

1957

Polly J. Lund v. Orin L. Lund : Brief of Appellant

Utah Supreme Court

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Worthen

**IN THE SUPREME COURT
of the**

STATE OF UTAH **FILED**

JUL 3 0 1957

Clerk, Supreme Court, Utah

POLLY LUND,
Plaintiff-Appellant,

—vs.—

ORIN L. LUND,
Defendant-Respondent.

Case No. 8707

BRIEF OF APPELLANT

WARWICK C. LAMOREAUX,
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IN THE SUPREME COURT of the STATE OF UTAH

POLLY LUND,	} Case No. 8707
<i>Plaintiff-Appellant,</i>	
—vs.—	
ORIN L. LUND,	}
<i>Defendant-Respondent.</i>	

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is a case on appeal from a decision of Judge Maurice Harding sitting specially on a subsequent, restricted portion of a divorce proceeding, in the District Court for Salt Lake County. The appeal involves only issues after the entry of an interlocutory decree in favor of plaintiff, the subsequent matters pertaining to an attempted reconciliation during the pendency of disposition of motions for a new trial and to amend the earlier findings. The parties attempted a reconciliation, but the misconduct found by the earlier trial court was resumed making the attempted reconciliation a failure. Judge Harding, against the uncontested and undisputed

evidence of resumption of the misconduct, found plaintiff-appellant, by resumption of the marital relation, condoned the offenses found in the original decree, and entered a decree estopping appellant from asserting accrued rights, and nulifying the decree of divorce.

The original divorce decree in favor of plaintiff-appellant is not before this court on appeal as neither party has raised any questions concerning same. The court trying that original case entered Findings, Conclusions, and a Decree all of which reflected that respondent had been cruel to appellant, and required that he pay \$175 per month alimony and support money among other things. This he failed to do. He filed motions to modify Findings, and for a new trial, but prior to action on said motions, the parties attempted a reconciliation. This failed. Defendant-respondent resumed the misconduct, and grossly compounded his faults. Judge Larson, who had tried the original case, saved any question of condonation in ultimately over-ruling the motions for new trial and amendment of findings. It was the question of condonation, and the right of appellant to receive accrued alimony and support money, that was the subject of the hearing by Judge Harding on April 3, 1957 which resulted in that judge finding condonation and depriving appellant of her divorce and the money judgment. This appeal is addressed to the error of Judge Harding in so ruling.

The principle aspect of this appeal, in relation to that ruling, is the fact concerning the resumption of respondent's misconduct, the conditions attached by

appellant to the attempted reconciliation, and the breaking by the respondent of those conditions. The law on the case has been clearly stated by this court in two recent cases of *MacDonald v. MacDonald*, 120 U. 573, 236 P. 2d 1066, and *Beezley v. Beezley*, 296 P. 2d 274.

It is appellant's contention that the court erred as follows:

1. It failed to make Findings in accordance with the uncontested evidence that there was a resumption of the misconduct.

2. It failed to make findings that there were conditions attached to the reconciliation, on which the evidence was uncontested.

3. It made a fundamental finding that the reconciliation was without express condition (Tr. 143) which was contrary to the evidence.

4. It failed to apply the law as stated by this court in the *MacDonald* and *Beezley* cases.

5. It deprived appellant of due process of law in taking away from her vested rights to receive money and property before decreed to her.

In a supplemental appeal, appellant is perfecting her claim to receive:

1. Temporary alimony and support money pending the appeal.

2. Temporary attorney fees and costs, among other things, and for contempt against defendant.

STATEMENT OF THE FACTS

This is a summary of the facts and procedures.

1. An interlocutory decree of divorce was signed by Judge Martin Larson on February 10, 1954, (Tr. 12-24) after he had entered a memorandum decision at page 10 of Transcript. He found that plaintiff-appellant had been and was very ill; that defendant-respondent had quarreled, had nagged at her without just cause; that he possessed certain sexual paraphernalia suggesting possible infidelity that caused appellant great emotional distress; that he absented himself often at night with no explanation; that he did not love her; that his attitude toward the marriage was not sound and wholesome, that it was dictatorial; that he lacked courtesy and grace during her serious illness and gave no cooperation; that much of the family fortune had come from appellant's hard work, which, because of her illness she could not resume; that she had been a good wife; that in his military travels respondent did not want appellant to accompany him. In his memorandum decision Judge Larson stated "If this attitude and manner at home was 50% of that displayed in court, we may doubt any woman could live long with him and maintain her sanity." (Tr. 10, 13)

2. The court awarded plaintiff \$175 per month alimony and support money "such payments to be made regardless of any motions for new trial or appellate procedures that might be instituted by defendant," (Tr.

22) and in addition ordered him to pay certain bills, and keep certain insurance policies in force. (Tr. 23) Plaintiff was awarded the mink after finding that defendant had made an absolute gift of them to her in consideration of her staying at home during his travels. (Tr. 14) She also was awarded the equity in the house, however monthly payments of \$87.50 were and are required to keep the equity alive. (Tr. 22, 1)

3. Soon after the Findings and Decree were signed, respondent filed motions for amendment of Findings, or a New Trial (Tr. 25) which were not disposed of until after the attempted reconciliation had failed. "I will state that both sides, so far as counsel are concerned, together with the trial court that has handled this matter, have worked sincerely to effect a reconciliation of these parties." (Tr. 82) It was for this reason that there was long delay in the court entering its decree overruling respondent's motion for new trial, dated January 15, 1957. (Tr. 45)

4. During the interlocutory period, and in early May 1954 the parties commenced discussion of reconciliation. It was principally on account of their minor son James, about age 8 at the time, that the parties got back together. (Tr. 53, 1)

5. The issue of how they got back together and its consequences were saved by Judge Larson for any subsequent trial either party desired. (Tr. 45) Respondent-defendant insisted in a pleading at page 41 of the

transcript that the reconciliation amounted to a condonation. Appellant traversed such a claim in a pleading at page 43 of the transcript, stating that respondent had not acted in good faith in the attempted reconciliation, and had among other things, resumed the misconduct before found by Judge Larson. It was this issue that was tried by Judge Harding, and the circumstances of the reconciliation were heard. The record before this court is principally on that subject.

