

1951

# Mahala E. Lawlor v. R. Keith Lawlor : Brief of Respondent

Utah Supreme Court

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L. E. Nelson; Attorney for Plaintiff and Respondent;

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# In the Supreme Court of the State of Utah

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MAHALA E. LAWLOR  
Plaintiff and Respondent

vs

R. KEITH LAWLOR,  
Defendant and Appellant

RESPONDENT'S

BRIEF

Case No. 7742

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**Appeal from the District Court of Cache County, Utah**

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**Honorable Lewis Jones, District Judge**

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**FILED**

DEC 29 1951

L. E. NELSON

Attorney for Plaintiff

and Respondent

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**Clerk, Supreme Court, Utah**

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# In the Supreme Court of the State of Utah

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MAHALA E. LAWLOR

Plaintiff and Respondent

vs

R. KEITH LAWLOR,

Defendant and Appellant

RESPONDENT'S

BRIEF

Case No. 7742

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## STATEMENT OF FACTS

Plaintiff and defendant were married at Brigham City, Utah, on the 8th day of May, 1931 (R. 32.) They have one child, Ian Keith Lawlor, 20 years of age, and because he is in the military service of the United States, the Court made a finding that he had reached his majority (R. 12). Prior to 1942, the parties resided at North Logan, and in September of that year they moved into a small home at 38 North 1st East, Logan. It is an old home and is partially modern (R. 33, 38). They purchased it about October 21, 1944, at a cost of \$1600.00, paid from joint funds (R. 33, 58, 61). Plaintiff purchased necessary furniture and a refrigerator, bathtub and bedroom suite (R. 37). She has also paper-

ed and painted the interior of the house several times (R. 37, 38, 62).

Defendant is partially disabled resulting from injury received in military service for the Canadian Government in World War I, and has been drawing monthly compensation of \$25.00 (R. 40). Since the year 1942, the defendant has not had regular employment (R. 38), and from 1942, to date of trial (June 21, 1951) his aggregate income from employment was \$1945.00 (R. 175). Thus in order to provide support for the family, in July 1942 plaintiff began to work at U. S. Depot Second Street, Ogden, and was regularly employed there for about 2½ years (R. 33). After deducting transportation expense, her net monthly salary was about \$135.00 (R. 34), and during the period that she was employed there, her net aggregate salary income was \$3780.00 (R. 173). Plaintiff was then transferred to Wicks at Logan, where she was employed for a period of 8 months, or until August, 1945, at a net monthly salary of \$180.00 (R. 34, 35), or an aggregate of \$1440.00 (R. 173). Since September, 1945, she has had continuous employment at J. C. Penny Company at Logan (R. 36, 37). Her net monthly salary from Pennys has been about \$120.00 and during the last two years she has during evenings crocheted booties which were sold at the store, from which she received an additional income of \$20.00 to \$25.00 a month, (R. 36, 37) or an aggregate salary income at Pennys of \$9000.00 (R. 173). The

money thus earned by plaintiff from July, 1942 to June 1951, aggregated about \$14,220.00 (R. 173). Plaintiff testified that the foregoing income was expended for grocery bills, household expenses, the purchase of furniture, and support of the family (R. 37, 195.)

On several occasions while these parties resided in North Logan, defendant without provocation struck plaintiff in the face with his fist and she was disabled for several days (R. 41-47, 68). On one occasion plaintiff was in bed three days (R. 68). And since 1942 when they removed to Logan, defendant has without provocation, violently struck plaintiff in public and at home, from which she suffered intense pain and was disabled for various periods of time (R. 41-46). The defendant exhibited a violent temper, and was officious with plaintiff. Frequently when they were discussing something, he would precipitate quarrels because of his contentious attitude (R. 46-47).

