Goldfarb and how you look at Wiesenfeld.

Q Whether there is discrimination against men or women.

MR. CAPELL: Yes, sir.

Q If you should prevail here, what happens?

MR. CAPELL: It goes back to Alabama, Your Honor.

Q And then what?

MR. CAPELL: And Alabama will look at this case on a sex neuter basis, looking at need, not sex, looking at ability to pay, looking at from the standing of where both men and women come into court on an equal basis where there is no tilt, where there is no favoritism because of sex.

Q What if your Alabama court says that the result of this litigation is that no alimony is permissible in Alabama?

MR. CAPELL: Two things would happen very quickly,

Your Honor. Again it is up to the Alabama and not this Court, is my feeling. But under the common law doctrine that was in existence prior to the statute, it could take effect. But they would have to look at it with your order in mind--that is, sex neuter, equality under the law regardless of sex.

Q So that even if you prevail here, you still may ultimately lose, depending on the facts?

MR. CAPELL: Yes, sir, depending on what we call losing and what we call winning, Your Honor, because I feel that when Mr. Orr came into the lower court, he came in with not a chance to bargain, to place himself on an equal footing with Mrs. Orr. We ask for that right.

Q Are you suggesting that in every divorce in Alabama the husband is ordered to pay alimony?

MR. CAPELL: No, sir, quite the contrary, Your Honor.

Q That is what I thought.

MR. CAPELL: And yet in many, many cases--

Q Are you suggesting that your client was entitled--had the Alabama statute authorized and allowed it--that your client was entitled to alimony in this case?

MR. CAPELL: Whether he was entitled to it, we wanted the right to ask, Your Honor, so that we could go in encloaked with the right to obtain--

Q You could certainly have said, "Under the

circumstances of this case, my client should not pay any alimony at all." You have just told me that, and you said that legions of cases in Alabama, divorce cases, the husband is not ordered to pay alimony; correct?

MR. CAPELL: That is correct, sir. But it is based on the--

Q The circumstances of that particular case.

MR. CAPELL: Yes, sir, and there are many men, though, who fit under that category who should be receiving it who are not, sir, because of their sex.

Q Is your client one of them?

MR. CAPELL: My client would have asked; and as a result of asking, in my opinion--

Q He did not even say he did not owe any alimony himself, let alone ask for any from his wife.

MR. CAPELL: Because he was not allowed to by Alabama law, Your Honor.

Q You were certainly permitted, as you have just told me, to say you did not, under the circumstances of this case, owe the divorced wife any alimony at all. But you did not do that.

MR. CAPELL: No, sir, I did not do that because of the fact that that is a matter that the state should take up, again on a sex neuter basis, Your Honor, not on the basis of whether Mr. Orr is a man--

Q Sex neuter or whatever, you never took the position that you did not owe alimony under the circumstances of this case until this constitutional attack on the statute itself. Under the circumstances of this case, you never took the position that there should be no alimony award against you.

MR. CAPELL: No, sir, we did not.

Q As you tell me, it was wholly permissible in Alabama for you to do.

MR. CAPELL: It was wholly permissible in Alabama for us to raise the constitutional issue--

Q No, no. The contempt citation grew out of a court decree, not out of any statute, did it not?

MR. CAPELL: Yes, based on the statute.

Q And the court decree was based upon the circumstances of this case, in which the court found that under the circumstances of this case, your client should pay his divorced wife alimony.

MR. CAPELL: Yes, sir, relying on the state statutes.

Q Relying on the circumstances of this case. The state statute does not require that the husband pay alimony in every case, does it?

MR. CAPELL: Not in every case, no, sir. But it is strictly related to men paying, not women paying, sir.

Q Was not the divorce court relying on a settlement agreement here, in which he agreed, as Mr. Justice Powell

pointed out? The court did not have to make any decision except to pass on the settlement agreement, did he?