Prior to the commencement of the hearing the court and counsel discussed procedure and the law at which time the court stated in effect that if the parties had lived together for more than a year, the law would require him to find plaintiff had condoned defendant's misconduct, but upon insistence of plaintiff's counsel, the hearing was had. Reference is made to the said conference at page 11 of plaintiff's brief to the court, (Tr.) It is hence most important to a disposition of this appeal that the facts developed at the trial concerning the reconciliation and life together should be understood.

6. That the attempted reconciliation in May 1954 was not eagerly sought by either party is apparent; it was done out of regard for the child. (Tr. 52) The difficulties before encountered, and found by Judge Larson, were thoroughly discussed for a long time. The good offices of Stake President Harline, were utilized by both parties. (Tr. 55, 108) The charges and countercharges, about which the original proceeding was had, were discussed. These involved the evidences of infidelity upon

which Findings were made, among other things. (Tr. 79, 109, 13). Those paraphernalia (condrums and leud handkerchiefs) which had been upsetting to plaintiff were discussed with the stake president, defendant pleading his innocence, plaintiff reporting that, he claimed, "I had misjudged him and that he wasn't guilty; he was a clean man." (Tr. 79) Plaintiff felt her husband had not been honest with her over the past years. It was this subject of honesty that played a major part in the reconciliation, and was a condition to resumption of marital relations. (Tr. 56)

Defendant's counsel on direct examination of Mrs. Lund asked:

"Q. Were there any promises made by either of you about anything that concerned the divorce?

A. Yes—that the truth, the whole truth and nothing but the truth would be told by both of us, completely. In fact I specified that to Orin, because that has been one of my complaints with Orin, is that he has not told me the truth, and I specified that I wanted the truth, the whole truth and nothing but the truth about everything, what he did and why he was doing it." (Tr. 56)

There were a multitude of things discussed which we will only summarize, but the testimony of both parties is clear and uncontradicted that Orin, was to improve his conduct. They were to "get their house in order," go through the temple, have Jimmie sealed to them. Defendant himself testified: "... We went to Harline's

home . . . discussed all our differences over money, these condiums and the handkerchiefs . . ." (Tr. 108) . . . "we went back together. Everything was to be above board and out in the open;" things would be confidential between them, and everything he had was to be her's, and everything she had was to be his. (Tr. 113)

7. As a result of these discussions, they resumed their marital relationship and lived a relatively happy life for about a year. (Tr. 55) She mistakenly believed during this period that he was doing as he promised, and that all the money from their efforts was going into a joint bank account. However, he had a separate account which he did not disclose to her, (Tr. 97) this during the time when all was supposed to be going well. The court struck Mrs. Lund's statement that the concealment of the funds used in Florida violated the agreement of reconciliation. His bank statements on this concealed account were sent to another address; (Tr. 115) and his mother, not his wife, had the sole power to the funds in case of Orin's death. (Tr. 119) Exhibit 38 is his own check book showing the dates after reconciliation when he made deposits and withdrawals, and it can be seen that he was keeping funds from the joint account, unto himself, contrary to the reconciliation agreement. He also practiced deceit in relations with plaintiff's mother regarding the moving of the mink, which upset plaintiff, during a time when Judge Harding assumed all was going well. (Tr. 101)

8. Then on Mother's day, 1955 the real break in the attempted reconciliation commenced; defendant had re-

fused to go to church with his child and wife; he returned from being on the property the court had awarded to him, was "antagonistic and vicious towards me and said he was going to leave me and when he left me he was going to leave me absolutely penniless, cut my allowance out until I would never know I had a penny." (Tr. 59) It is here that the real resumption of the old misconduct comes into the open, and it was climaxed four months later with brutality. We will scan only the high lights of his resumption:

a. **INDIFFERENCE IN HER SICKNESS:** Plaintiff was hospitalized for surgery. Defendant stayed away. (Tr. 60)

b. **EYE TROUBLE:** She lost the sight of one eye. It antagonized him. He reacted as the court had found before. (Tr. 61, 14)

c. **DRUNKENESS:** He returned from a trip to Albuquerque in a drunken condition, completely exhausted, having taken liquor along over her protest, (Tr. 62) this at a time when he was needed in the mink operation. He came home often in drunken condition. (Tr. 64)

d. **INDIFFERENT TO HER:** It was none of her business where he had been, what he was doing. (Tr. 64, 65, 66, 67)

e. **SMELLED OF PERFUME:** Several Sundays he would come home late smelling of perfume he did not use. (Tr. 64)

f. ILLEGITIMATE SEX: “. . . he said to me rather snottily that I didn’t need to think I had anything too wonderful, that he knew if he couldn’t get it at home legitimately, that he could get it illegitimately.” (Tr. 66)

g. ARGUMENTATIVE: “He was argumentative and he picked on everything, he was critical; nothing pleased him and he just came and went as he pleased. Said nothing to me, discussed nothing with me, was most argumentative, mean, hateful.” (Tr. 67)

h. MYSTERIOUS PHONE CALLS came from men and women, late hours, his callers would disguise their voices. (Tr. 67)

i. GUARD ENCAMPMENT: He attended, taking street clothes, not needed, remaining away three weeks when two weeks only were required, this at a time when his help was needed in the mine, and she was too ill to do the work. (Tr. 68)

j. RIFLE TEAM: He returned from the extended stay at Guard Encampment, changed clothes and represented he *had* to leave again to take a sick man for the National Guard to the middle west, and did not stay even a night with his sick wife and child. His wife learned he had lied to her and had taken the Guard rifle team on a junket. When he returned he was in a drunken condition. (Tr. 68, 69, 110)

k. PLAINTIFF’S ATTITUDE: “I wanted to be your wife more than anything in this world, and I would

be the happiest girl in the world, but I can't be under this cloud of deceit." He didn't say anything. (Tr. 66)

l. CONCEALED BANK ACCOUNT: It was upon his return from the Guard trip drunk, that the concealed check-book fell from his pants, showing that for months before he had deposited money and checked on it without her knowledge. This she discovered in late August or early September 1955, (Tr. 70) and related to money concealed in January of the same year.