It also appears from the record that the defendant when attending socials, such as dances or private parties, and after partaking of intoxicating liquor he became quarrelsome and contentious and particularly with the plaintiff and it was at such times he berated her or struck her (R. 68). It also appeared that occasionally when plaintiff and defendant attended dances or socials that defendant assumed a hateful attitude towards the plaintiff and after they returned home he precipitated quarrels with, and physically abused the plaintiff (R.

69.) At times when defendant abused plaintiff, she warned him that if he didn't desist she would seek a divorce (R. 74.) That on account of the defendant's officious, quarrelsome and contentious attitude which he frequently manifested toward the plaintiff, which became more intense during recent years, she became more nervous and upset (R. 47, 78), and was obliged to seek medical treatment from Doctor Hale, a Logan naturopathic physician, Doctor Viko, a Salt Lake specialist in nervous diseases, and also Doctor C. J. Daines, family physician (R. 47, 48, 177, 178).

### ARGUMENT

*Point I The findings, conclusions and decree awarding plaintiff a divorce from defendant, are supported by competent as well as by a preponderance of the evidence.*

There is direct and positive testimony by plaintiff that on several occasions, over a period of some ten years, defendant has without provocation, forcibly struck the plaintiff with his fist about her face and head with serious effects (R. 41, 42, 43). On several occasions she was confined to her bed in order to recover from the injuries and shock (Tr. 42). The defendant admitted slapping the plaintiff (R. 126). During the month of December, 1949, these parties with Mr. and Mrs. Anderson and Mr. and Mrs. Johnson attended a dance, and after the dance they returned home and plain-

tiff prepared a lunch and while they were eating defendant being intoxicated stood up, hit his fist on the table and said: "Even Jesus Christ is a phoney." They were all surprised and mortified (R. 42, 43). After the guests left the home, the defendant grabbed plaintiff by the throat, threw her backwards in the bathroom over the sink and seriously injured her back. He then called her the "filthiest names" (R. 43) Their son was awakened and he called a taxicab, and meanwhile, defendant was sharpening a butcher knife and threatened to "finish" plaintiff and their son. About that time they left home, going first to police headquarters to report the trouble created by defendant; then they went to the home of Mr. and Mrs. Johnson, and remained there for three days until plaintiff recovered and defendant's temper abated (R. 43). Defendant admitted that plaintiff and son spent three days at Johnsons' home. (R. 157)

On another occasion in May, 1950, at a public dance defendant was intoxicated and in describing the incident plaintiff testified: "And at that time he got very abusive. He put his hand in my face and pushed me back in the chair and stood over me there and called me very abusive names and swore as usual and caused the whole party to break up that night." (R. 44) Plaintiff testified that thereafter she refused to go out in public with him; that she had all the abuse she could take in public (R. 44) There were other occasions when



he abused her, but the foregoing were the most important occasions, as she testified: "Those were really the times they really did hurt and hurt very deeply." (R. 44)

Plaintiff testified that in addition to the foregoing acts of cruelty, defendant has at least three times a year since 1942, indicated that he was going to slap plaintiff and she has avoided same (R. 46). And, in order to avoid being struck by him, she has ceased to "discuss things with him." (R. 46) "He's quick tempered and he's very quick on the hands." "I didn't discuss anything with him because Keith knows it all." (R. 46)

Plaintiff testified that she could no longer endure such physical and mental abuse. That her, "nerves are completely gone." (R. 85). And as to the serious effect of such treatment by defendant she testified: "It has made me so nervous that there has been day after day that I haven't been able to take care of my work at the store because of my nervous condition. I've had to ask the other girls to assist me, and I have had to stay off the floor a lot of times and calm down so I could go out on the floor and sell. I'd take spells and have to have shots quite often, and I have taken medicine and pills at constant intervals for my nerves. Also treatments from Dr. Hale." (R. 47)

Plaintiff's condition gradually became worse,—"It started right after we were married, because I was so

nervous and so afraid of Keith.” (R. 47) It affected her nerves and heart (R. 48). Two years ago plaintiff consulted Dr. Viko in Salt Lake City, and with respect to his diagnosis she testified: “He (Dr. Viko) said it was nothing, only the nervous strain that I was living under.” (R. 48)