MR. CAPELL: That is right. And under the state statute, Mr. Chief Justice, they, being the third party involved in each divorce suit, do not look to the fairness of the award as they should, which is our contention. They look to see if the wife is protected. I am relying on the standing case which is applied to--

Q As several of us have been driving at--trying to drive at--was not the time for him to raise any constitutional question at the negotiation stage at which he would refuse to agree to pay anything? And then he might be ordered to pay it, and then he would challenge the validity of that order on the grounds that you are now trying to raise here. Is that not the way a constitutional question--

MR. CAPELL: Yes, you are right, Your Honor. But in addition to that, Mr. Orr, as the Alabama appellate court stated, timely filed his objection to the constitutionality of that statute at the time he raised the issue when she brought him into court in Alabama state--

Q In the contempt proceeding?

MR. CAPELL: Yes, sir. Yes, Your Honor.

Q But under the existing Alabama law, you have told me that a divorcing husband is entirely free to make the point that he should not be ordered to pay his wife anything

by way of alimony. And he never even went that far.

MR. CAPELL: There would be no hearing on that, Your Honor, because the courts are not allowed to even decide that or sit on it. They have even reversed a lower court which allowed a man to stay in the home which stayed in joint tenancy because of the fact--

Q How many Alabama divorces do you suppose there are where there is no alimony award at all?

MR. CAPELL: Probably--no alimony--

Q Fifty percent at least, is it not?

MR. CAPELL: No, sir. I would say, Your Honor, and respectfully request to say to you that probably 25 percent of all Alabama cases there is not some form of alimony, be it alimony en gros, a lump sum, or what have you.

Q But there is not any. There is not any. And that is perfectly permissible under Alabama law.

MR. CAPELL: Yes, sir, looking at the ability of the man, period.

Q Right, and the need of the woman, including her age and the circumstances of the misconduct alleged, and so on.

MR. CAPELL: Yes, sir.

Q We all know that. But you did not even take that position, let alone that you were entitled to alimony from the wife.

MR. CAPELL: No, sir, that issue was not raised at

the lower court proceeding. The record is moot on that point.

Q Mr. Capell--

MR. CAPELL: Yes, sir.

Q --suppose the court of appeals, in responding to your claim, had ruled as it did on the constitutionality but then said, "Even if we are wrong on this, nevertheless we would still interpret the statute as requiring alimony based on need as to either person; and in this case it has already been determined in the divorce court in effect that the wife was needy and that the husband could pay it, and the husband does not challenge that here. So, we are just going to rule against him here." Suppose the court of appeals had expressly said that. Would you be here then?

MR. CAPELL: Would I be here? Yes, sir, I would be here for the sole purpose--

Q Why would you?

MR. CAPELL: In Beal v. Beal, in the main case, the situation is such that Mr. Orr's standing to come into court at the initial time to ask for fairness and equality under the law--the guarantees of the Fourteenth Amendment--these were not allowed to him--

Q Let me ask you this.

MR. CAPELL: Yes, sir.

Q Has an alimony order denying or granting alimony to the wife ever been reversed by an Alabama court of

appeals?

MR. CAPELL: Only when the judge abused his discretion. Only on that ground only.

Q Suppose a husband is ordered to pay alimony and he appeals. Has he ever won?

MR. CAPELL: Has he ever won?

Q Has he ever won in an Alabama court?

MR. CAPELL: Sure, on the discretionary abuse by the lower court.

Q On whatever ground, on whatever ground. So that the Alabama court of appeals, if it had expressly said that there is already outstanding a court order for the payment of alimony, and it has never been challenged...

MR. CAPELL: Yes, sir.

Q You did not challenge it after that point except on a constitutional basis.

MR. CAPELL: Oh, we established it strictly on the constitutional basis.

Q Mr. Capell, if you prevail and the Court should hold that the Alabama statute is invalid, would that result in every alimony decree in Alabama being voided?

MR. CAPELL: No, sir.

Q Why?

MR. CAPELL: Because Alabama takes each case on a case-by-case basis.

Q But the statute under which the decree was issued was held to be unconstitutional in this case. Why would not every one of those cases be analogous to your case?

MR. CAPELL: It would give rise to the case being brought back before if the man wanted to make the claim saying that this alimony, based on my case, was unconstitutional likewise. But the court would have a sex neuter statute, which I would hope this Court would look at and adhere by; and, therefore, they could go and listen. Otherwise, it would not automatically terminate each and every award of alimony prior to the case of Orr.

Q Mr. Capell, how about all of the alimony cases that were handed down the same day this one was handed down: Could they all file?