m. PROPHYLACTIC KIT: Among his things at the home she found exhibit 39 which counsel for Mr. Lund stipulated "are for prevention of venereal disease after intercourse if used as directed." (Tr. 76)

n. PORNOGRAPHIC HANDKERCHIEFS: Exhibit 40 constitutes four such; plaintiff did not want her husband filling his mind with such things, nor have them about the house. ((Tr. 78) As counsel examined the exhibit and "definitely" stated there was no objection, Mrs. Lund, observing their examination of them in court, said: "It makes no difference to him that I find those things; he thinks it is just a lot of hooey; there is nothing sacred about our marriage, so he makes light of it." (Tr. 78) It was talk about such things that Orin and Polly had with President Harline 16 months before when Orin said she had misjudged him, that "he wasn't guilty, he was a clean man." (Tr. 79)

o. LIE ABOUT CONDRUMS: Exhibit 42, the cigaret lighter, is relevant in that in the former trial condrams had been found in the box; Orin had said in

the reconciliation talk with President Harline the lighter itself had been stolen, and that someone had pushed the condrums, in evidence in the former trial, into the "cover around the cigarette lighter and that he was innocent." Now, in late August 1955 Mrs. Lund finds the lighter, and the former lie became evident. (Tr. 80) It is the deceit that is important, not the lighter!

p. BRUTALITY: The day after Labor Day, 1955 he came to her office near the mink operation and demanded: "I want *my* bank statements." He was admonished "I am checking them over and am not through with them; they are not *your* bank statements, they are *our* bank statements." He thereupon struck appellant three times with his fist, and kicked her down the basement steps with his foot. He blackened the eye of Mrs. Lund's mother, and then ran, son James seeing. He got his clothes and left the house, and has not returned. (Tr. 81 to 86) Plaintiff had to see a doctor and was treated, expense involved.

9. ALIMONY DUE: Plaintiff-appellant proved at the time of the said trial delinquent payments ordered to be paid her by respondent were unpaid in the sum of \$3,597.93. (Exhibit 46, Tr. 124) This gives him credit for \$950.00 paid, and the balance is alimony and support money, excepting the full period when they lived together, plus the specific bills Judge Larson ordered him to pay of \$697.93 which he did not pay. As of April 1, 1957, the sum of \$3,597.93 was in arrears. Judge Harding ignored this entire subject.

10. **ATTORNEY FEES:** Appellant requested the court to require respondent to pay her attorney fees. (Tr. 126) She stated it had been a long and arduous litigation, and she had no funds. At this time defendant had filed an appeal of Judge Larson's overruling his motion for a new trial. Defendant seems to have now abandoned that appeal. Plaintiff's counsel was sworn and made a statement of the entire long matters, and the difficult trial for which the original court ordered defendant to pay \$200 as attorney fees. That is unpaid to this day. He further outlined his work, showing sincere attempts to see the reconciliation work, but upon its failing, more work was involved. He requested, in addition to the \$200 before awarded, the additional sum of \$750 as attorneys fees, (Tr. 132) but this was not given because the court found condonation had estopped both parties, and the divorce was annulled.

At the end of the Harding trial, because the court had stated it did not regard plaintiff as having any rights because of living for more than one year with defendant, plaintiff filed an extensive brief exceeding forty pages. As will be seen from the supplemental appeal, there have been additional matters for which attorney fees are asked.

11. **JUDGE HARDINGS DECISION:** On May 13, 1957 this judge served a memorandum decision holding that "plaintiff condoned the misconduct of defendant" by the reconciliation, finding:

a. "This reconciliation was without express condition, and the court finds it was not conditional," and

b. "Any misconduct of the defendant from which arose the original grounds for divorce was condoned and forgiven by plaintiff." (Tr. 141-143)

It is from the decree and findings that plaintiff now appeals.

12. TEMPORARY ALIMONY, S U P P O R T MONEY, ATTORNEY FEES: Pursuant to the Harding decision, plaintiff sought temporary relief; hearing has been had, and from the decision of Judge Aldon Anderson, a supplementary appeal is being perfected to accompany this major appeal.

STATEMENT OF POINTS RELIED ON

POINT I.

THE COURT ERRED IN FAILING TO MAKE FINDINGS ON THE UNCONTESTED ISSUE OF RESUMPTION OF THE MISCONDUCT.

POINT II.

THE COURT ERRED IN FINDING APPELLANT CONDONED THE WRONGS OF RESPONDENT. THE COURT IGNORED THE LAW OF UTAH.

POINT III.

THE COURT ERRED IN FINDING THE RECONCILIATION WAS NOT ON CONDITION. THERE WERE CONDITIONS AND THEY WERE BROKEN.

POINT IV.

THE COURT ERRED IN FAILING TO ENTER JUDGMENT FOR ALIMONY AND SUPPORT MONEY, AND FOR CONTEMPT.

POINT V.

THE COURT ERRED IN FAILING TO ASSESS AND AWARD ATTORNEY FEES FOR APPELLANT.

ARGUMENT

POINT I.

THE COURT ERRED IN FAILING TO MAKE FINDINGS ON THE UNCONTESTED ISSUE OF RESUMPTION OF THE MISCONDUCT.

No where in the disposition of the case did Judge Harding make any reference to resumption of the misconduct before found by Judge Larson. The issue was resolved on the simple proposition that if the parties reconciled and lived together for a year, that ended it, that plaintiff had condoned the offenses and forgave them. The trial court ignored the law as clearly announced by this court in

MAC DONALD v. MAC DONALD, 120 U 573,
236 P2 1066

BEEZLEY v. BEEZLEY, 296 P2 274

It is elementary that the court must make findings on essential issues raised in the pleadings and at the trial.