Dr. C. J. Daines, family physician, testified that plaintiff has been extremely nervous, and that from appearances her condition could result from marital troubles (R. 177, 178). Plaintiff testified that her condition has improved since she moved away from the defendant (R. 48). The plaintiff is also corroborated by the witness Mrs. Coleman who works with the plaintiff at Pennys store, who testified that since the complaint was filed she had observed an improvement in the plaintiff's condition. (R. 92-94). It will thus appear that plaintiff has patiently endured defendant's cruel treatment. It would be difficult to find a case where a party withstood such abusive treatment for so many years. Plaintiff's life and welfare was and is at stake.

The defendant admitted to some of the incidents testified to by plaintiff. He also admitted coming home intoxicated (R. 153). The witness Nyman testified that defendant became intoxicated on a number of occasions (R. 172). Although defendant did not concede to all of the acts of cruelty testified to by plaintiff and, conceding that there was some conflict in the evidence, yet the court heard the evidence and observed the demeanor of

the parties and their witnesses, and on disputed questions of fact he decided in favor of plaintiff.

Defendant contended that plaintiff was cruel to him because of defendant's exhibits 1 to 6 inclusive (R. 186-188). This was a ridiculous contention. Plaintiff explained exhibits 1, 2 and 3 as common place which defendant enjoyed at the time (about 7 years before the trial). They were brought home while plaintiff was working at U. S. Depot at Ogden (R. 186-188). Plaintiff didn't know where exhibit 4 came from. Exhibit 5 was given to the defendant as a gift from the ladies at the store (R. 187, 201). Exhibit 6 was brought home by the defendant when he attended the D. A. V. convention in San Francisco (R. 186). When defendant saw fit to bring such trash into court it demonstrated how desperate he was to produce some kind of a defense. He was certainly scraping the bottom of the barrel. It also characterizes the defendant and gives a fair idea of what sort of an individual plaintiff lived with for twenty years.

In the case of *Edith Gardner V. Earl Gardner*, 222 P. 2nd. 1055, the evidence revealed that the parties lived together about six months, and that during that period of time the defendant provoked a number of serious quarrels which finally culminated in Mrs. Gardner's suit for divorce in which she was awarded judgment, and on appeal the decision was affirmed. Mr. Justice McDonough wrote the opinion with unanimous concur-

rence, and in the course of the opinion he stated:

“With respect to the contention that plaintiff’s conduct was such that she was equally as blameworthy as defendant, and that the court should have denied her a decree, we are not disposed to disturb the findings of the trial court. The judge observed the demeanor of the parties and of their witnesses, and on disputed questions of fact he decided in favor of plaintiff. No doubt each of the parties expected that the other would make greater adjustments to assure marital harmony. Such an attitude, however, did not justify the defendant in doing things which destroyed his wife’s affections for him, nor in initiating quarrels to keep her under a nervous tension. There is evidence sufficient to warrant a finding of mental cruelty.”

It is respectfully submitted that upon the authority of that decision, the trial court was warranted in finding and concluding that defendant was guilty of mental and physical cruelty in the instant case.

Point II. *The findings, conclusions and decree awarding the home and furniture to plaintiff, is supported by competent as well as by a preponderance of the evidence.*

The defendant testified that the dwelling and lot was worth \$4800.00 (R. 121, 161). Plaintiff valued the home property at \$2500.00. (R. 83). The witness Johnson, an expert witness, valued this property at \$3000.00. And that it had a loan value of about \$1200 (R. 31). It is rather difficult to understand defendant’s theory

with respect to the value of the home property. He does not allege any particular value in his answer. But he prays therein for "all the real property, Canadian bonds and Plymouth car together with a reasonable share of said furniture." In other words he asked the court to give him all the property, except a portion of the furniture. This is a rather reckless demand in view of the fact that it was plaintiff's income that supported the family from about July, 1942 until May 26, 1951, when the action was begun. Then he follows the foregoing demand with a reckless and unfounded valuation on the real property of \$4800.00 (R. 121, 161). This is about \$1800.00 above the valuation placed thereon by a real estate man of thirty years experience (R. 30).