MR. CAPELL: Your Honor, sir, I cannot answer that.

Q Why not?

MR. CAPELL: I would say they could file, probably.

Q If you could, they could.

MR. CAPELL: Yes, sir.

Q There is no magic in you.

MR. CAPELL: No, sir, there sure is not.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Capell.

Mr. Horsley.

[Continued on page following.]

ORAL ARGUMENT OF W. F. HORSLEY, ESQ.,

ON BEHALF OF THE APPELLEE

MR. HORSLEY: Mr. Chief Justice--

MR. CHIEF JUSTICE BURGER: You might tell us at some early point whether you think there is a case here at all.

MR. HORSLEY: No, Your Honor, I do not. I understand the questions by the Court to Mr. Capell today. If he did not ask for alimony himself--that is, Mr. Orr--why would he be able to challenge the constitutionality of a law which does not give him a right to ask for alimony. I would agree that he should not have such a right.

Q You do not make that point in your brief at all.

MR. HORSLEY: No, sir, I do not. I have not argued that point up to--

Q He does not even deny the wife's need.

MR. HORSLEY: No, sir, he does not.

Q Mr. Horsley, let me test that proposition. Supposing instead of discriminating between men and women, the statute said that in the appropriate case, alimony may be awarded against a black person but no alimony may be awarded against a white person. And then there was a divorce between two blacks and one of them subsequently sought to challenge the constitutionality of the statute even though that person had not affirmatively sought alimony; he had just been required to pay alimony. Would you say that black person had standing

to attack the statute or not?

MR. HORSLEY: Excuse me, Your Honor, the statute said that--

Q Alimony may be awarded against blacks only.

MR. HORSLEY: Oh.

Q And alimony was awarded against a black who did not ask for alimony against the other person in the lawsuit, would the black person have standing to attack the constitutionality of the statute?

MR. HORSLEY: I do not suppose that the standing question would be any different from this case.

Q And I do not think it would either. And what is your answer?

MR. HORSLEY: I am sorry, I am not certain that I exactly understand the question now.

Q The question is, If instead of a discrimination between men and women, this were a discrimination between blacks and whites; the statute said alimony judgments may be entered against blacks but not against whites. If such a judgment was entered against a black person and the black person did not ask for alimony from the other spouse but sought to challenge the constitutionality of the statute on the ground that it violated the Equal Protection Clause, would the black person have standing to make the challenge?

MR. HORSLEY: That is what I am saying--no, sir,

I do not think that he would any more than Mr. Orr has standing.

Q And why not?

MR. HORSLEY: Because he has not lost anything by it, since he was not asking for alimony.

Q I see. The fact that the statute gives the judge to enter a certain kind of judgment against one class of persons and against no other does not give a member of that class standing to attack that statute?

MR. HORSLEY: It is my understanding that to raise the constitutional issue, you should have suffered the discrimination that you are claiming is inherent in the statute. And if you have not suffered the discrimination, then it is not up to you to raise the constitutional question.

Q How else could one suffer the discrimination but by being ordered to do what the statute authorizes as against just the members of that class? How else could he suffer the discrimination? A burden has been imposed upon him that is authorized only against members of the class of which he is a member.

MR. HORSLEY: Mr. Orr would have suffered discrimination if he had requested alimony and been denied because he is saying that the imperfection in the statute is that it does not give him a right to ask for alimony. But since he has asked for none, he has lost nothing.

As I understand this Court's decision since 1971 in cases involving gender classification statutes, it is the law that statutes granting an economic preference to women are constitutional. This is so because the Court has recognized that in this country there has been a long history of economic discrimination against women. The statutes designed to compensate for that discrimination do not violate the Equal Protection Clause of the Constitution. The Alabama law undeniably economically prefers women. But this preferential treatment is constitutional, we say, because of its compensatory function.

Mr. Orr, the appellant, takes the position that the Alabama alimony law is based on an archaic notion that women are not fit to be self-supporting. He says the law thereby produces dependency of women. We say that it is precisely because of this archaic notion that women are unfit to be self-supporting that the Alabama law is necessary. And we say that the Alabama law does not promote dependency. Rather, at the time of divorce, dependency is already an established fact because of the discriminations that had been practiced against the woman in the years leading up to the divorce.