Plaintiff raised the issue by the pleading on page 43 of transcript, where she alleged, and proved at the trial, that “. . . he resumed the misconduct of which he was charged and proven to be guilty in the principal trial.” This was in response to defendant’s pleading on page 41 of transcript that plaintiff had condoned. But in this pleading defendant admitted in his paragraph 3 “. . . the parties had further difficulties.” At no time in the trial of this issue, on which defendant had the burden of proof, (Tr. 52) did defendant dispute or argue that he

had not resumed the conduct Judge Larson had found against him. He ignored the entire subject. It was in his own case in chief that the resumption facts were set irrevocably in the record by his examination of Mrs. Lund, his first witness. Mr. Lund failed to dispute any of the fundamental facts plaintiff established, and these facts must be accepted as true, and the court must make findings thereon which establish resumption of the misconduct. To ignore these facts is error. The facts to which we make reference are in paragraph 8 of the Statement of Facts under the heads from "a" to "p" inclusive. At no time did he attempt to dispute, explain or alter her testimony concerning: Indifference during her sickness, antagonism during her eye trouble, his drunkenness, his perfume aroma and it's implications, his threat of illegitimate sex, his argumentative attitude, receipt of mysterious and feminine phone calls, three weeks at National Guard camp when two only were needed, her version of his lie about contraceptive talk with President Harline. He left the entire subject of the batteries at the end of their resumed life together, exactly as Mrs. Lund had laid it in the record, attempting in no way to explain or justify his vicious conduct. It is clear that his whole case before Judge Harding was predicated on the erroneous belief that the law was against his wife when she went back to him and lived with him for a year!

He did fiercely controvert that he had lied to her about taking the sick man to the middle-west, testifying that the day he returned from 3 weeks absence, he in-

sisted it was necessary to fly the rifle team on the junket. (Tr. 118) He had absented himself to guard camp for the former three weeks, taking dress clothes to Camp Williams, when mink work had to be done at a time when she was too ill to do it and then he went again. This court will form it's own opinion as to whether he would use the reason of the junket as justification for leaving again, or plead the urgency of taking the sick man to aid. (Tr. 90) The important thing is that he cared nothing for his wife and child, for the mink business, and left without sentiment, returning drunk!

He did testify he'd told his wife about the private checking account, (Tr. 115) but this was at the time of reconciliation. But he there agreed they would keep all their accounts together and tell her everything. (Tr. 113, 119) It was 9 months later that he was still making secret deposits and withdrawals; and had he died, on one of his junkets, appellant would have burried him without aid of that fund; it would have gone in ignorance to his mother instead of his wife. (Tr. 119) This was not an agreement kept. It was one broken, and a resumption of his misconduct. His attempt at explanation does not exculpate him in the least.

Regarding the prophylatic kit, exhibit 39, found by Mrs. Lund just before the battery, he did not address himself to the subject except that his counsel stipulated what could be accomplished therewith when well used. (Tr. 76) His only inference of legitimate possession to

said exhibit is on page 108 relating to other implements suggesting outside activities.

With clear findings by the former court, the re-appearance of worse paraphernalia during a time when each was to completely share with each other what they had between them (Tr. 113) there is clear, undisputed evidence of resumption, a return to misconduct.

The importance of finding these paraphernalia is interestingly discussed by the California court in *Arnold v. Arnold*, 174 P2d 674, a case to which this court made reference in deciding *Mac Donald, v. Mac Donald, supra*. In the *Arnold* case, the court said:

“At about the same time appellant found in his pocket an article that is used in sexual intercourse which justifiably caused her to assume that his adulteries had not ceased. His fatuous explanation that he had found the article in a box in the basement does not furnish a legitimate reason for his carrying it in his pocket.”

It was only natural in the face of respondent stating to her that if he could not get what he wanted at home, he knew he could get it illegitimately. (Tr. 66) See what effect it had on her at the top of page 67 of the record. And the finding of pornographic handkerchiefs and the little man on a cut-out-card his sister described (Tr. 104, Ex. 45) forced the honorable Judge Harding to make some reference to a resumption of the misconduct. But the findings are silent! Does forgiveness and attempts at reconciliation come at such a high price? It will make bad law to condone such resumption!

Respondent tried to lessen the importance of the pornographic handkerchiefs (Ex. 40) by the most interesting testimony that his wife has been told by her attorney to lie, not about the existence of the handkerchiefs, but alone as to where they were kept, as if this would alter the fact that he had resumed the misconduct! (Tr. 107) The testimony of respondent's sister as to how he came by the pornography is relevant as to his whole attitude on resumption. (Tr. 102)

In *Angell v. Angell*, 191 P2d 54, the California court disposes of a very important condonation case, helpful to this court, but ignored by the trial court in this case. There the trial court ignored, as here, the uncontested evidence, and decided that if the parties had gone back together the court had no discretion to hear or find issues of how they came to resume. The learned trial court in our case committed the identical error; and in reversing, the California high court held:

“The state is interested in saving the marriage if possible. That purpose would seldom be effectual if the innocent party could not dare try to effect a reconciliation at the peril of losing the right to secure a final decree. It is in the public interest for the courts to encourage persons who have secured an interlocutory to become reconciled.”

On the matter of the failure of the trial court to use discretion, and find according to the record that court held:

“But where the evidence, and the inferences therefrom, are all one way, the trial court has no discretion to refuse the relief warranted by such evidence. As was said in *O’Connell v. Superior Court*, 240 P 294, “Where there is a legal right to relief under certain facts, and the existence of such facts is not questioned, a court having jurisdiction has no discretion to refuse the relief.”

It was clear error of the trial court in failing to make findings of fact on the uncontested issue of resumption of respondent’s misconduct.

POINT II.

THE COURT ERRED IN FINDING APPELLANT CONDONED THE WRONGS OF RESPONDENT. THE COURT IGNORED THE LAW OF UTAH.

The Supreme Court of the State of Utah has recently and clearly laid down the law of condonation in *Mac Donald vs. McDonald*, 120 Ut. 573, 236 P2d 1066 where Judge Crockett wrote:

“. . . where the defendant’s misconduct is resumed, the law permits the injured party to assert all of the prior misconduct as well as that occurring subsequent to the condonation.”

The Utah court then cited the following powerful cases, all in point:

ARNOLD vs. ARNOLD, 76 Cal. App. 2d, 877;
174 P2d 674.

BURT vs. BURT, 48 Wyo. 19; 41 P2d 524.

THUMB vs. THUMB, 105 Colo. 352; 98 P2d 279.