It may be that defendant thought he could frustrate plaintiff's claim for the home by inflating its value far above the value of the bonds (\$1340) and the car (\$500). But after the court heard the valuation placed thereon by a disinterested witness, and the description of the house and its size and ancient vintage; and considering and comparing the plaintiff's income of \$14,200.00, with defendant's income of about \$2000.00, during the same period of time, the court concluded that a fair division of the property would result by awarding the home and furniture to plaintiff, and the bonds and car, and some articles of personal property to defendant. But since the defendant had testified that the real estate was well worth \$4800.00 (R. 121, 161), the

court afforded him an opportunity to acquire it by paying that price, and adding thereto \$100.00 for the linoleum. and \$100.00 for the curtains (R. 207). When defendant's counsel said the home could not be sold for \$4800.00, (R. 208) the court replied,—“You say the property is worth \$4800.00,” xxxxx “and the court is giving him the right of getting the property at his own valuation.” (R. 208).

Plaintiff had industriously made improvements on the home, and purchased new furniture from her income, and it is situated near the store where she is employed, and she will take care of it. On the other hand, if the court had awarded the home to the defendant, in addition to the bonds and the car, it would have been a grossly inequitable division of the property. And it is likely that he would neglect it. Plaintiff testified that during the time that he had possession of the home, between the commencement of the action and the trial thereof, she had occasion to go back to the home and she found it in a very disheveled and run-down condition. She testified that it looked terrible. (R. 191)

The defendant contended that the car was worth only \$200.00. However, the evidence showed without dispute that the car had a new motor and new tires, and the defendant informed the plaintiff that he wouldn't take less than \$500.00 for the car. (R. 49)

It is respectfully submitted that the evidence in this case supports the courts findings, conclusions and de-

cree, awarding to plaintiff the home, and furniture; and to the defendant the Canadian bonds, the car, and some articles of personal property.

### Point III. *Condonation*

There was no allegation made in plaintiff's answer that the cruelty of the defendant, if any, was condoned by the plaintiff, and no reference was made to the subject of condonation during the trial. The findings, conclusions and decree were signed by the Court on July 16, 1951, and there was no reference made therein to the subject of condonation. On July 23, 1951, and after the case was closed, the defendant made a motion to amend his answer to provide that although defendant denies acts of cruelty, but,—“if true, plaintiff has condoned the same.” After some consideration of defendant's proposed amendment the court made a supplemental finding to the effect that the parties had been quarreling and having differences with each other for a number of years, and after each severe quarrel there was a reconciliation and a conditional condonation on the part of the plaintiff. But in each and every instance the defendant had failed to meet the conditions under which condonation was entered into between plaintiff, and the court therefore finds on this issue that there never was a complete condonation between the parties. (R. 215) With the court's permission, plaintiff's reply was amended by adding the following para-

graph 21 $\frac{1}{2}$ . \* Denies paragraph three of said answer as amended. (R. 7)

It is respectfully submitted that the court's supplemental finding is correct. Respondent respectfully submits that the following rule is controlling here:

"A repetition of the offense after condonation revives the original offense. Thus if a reconciliation takes place after a separation because of cruelty, subsequent cruel conduct of the guilty party revives the former acts and permits a divorce upon the ground of all acts of cruelty, either before or after the reconciliation. *An offense which has been condoned may be revived not only by a repetition of the same offense, but also by the subsequent commission of other marital offenses.*" 19 C. J. 88, Sections 204, 205.

For the foregoing reasons respondent respectfully submits that the judgment and decree of the trial court should be affirmed, with costs.

*Respectfully submitted,*

L. E. NELSON

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and Respondent