The alimony law in Alabama, far from promoting dependency, gives the woman some financial aid to help her overcome dependency.

Q What is there in this record that shows

Mrs. Lillian M. Orr is dependent on anybody?

MR. HORSLEY: The judgment of the lower court, the Circuit Court of Lee County, Alabama--

Q Says that? Said that she is dependent?

MR. HORSLEY: I think that is the inference, Your Honor.

Q No, I asked, where did it say it?

MR. HORSLEY: It is not written down, so far as I know.

Q It is not in this record?

MR. HORSLEY: No, sir.

Q How can you argue it?

MR. HORSLEY: Under the Alabama alimony law and the cases in Alabama construing it, the trial judge is to take--

Q That would apply to a woman who has an independent income of $80 million?

MR. HORSLEY: What I am saying--

Q Right? Right?

MR. HORSLEY: Would it apply to her?

Q Yes.

MR. HORSLEY: Yes, sir, but the Court would have the discretion not to give her alimony.

Q "Yes, sir, but." Why do you not say yes and quit?

MR. HORSLEY: Yes.

Q But presumably a court would not order her husband to pay her alimony.

MR. HORSLEY: That was my point.

Q She herself had an income of $80 million per annum.

MR. HORSLEY: Yes, sir.

Q Where is that case?

MR. HORSLEY: Where is--

Q The only case you have got is Mr. Justice Stewart. That is the only party you have got so far. Have you got any authority beside that, any Alabama authority?

MR. HORSLEY: I do not have the cases in hand, Your Honor--

Q In an Alabama divorce is the husband always required to pay alimony?

MR. HORSLEY: No, sir.

Q Upon what does the decision to order him to pay alimony depend?

MR. HORSLEY: The decision depends on the needs of the wife, the needs of the husband--

Q On the needs of the wife, does it not, among other things?

MR. HORSLEY: Yes, sir.

Q But it is true, is it not, that there are cases in which the wife is not needy but nevertheless receives

alimony.

MR. HORSLEY: That is possible under the Alabama alimony law. That perhaps would be an abuse of discretion subject to reversal.

Q Perhaps so, but it could be a perfectly proper award if you had a wealthy wife and an extremely wealthy husband; you might still find it appropriate to have have some alimony, would you not?

MR. HORSLEY: Yes, sir.

Q May I quote to from your quote?

MR. HORSLEY: Yes, sir.

Q "It is the wife of a broken marriage who needs financial assistance for whom the alimony statutes of Alabama were designed." They do not say one word about married at all.

MR. HORSLEY: One word about what?

Q What happened to her, she had a broken marriage. That is what entitled her to it.

MR. HORSLEY: I think it said that she was in financial need.

Q I did not see any financial--they are quoting from the Georgia Supreme Court.

MR. HORSLEY: Oh, from Georgia.

Q They adopted it.

MR. HORSLEY: Yes, sir.

Q Page 12a.

MR. HORSLEY: Of the Jurisdictional Statement?

Q Of course, the trial court did not have to worry about too much when he had an agreement to pay.

MR. HORSLEY: Yes, sir, that is true.

Q He did not have to do any measuring of need because the parties between themselves had arrived at an agreement on the need.

MR. HORSLEY: Yes, sir, this is true.

Q And on the obligation.

Q They agreed on both.

MR. HORSLEY: Yes, the trial court merely approved the agreement that the parties had already entered.

Q They agreed that she needed it and he had it; they agreed on both.

MR. HORSLEY: I think that is the effect of it, yes, sir.

Let me give an example of what I consider to be a fairly typical alimony case, which I think illustrates the justice of the Alabama law. If you assume that back in 1958 two persons 20 years of age of equal ability and intellect, competence, were married, the wife at that point could well have surveyed the job market and made a decision not to enter it. To understand, we are talking about 1958, and this would be before the Equal Pay Act and before Title VII of the Civil Rights Act. She would see a job market where she would make

less wages than a male counterpart. She would have less opportunity for advancement and perhaps even less opportunity to get employment. So, this hypothetical person back in 1958 would have decided quite reasonably to become a homemaker. And the husband at that point perhaps went to work for a bank. And it is 20 years later. They are both 40 years old. They are getting a divorce. The husband at this point is in line to become president of the bank. The wife, if she goes to work for a bank, probably has to go to work as a secretary or a teller. The difference in the financial rewards offered by the position of the bank president versus bank secretary are obvious. But the differences do not exist because the man is more competent than the woman. The difference exists because of the discriminations against the woman that steered her into her role as homemaker and caused her to forego the education and the training and the experience that would have today qualified her for the better job and the better paying position and the more responsible position.