In the MacDonald case, decided in 1951 the erring party resumed the misconduct, and the court laid down the above language which the trial judge failed and refused to employ in this case.

The other and more recent case is *Beezley vs. Beezley*, 296 P2d 274 where the court adopted broad, widely used language as follows:

“Our holding here is in accord with 17 Am. Jur. 258, sect. 213, REVIVAL OF CONDONED OFFENSES: Condonation of the violation of the marital duties and obligations is *conditioned* on the future good conduct of the offending spouse, and a subsequent offense on his or her part revokes or nullifies the condonation and revives the original offense as a cause for divorce.

“In other words, condonation ceases to be a defense to a divorce suit where the condoned offense is *repeated*. The general rule is that to constitute a revival of the condoned offense, the offending spouse need not be guilty of the same character or degree of offense as that condoned; any misconduct is sufficient which indicates that the condonation is not accepted in good faith and upon the reasonable conditions implied . . .”

We summarize the repetition of offenses. Before doing so, may we lay principal emphasis on the fact of the brutality practiced at the finale of the former repetitions. Respondent admitted the brutality first by pleading at page 41 of the transcript, wherein he stated: “the parties had further difficulties.” Those difficulties were clearly described by Mrs. Lund, and Mr. Lund did not cross examine on the subject, or testify con-

cerning it. He left it as she had put it in the record. It was inflicted when he asked for "*his* bank statements," and she had said: "I am not through with them but they are not *your* bank statements, they are *our* bank statements." (Tr. 81)

"Orin, let's get upstairs and we can talk this over, and he said take your hands off of me or I will knock you flat, and he did. . . . Then he hit me right here, (indicating) and knocked me flat

. . . Right here by my chin, or the side here . . . with his fist . . . so hard it knocked me right flat immediately . . . My mother came running and had me half way picked up from the back, and that is when he hit her . . . In the eye . . . my mother started to pick me up. That is when he hit her . . . I carried a bruise on my jaw for some time . . . It was out in the open by the basement steps, and after he struck my mother, I got up and started tussling with him and he knocked me down again. I was afraid he was going to go after my mother, but he knocked me down again, I believe, three times, and I started to run up the steps and that is when he turned and kicked me down the steps . . . With his foot, and it hit me right here . . . Son Jimmy was at the top of the steps . . . He was upset as we were and he was shaken up by the fact that Orin had beat my mother and I up . . . He (Orin) ran out and got in his car and got his clothes and left . . . he has never been back . . . I gathered my mother up and went directly to the Memorial Medical Clinic . . . Doctor . . . treated me and put me under sedative and I had to go home and go to bed . . . expenses, yes."

In summarizing the resumption of misconduct before the above batteries, reference is made to the Findings of Judge Larson so as to tie up the fact that it was *resumption, repetition*. Note paragraph 8 of the within "Statement of Facts."

Judge Larson found in his Memorandum Decision:

The record shows an utter lack of affection or consideration and no thought of her illness, (a serious and probably incurable condition)." (Tr. 10) In his Findings: "The defendant has mistreated plaintiff in a cruel inhuman manner over a long period . . . has quarreled with her without just cause, nagged at her . . . displayed a cool, indifferent attitude . . . he was in military service. Upon return there was found . . . some evidence of possible infidelity . . . exhibition of certain paraphernalia suggestive of his possible infidelity . . . caused plaintiff great emotional and mental distress when coupled with his cold and indifferent emotional behavior toward her . . . He has absented himself at night . . . without appropriate explanation . . . told her he did not love her . . . suggested marriage be broken up . . . ; defendant had filed former suit for divorce . . . the attitude of defendant toward this marriage has not been sound and wholesome. He has exhibited a snappy, dictatorial attitude . . . has had a contemptible disposition about having his own way . . . continually critical of plaintiff . . . exhibited a lack of courtesy and grace due and lack of affectionate consideration or of civil consideration during her illness . . . he has used the mink operation as an excuse to harass

and annoy plaintiff. As a result plaintiff's health has been seriously impaired . . . she suffers from either multiple sclerosis or Menier's syndrome . . . Her recovery is not foreseeable . . . she lacks equilibrium . . . will be unable to do hard manual labor . . . Considerable of the accumulated possessions are the result of her hard work and business accumen. Plaintiff has been a good wife to defendant . . . has been careful and prudent with the money of the family . . . The plaintiff's health will not stand any further arguing or bickering." (Tr. 13-16)

In the face of these findings, the present record is explicit. To avoid repetition, please refer back to paragraph 8 of the Statement of Facts. He was indifferent to her during her illness after resumption when she was hospitalized with surgery, was antagonized because she had an eye loss, temperature; he stayed away on trips longer than need be when the mink needed him, returning only to go again; and returned time after time drunk; his body smelled of strange perfume several times; he flatly told her he could get his sex elsewhere; he was argumentative and picked on everything, was mean, hateful; received mysterious phone calls and from women late at night; he lied to her about his travels with the rifle team and about money matters. There was the return of the paraphernalia" suggestive of infidelity" in exhibit 39, the vernier kit, the pornographic handkerchiefs, exhibit 40, which when coupled with his threat about sex elsewhere, were enough of themselves to constitute a finding of resumption of cruel conduct. Then the lie about the former condoms shown by the cigaret

lighter incident further shows his return to marital relations was not in good faith.

Indeed, appellant alleged in an appropriate pleading: "he resumed the misconduct of which he was charged and proven to be guilty in the principal trial, and for which decree and findings have been entered. . . ." (Tr. 43) And now the proof is evident, undisputed, admitted.

Further reference to the broad legal principles to which this court is committed will show Judge Harding committed error in failing to find the true facts, and apply the law of this court. This court cited three cases in the MacDonald decision. The first was *Arnold vs. Arnold*, 174 P2d 674 where the California court found the man had carried "in his pocket an article that is used in sexual intercourse which justifiably caused her to assume that his adulteries had not ceased."

The court said:

"Appellant's condonation of respondent's past offenses was upon the statutory condition that she should thereafter be treated with conjugal kindness. By reason of the acts of respondent occurring after the reconciliation, only a brief outline of which has been given, the condonation effected was revoked . . . The revocation of the condonation revived the original causes of action for divorce, both extreme cruelty and adultery."