Under these circumstances we say under Alabama law it is entirely proper to compensate her to make up for the opportunity she lost because of the discrimination she faced back at that time.

And appellant has made the point that there are some men who are dependent on their wives, and they need alimony in the event of a divorce. That is true. And to illustrate

that factual situation, let me reverse my example and suppose that this woman back in 1958, in spite of the discrimination she saw in the job market, gone ahead and gone to work for the bank. And the husband became the homemaker. If they were divorced today, it would be the husband who had the greater financial need than the wife. But under Alabama law, he would not be entitled to alimony. But the big difference is that he would find himself in financial need by choice rather than force. When he surveyed the job market back in 1958, he did not find it unreceptive to him as it was unreceptive to his wife. If he stayed out of the labor force, it was not because of any discrimination against him. He would not have any claims under a statute which is designed to compensate for past discrimination.

I think this very point was noted in one of the dissents in Kahn v. Shevin where it was said that while doubtless some widowers are in financial need, no one suggests that such need results from sex discrimination, as in the case of widows. I think that the same thing could be said of divorcees as was there said of widows.

Many states do have laws which provide the alimony to men, and there is nothing wrong with such laws if that type of law is what the legislature of that state determines represents the will of its people. But this is not to say that the legislation must be designed in that fashion to be

constitutional. This is a decision for the state legislatures to make. In Alabama it is determined that its compensatory alimony law does represent the will of its people. So, but for the archaic notions regarding women, the opportunities would not have been denied them, and alimony would not be necessary.

Since 1971 this Court has repeatedly acknowledged the fact that women have been denied equal opportunities in the business world. In the majority opinion in Kahn v. Shevin it was said, "There can be no dispute that the financial difficulties confronting the lone woman in Florida or any other state exceed those facing men."

In every sex discrimination case in this Court since 1971, it has been held that if the challenged statute granted an economic preference to women, it is constitutional.

Dissenting in Kahn v. Shevin, Justices Brennan and Marshall argued that the Florida tax exemption statute was over-inclusive because need was not considered under the terms of that statute. Under that statute, a wealthy woman who had not suffered from discrimination would have the same tax exemption that a poor woman would have. But I am taking the position that the Alabama alimony law is not subject to that attack because alimony in Alabama is not mandatory. It is up to the trial judge to make a determination as to whether or not it should be awarded. Need is certainly a consideration to be

used by the judge in exercising his discretion.

In Califano v. Webster this Court held that statutes economically preferring women are constitutional unless one of two circumstances existed: Unless the law has actually the effect of penalizing women, such as in the Wiesenfeld case, or the law was not intended as compensation. We have tried to demonstrate today that Alabama's law does not penalize women because it does not produce dependency. It does not steer them into a role as a homemaker and make them dependent on their husbands. As I have said, I think dependency is already established by the time of divorce.

The roles to be played by the parties to a marriage are ordinarily selected at the beginning of a marriage. I do not think it reasonable to suppose that marriages are begun in anticipation of divorce. So, the prospect of alimony should not be a significant factor in the selection of roles by the parties.

In any event, alimony is speculative as to whether it will be awarded or not. Mr. Capell mentioned that he thought perhaps in 25 percent of the cases there was no alimony award made. I have no statistics to back me up.

Q Mr. Horsley, was there finding of fault in this divorce decree?

MR. HORSLEY: Not in the divorce decree because it was agreed upon by the parties.

Q So, there is no necessity under Alabama law to assign a fault to issue the decree?

MR. HORSLEY: No, sir.

Q I take it then that the alimony order which the Court made must have been issued under Section 30-2-51, since the other two sections deal with when fault is found.

MR. HORSLEY: Yes, that is true.

Q That section expressly conditions alimony on the wife's estate being inadequate for her support; is that not right?

MR. HORSLEY: Yes.

Q I take it if that is the section under which this particular divorce court proceeded, must we not assume that there is a finding that her estate was insufficient?

MR. HORSLEY: I think that is true, Your Honor.

Q I thought there was an agreement in this one.

MR. HORSLEY: It is, Your Honor, but the alimony--

Q What has the statute got to do with the agreement? The agreement said that she needed and he had. Is that not what the agreement said?

MR. HORSLEY: Yes, sir, it is.

Q They agreed about money.

MR. HORSLEY: Yes, sir.

Q What else do you need?

MR. HORSLEY: I do not think that absent an alimony

statute the lower court would have had jurisdiction to even approve that agreement providing for alimony if there were not some statutory basis for alimony.

Q There certainly was a court order to pay it, was there not?

MR. HORSLEY: Yes, sir.

Q And if it was not paid, the non-payer might be held in contempt?

MR. HORSLEY: Yes, sir.

Q And if the order was valid, it was valid because it was issued under this particular section.

MR. HORSLEY: Yes, sir.

Q But intervening was the agreement of the parties, which made it unnecessary for the court to make any findings; is that not so?

MR. HORSLEY: Yes, sir, that is true. The court, so far as I can recall, took no testimony and made no investigation. It simply approved the parties' settlement agreement.

Q Supposing an Alabama court were to be presented with a settlement agreement. Would it feel bound to inquire on its own into whether the wife was needy or not; or would it simply approve the settlement agreement?

MR. HORSLEY: It certainly has the discretion to do that, and it can be done either way.

Q Is there any normal practice, or does it just

depend on which judge you happen to be before?

MR. HORSLEY: It would depend on which judge. In my own personal experience, judges would ordinarily approve whatever agreement the parties had made, the judges that I had dealt with.

Q Would that include an agreement under which the wife conveyed property to the husband?

MR. HORSLEY: I know of no case in which the court has approved that sort of agreement. I do not know that one has been presented to the court.

Q There is such a thing as a marriage between a reasonably impecunious husband and a reasonably affluent wife.

MR. HORSLEY: Yes, sir.

Q And a divorce comes along, depending upon their then relative needs and relative ages and relative ability to get jobs and what not, number of children and so on, where the custody is going to be, it is not unusual that elementary fairness would seem to dictate that there should be a conveyance of property from the wife to the husband. And many settlement agreements are made in various jurisdictions so providing. Have you ever heard of such a settlement agreement in Alabama?

MR. HORSLEY: Yes. There are many property settlement agreements where the husband, for instance, ends up with the home or the car. I know of no cases where the husband has

ended up with a sum of money to be paid by the wife.

Q Do you know of any cases where there has been a conveyance of the wife's property of any kind to the husband--

MR. HORSLEY: I know of none where it was the wife's separate estate.

Q You do not have community property in Alabama?

MR. HORSLEY: No, sir. There are many cases though where the parties own--

Q Jointly own.

MR. HORSLEY: --own jointly with survivorship, for instance.

Q And the husband is given use and occupancy of that property.

MR. HORSLEY: Yes, sir.

Q Is that just because certain trial judges kind of wink at the provisions of the Alabama statute, or do you think that is legal under Alabama law?

MR. HORSLEY: I think that it is legal under Alabama law because they can make an attempt to determine whose property is whose at the end of the marriage.

Q There the finding is that this nominally jointly held property is really the husband's property. That is quite different.

MR. HORSLEY: Yes, sir.

Q I am not asking about that.

MR. HORSLEY: I do not know of any case where property that would have truly been nothing but the wife's could be awarded to the husband.

Q Would that be illegal under Alabama law if a settlement agreement were reached along those lines?

MR. HORSLEY: Yes, sir, I think it would.

Q Counsel, are the statutes that we have been questioning, both you and your opponent, on page 3 of the Jurisdictional Statement--do 30-2-51 through 53 deal only with alimony or do they deal with distribution of property among the parties too? Or are there other sections of the Alabama code that deal with the distribution of the property upon the breakup of the marriage?

MR. HORSLEY: I think these are the only ones, Your Honor.

Q So, these deal with both?

MR. HORSLEY: Yes.

Q Do you have to have residence to get a divorce in Alabama?