In the case at bar, Mr. Lund resumed, and in defense of Mrs. Lund's request for liquidation of moneys accrued and due to her, he asserted she had completely forgiven

the old offenses and could not utilize the decree of divorce given; and the trial court went along. The court was in error. The California court said:

“Since the condonation was revoked and since the divorce should have been granted to appellant on both grounds charged in her cross complaint, cruelty and adultery, everything that had occurred both before and after the reconciliation, the long continued cruel conduct of respondent and his two years of adulterous relations with the correspondent, should have been given weight in determining the division of the community property. In view of respondent’s unquestioned and admitted misconduct the court erred in making an equal division. Appellant was entitled to much more than one half.”

California has a statute which this court has in effect adopted in it’s decisions above cited, to the effect that “When the condonee commits acts constituting a like or other cause of divorce, or when the condonee is guilty of great conjugal unkindness, not amounting to a cause of divorce but sufficiently habitual and gross to show that the conditions of condonation had not been accepted in good faith, or not fulfilled” the condonation is revoked.

The acts of respondent in our case, since the attempted reconciliation, are of themselves grounds for divorce and in addition, they are revival: the condonee is guilty of great conjugal unkindness, and he did not accept the conditions with good faith.

In *MacKay v. McKay* cited by this court *supra*, the Arkansas court, (290 SW 951) stated “. . . the right

of condonation lies with the innocent spouse, and not with the guilty one." This is a well established doctrine of equity, tied in with "he who would have equity should do equity." How could our trial court give Mr. Lund the full and unqualified equitable defense of condonation when he was the guilty party, wholly, and had done no equity, and his hands were not clean?

Our trial court found that the reconciliation was *not on condition*, but note what the Colorado court said in *Thumb v. Thumb*, 98 P2d 279, the last of the cases cited by this court in the MacDonald case:

"If prior to the separation, the husband had condoned the acts of cruelty of which he complained by continuing the marital relationship after their occurrence and his knowledge of them, or if it be assumed that by entering into the agreement he condoned such acts of cruelty, this in and of itself would not be a bar available under all circumstances to prevent his bringing an action for divorce. CONDONATION IS ALWAYS CONDITIONAL. It is conditioned on the assumption that there will be no repetition of the conduct condoned. Such a repetition voids the condonation and makes available as grounds for divorce not only the acts committed subsequent to the condonation but also those which have been condoned."

Why Mr. Lund asserted condonation is apparent: He had failed to pay the family bills the court ordered him to pay, together with alimony and support money for his sick wife and child (Tr. 23) and owed his wife \$3,597.93 (Ex. 46, Tr. 124, 126) He was in contempt of court! He had no other way out and took it, only to have

the court go along and estop the appellant from claiming her vested rights. But the court erred, and must be reversed.

POINT III.

THE COURT ERRED IN FINDING THE RECONCILIATION WAS NOT ON CONDITION. THERE WERE CONDITIONS, AND THEY WERE BROKEN.

The trial court found at page 143: "This reconciliation was without express condition, and the court finds it to be not conditional." Nothing could be further from the truth, both in fact and in law.

It was respondent's own counsel, not appellant's, who developed the conditions:

"Q. Was there any condition made on your getting back together?

A. During the conversation we discussed our church activity, and Orin being an Elder and my sincere desire was to get the house in order and go through the temple . . . have Jimmy sealed to us . . . that the truth, the whole truth and nothing but the truth would be told by both of us, completely. I specified that to Orin . . . because that has been one of my complaints with Orin, he has not told me the truth . . . about everything, what he did and why he was doing it." (Tr. 56)

The record is full of the circumstances on which these things were thrashed out with the stake president. We will not repeat. But Orin was not truthful either before or after the reconciliation. He had lied about the

condrums with the president, as shown by Mrs. Lund finding the cigaret lighter. (Tr. 79) He lied about his private checking account. (Tr. 96, 97, 115-117) While he declared he told his wife about the money, he may have done this prior to the reconciliation; but for him to use that account after reconciliation, making deposits and drawing on same during a time when they had agreed everything would be in common between them, was not honest. He would never have told his wife that his mother, not his wife, would have the balance if he died! This was a fraud, and it broke the condition.

In the face of the doctrine of *Thumb v. Thumb*, supra, that "Condonation is always conditional," and this as a matter of law, how can the decision of Judge Harding stand? It can't, he was in error.

The importance of conditions is well tried out and explained in the following California cases, all of which were before the trial court by brief, before he made his error:

Angel v. Angel, 191 P. 2d 54;

Hellbush v. Hellbush, 290 P. 18;

Lane v. Superior Court, 285 P. 860;

Butterfield v. Butterfield, 34 P. 2 145;

Olson v. Superior Court, 165 P. 706, 1 ALR 1589;

Slusher v. Slusher, 193 P. 2d 778.

In *Angel v. Angel*, supra, the supreme court said:

“Whether an agreement is an unconditional one of forgiveness and therefore justifies the denial of the final decree or a conditional one, and therefore warrants the granting of the final decree, is a question of fact. If the evidence or the reasonable inferences therefrom, is conflicting, the determination of the question by the trial court, in accordance with elementary principles, is conclusive on the appellate court.” (page 57)

There is no conflict in the evidence. The conditions exacted by appellant were never contradicted. Respondent virtually adopted her statement of the circumstances, except for irrelevant matters. (Tr. 109) They agreed to have things confidential, “everything that you had was to be her’s and everything she had was to be yours? That is true.” (Tr. 113) Certainly there were reasonable conditions. There could not help but be. Note Mr. Lund admits at page 113 of his testimony the entire subject of the “handkerchiefs and the contraceptives was discussed with Polly . . . and with President Harline.” This meant his conduct. We will not further labor it.

Bajakian v. Bajakian, 57 R.I. 470, 109 ALR 1001 et sec.

The Angell case, supra, embraces the following pertinent language, decisive of the issue:

“The resumption of marital relations was based on the express agreement of the parties that the reconciliation should be conditional. There is not one word of evidence to the contrary, and defendant does not contend that there is. Defendant

contents himself with the mere assertion that where parties resume marital relations whether the final decree shall be granted rests in the discretion of the trial court. But that does not mean at the whim or caprice of the trial court. It means a legal discretion guided by law. When the law is clear the only discretion is to follow the law.

“There being no evidence and no inference from the evidence to support the implied finding that the forgiveness here involved was unconditional, and the uncontradicted evidence showing that the forgiveness was conditional, we are of the opinion that the action of the trial court in refusing to grant the final decree was an abuse of discretion. The order appealed from is reversed.”

Our trial court refused to apply the law in a clear case where there were reasonable conditions, in the face of which he found there were no conditions.

The Utah Supreme Court has not labored the question of conditions. It is on the sound ground simply of resumption of the misconduct. It has followed the Colorado court in *Thumb v. Thumb*, supra, where “Condonation is always conditional.” But if this court desires to examine this record on the cited California cases of *condition* the record will support appellant on that ground too. The trial court was clearly in error.

POINT IV.

THE COURT ERRED IN FAILING TO ENTER JUDGMENT FOR ALIMONY AND SUPPORT MONEY, AND FOR CONTEMPT.

The trial court had before it an “Order To Show Cause” why respondent should not be required to pay

appellant the sum of \$2400 as accrued alimony and support money. (Tr. 38) Brought down to the date of the trial, the money owed by respondent was \$3,597.92. (Tr. 48) and proof was made before Judge Harding thereof.

These moneys accrued pursuant to Judge Larson's Decree wherein he had found: "Plaintiff is presently without funds, she having sufficiently exhausted the cash resources at her disposal as to make it necessary at once for defendant to begin the alimony and support money payments, regardless of any appellate procedure that might be instituted by the defendant." (Tr. 15) In addition, there was mandate for him to pay certain accrued bills. (Tr. 23) The alimony and support money was to be paid at \$175 per month, plus \$200 attorney fees.

The above liquidated sum of \$3,597.92 does not include any accrual for moneys during the attempted reconciliation. It includes accrual of \$225 before the attempted reconciliation, \$697.93 for payments to doctors, groceries, and the balance is for payments not made after he committed the battery in September 1955 and abandoned his wife and child. During the entire period, he paid \$950 at the rate of less than \$50 per month, solely for his son James, when the court had specified he pay \$75 support money, and \$100 as alimony. See Ex. 46, and transcript p. 124.

In failing to pay these amounts, he was carrying

out his threat to appellant wherein he said, and he did not ever dispute or answer this testimony:

“ . . . he said he was going to leave me and when he left me that he was going to leave me absolutely penniless, cut my allowance out until I would never know I had a penny.” (Tr. 59)

He did, and is doing, just that! And she is a sick woman, with a “serious and probably incurable condition.” (Tr. 10, 58)

The trial court in finding condonation, estopped appellant from asserting rights to said \$3,597.93 and declared she was in effect still married to respondent, notwithstanding he was doing nothing for her. She was awarded the house on Millcreek Way (Tr. 15) but there was a “balance due on said home of between \$9000 and \$10,000.” (Tr. 12) She has had to protect this equity and she has. If respondent prevails in his position, her sacrifice in borrowing to meet these monthly payments will have enured to him.

The trial court found that respondent had made an absolute gift of the mink to her as a condition of her remaining at home during his military travels. (Tr. 14) She has had to feed those mink, during a time when she was getting no help from him.

Appellant got the insurance policies long before taken out, but nothing to pay the premiums except her alimony. That is part of why the court ordered the payment of the alimony and support money regardless of appellate procedures. (Tr. 23) And in the supplemental

brief, it will be shown how she has had to go into debt to keep up the house payments, feed the mink, herself, his child, and pay the insurances.

Did the orders to pay these sums accrue? Are they a vested right in appellant? Should she be awarded these sums? The answer is "yes," and there are two bases for argument:

A. If respondent wanted to stay the accrual of these obligations, during the time his motion for new trial was being considered, he should have filed a supersedeas bond under the rules applicable, but he did not. The order to pay may be regarded as temporary alimony. The statute 30-3-3 UCA gives the court power to enter the orders it did. Under Rules 58A, 59, 62 a, b, d, and h, the rights of the parties to deal with the order to pay money are stated, and Rule 54 b is also apposite. Respondent has done nothing to stay the accrual of appellants rights, and they have vested.

B. The *vesting* of rights to receive accrued alimony and support money is clearly stated by the court in *Openshaw v. Openshaw*, 144 P. 2d 528 stating: ". . . the right to collect such installments becomes *vested* upon their due date." It will be argued that by the reconciliation appellant divested herself. At the least, she did not divest herself of that which had accrued prior to the attempt to reconcile, in the sum of \$225. (Ex. 46) But the court even ignored this small sum.

If appellant divested herself of vested rights by condonation, then the bills are all respondent's as his

wife. But this argument is specious, worthless. These parties are obviously at the end of everything. The marriage is a "wreck," and in the language of *MacDonald v. MacDonald*, supra, this court must "pronounce a benediction on the wreck" and in justice and equity, use the best means of "arrangement of the property and income of the parties" and this is to find respondent resumed his misconduct, restore appellant to her decree, and require respondent to do what Judge Larson told him to do. And punish him for contempt!

In considering the decision of the trial court, this court will be bound to utilize its own criteria as stated in *Wilson v. Wilson*, 296 Pd 977, and will give attention to: "... the age of the parties; ... their health; considerations relative to children; the money and property they possess and how it was acquired," etc. Note in the original Findings of Fact, Judge Larson stated appellant was very important in acquiring the family possessions. (Tr. 121) The fact that she is ill, probably incurable (Tr. 10), and has the child of the parties, should leave no doubt in this court's mind, in the face of his earnings and good health. (Tr. 13) She had done hard physical labor of which she is no longer capable. This court has many times admonished trial courts to take these things into account. And his making over \$400 a month and sending less than \$50 to cover the enormous burdens of appellant is unworthy. (Tr. 124) It is contemptuous. Reference is here made to the supplementary appeal and brief to follow, to show his continued attitude of leaving this woman penniless.