MR. HORSLEY: Yes, sir.

Q I notice that he was not there at the divorce.

MR. HORSLEY: He was there at the time of the divorce. Now, at the time he raised his constitutional challenge some several years later, he had moved to California.

Q I am reading that the complainant, Lillian

M. Orr, appeared with her attorney, on page 17a.

MR. HORSLEY: Yes, sir, that is not the final judgment of divorce. This is the judgment that the court entered at the time he made the constitutional challenge, and he lived in California then. You see, this is dated 1976. The divorce actually occurred back in either '73 or '74.

Q I see.

MR. HORSLEY: Again looking at the Califano v. Webster decision, the Court there said that compensatory legislation should have been intended as such to be constitutional. The appellant, of course, has argued that the Alabama law was not intended as compensation because he says that it grows out of the husband's common law obligation of support. We say that the husband's common law obligation of support was intended as compensation, and alimony merely continues that obligation after marriage. The Alabama appellate courts have viewed the obligation of support as compensation to the wife of the rights taken from her by marriage, such as the right to contract, the right to own property under own name. These rights were stripped from the woman at common law, and it was because of the stripping of these rights, it is my understanding and contention, that alimony was granted to the wife to make up for that.

It should be noted on the question of intent what the legislature intended. This Court approved Florida's tax-

exemption standard in Kahn v. Shevin, presumably determining that the Florida legislature had a compensatory intent in mind. The Florida statute was passed in 1885. Alabama's alimony law was passed in 1854; only 31 years separated the passage of these laws. There is no reason I think to attribute a more benign purpose to the Florida legislature than to the Alabama legislature. This Court found that Florida's purpose was compensatory. Certainly Alabama's ought to be found to be compensatory also.

Q Excuse me, on this point it still worries me.

MR. HORSLEY: Yes, sir.

Q If Mr. Orr was under the jurisdiction of the court in the original divorce action, why did he file this motion specially?

MR. HORSLEY: I do not know, Your Honor.

Q He did not submit to the jurisdiction of the court then, did he?

MR. HORSLEY: No, sir, that is true; he did not voluntarily submit to the jurisdiction of the court.

Q It said on August 19th--this is the order of the court--the respondent, William Herbert Orr, appeared specially.

MR. HORSLEY: That is true.

Q And you still say he did appear in person at some time?

MR. HORSLEY: His attorney was there to file this

special appearance challenging the constitutionality of the law in 1976.

Q I am talking about when the divorce itself was grantdd, was he there?

MR. HORSLEY: Oh, yes, sir.

Q Why would he come in specially?

MR. HORSLEY: I do not know, Your Honor.

Q Can you appear specially in your state and challenge the constitutionality of a statute which is implicated?

MR. HORSLEY: I do not know why he appeared specially. There is a provision for special appearances. Ordinarily if you have some matter in abatement, you appear specially. But I see no real reason for him to have appeared specially to challenge constitutionality.

Q He had a careful lawyer who was trying to preserve everything he could.

MR. HORSLEY: Yes.

Q What were the grounds of divorce alleged in the complaint that you filed?

MR. HORSLEY: Adultery.

Q And that was fault, was it not?

MR. HORSLEY: Yes, sir. However, I will have to admit that the lower court did not make any finding as to whether our allegations were supported or not since we agreed

on the divorce and the property settlement.

Q You do not grant divorces by stipulation in Alabama, do you? There must have been at least an implicit finding of fault, or it would not have had jurisdiction, would it?

MR. HORSLEY: We do have no-fault divorce in Alabama.

Q Oh, I see.

MR. HORSLEY: Incompatibility is also a ground for divorce.

Q I come back to Mr. Justice White's question. This divorce was under 51, not 52 or 53.

MR. HORSLEY: I think 52, Your Honor.

Q Fifty-three speaks of misconduct, as I recall.

MR. HORSLEY: Oh, 51, yes, sir, that is correct.

Q It had to be.

MR. HORSLEY: Yes, sir.

In conclusion, Alabama's alimony law, we contend, passes the test devised by this Court in Kahn v. Shevin and Califano v. Webster. And on that basis we would urge this Court to hold Alabama's statute constitutional.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen; the case is submitted.

[The case was submitted at 12:00 o'clock p.m.]

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