This case is just the opposite of *Larsen v. Larsen*, 300 P2 596, where this court excused the payment of accrued alimony. In the case at bar, respondent knew the family obligations, knew his wife's inability to meet them alone, and the court had specifically ordered him to pay, carving out any exception for appellate procedures. (Tr. 22) This of itself makes the obligation in the nature of temporary support, when respondent contemplated a new trial. And when he left his sick and brutally beaten wife and child as he did, knowing these things, he ought to have no defense or excuse, particularly when appellant makes no claim for help during the time they tried to make a go of it.

It was the child that brought the attempted reconciliation and what appellant did must not prejudice that child. The mother could not cut off the right of the child for support. *Price v. Price*, 289 P2d 1044, Utah. And it is apparent that the best interests of the child are that he and his mother have the money the court earlier decreed should be paid.

It will produce sound results in broad public policy for this court to find respondent broke the condonation; that he must pay the bills. For this court to affirm the Harding decision is a warning against attempts at reconciliation, and this is contrary both to general public policy, and to the new statute recently enacted. Our law now reads:

“It is the declared public policy of the State to maintain desirable marital and family relationships, and to take reasonable measures to *pre-*

serve marriages, particularly where minor children are involved. . . ." (30-3-11, 1957 pocket supplement, 1957 session.)

" . . . no hearing for decree of divorce shall be held by the court until 90 days shall have elapsed from the filing of the complaint. . . ." (30-3-18 *ibid.*)

This means the law of Utah is designed to encourage by all possible means the preservation of the marriage. When the complaint is filed, does this mean the parties are to remain apart absolutely for the 90 days, in peril of condonation? Of course it does not. The doctrines of this court in the MacDonald and Beezley cases, *supra*, take care; and if the attempted resumption is interfered with by a resumption of the wrong named in the complaint, this court will not throw that plaintiff out. And in the instant case, the parties and the public should be encouraged to try just what the litigants at bar tried. If the offending party resumes his misconduct, the innocent should not suffer. Again see *Price v. Price*, *supra*, and *Angel v. Angel*, 191 P2 54, the California case quoted, *supra*.

See the strong policy of the 1957 legislature for enforcing accrued alimony when the innocent party is on relief (30-3-22, 1957 session laws, pocket edition). And when Mrs. Lund fortunately avoids the relief rolls, she ought not to be penalized.

This court should enter judgment for the sum of \$3,597.93 as of April 1, 1957 and send the case back for

the sole purpose of liquidating the intervening balance, plus attorney fees and to punish respondent.

POINT V.

THE COURT ERRED IN FAILING TO ASSESS AND AWARD ATTORNEY FEES FOR APPELLANT.

Appellant's counsel took the stand and testified as to the arduous nature of this bitterly contested case, asking the court to take judicial notice of what is on file. All parties worked for the reconciliation, including appellant's. (Tr. 131) but it miserably failed because of the contemptuous conduct of respondent.

Appellant was awarded \$200 attorney fees for the original action which has never been paid. (Tr. 132) Three years of work has subsequently gone into the case that ultimately came before Judge Harding, for which appellant asked the court to award \$750 additional attorney fees but he ignored the subject. (Tr. 127) As an example of the earnestness with which appellant's counsel has worked in the case, reference is made to the brief filed with Judge Harding so that he could see the full fact and law situation. But that has been ignored. (Tr. See Supplemental Brief.)

We submit to this court the matter of fees, asking that the attitudes of the respective parties be taken into account. In the face of the contemptuous conduct of

respondent manifested throughout the proceedings, there was and is nothing for counsel to do but continue the fight for justice and equity. The ethics of the bar require nothing less.

In setting attorney fees, the court is requested to take note of the following:

1. The Affidavit, and Order to Show Cause, soon after the infliction of the battery, filed October 13, 1955, was not heard, due to negotiations.

2. After the battery and respondent's complete abandonment of appellant, it became apparent the long matter must be brought to an end, and this is manifest by Notice Calling up Motions, (Tr. 33) which resulted in the issue of condonation being framed by pleadings, (Tr. 35, 41, 43). Appellant's Petition and the court's Order to Show Cause, (Tr. 37, 38) finally came before Judge Larson, together with all other matters, and it is clear they were complicated, on December 22, 1956. The preamble to the decree of that judge recites the great work that had gone into the case both by counsel and the court, looking for an amicable settlement; but it's utter failure after bona fide attempts numerous times drove Judge Larson to wash his hands of the case. Obviously he did not do this for light cause; but appellant's counsel has had to go on. The proof of his arduous

labors is evident in this decree. (Tr. 45) It was there that condonation was saved for the trial that was later had. The supplemental pleadings necessary to bring all matters pending before the court, including accrued alimony, etc., were all before the court; but when the trial judge heard the case, he was not interested in anything but condonation.

The attitudes of the litigants is clearly stated at page 122 of the record respecting difficulties to get financial help to appellant. Respondent has balked every inch of the way in paying the bills he contracted for the house, insurance, etc. He has left them to his wife, who has had to fight the difficult battle alone, and the equities in all these things have been maintained only by her borrowing and scant living. Respondent's attitude has been to defeat the divorce, by condonation, so that Mrs. Lund, under his theory has been his wife all along; but he has failed to assume a manly, decent respect for his obligations, whether as husband, or as divorcee. It has been necessary that appellant's attorney pursue the matter diligently, and she says that he has. (Tr. 126)

STUBER v STUBER, 244 P2d 650, Utah

It is only just that this court assess the fees in the amount conservatively requested, that of \$750 since the original decree, and to this part of the case.

CONCLUSION

Finally, appellant asks this court to find that the divorce decree entered February 10, 1954 is valid; that she has not condoned the faults of respondent; that he resumed his misconduct, reinstating the old decree; that she have judgment for all alimony and support money down to date, except the time they attempted to reconcile; that he be required to pay the bills Judge Larson ordered him to pay; *that he be adjudged in serious contempt*; that he be required to pay attorney fees, and that the matters between them be given finality.

Respectfully submitted,

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Attorney for Appellant

July 1957