

1957

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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

POLLY J. LUND.

Plaintiff and Appellant

—vs.—

ORIN L. LUND,

Defendant and Respondent

No. 8707

BRIEF OF RESPONDENT

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INDEX

	<i>Page</i>
STATEMENT OF THE CASE	1-5
STATEMENT OF FACTS	5-11
ARGUMENT:	
As to the law	11-16
POINT 1: The court did not erre in failing to make findings on the issue of resumption of misconduct..	16-18
POINT 2: The court did not err in finding a reconcilia- tion.	19-20
POINT 3: The court was correct in finding the recon- ciliation was not conditional.	20-22
POINT 4: The court did not err in refusing to grant alimony and support money, and to hold defendant in contempt.	22-24
POINT 5: The court did not err in failing to award attorney's fees for plaintiff.	24
CONCLUSION	24-25

TABLE OF CASES CITED

Angell v. Angell (Calif.), 191 P(2) 54.....	13,14
Beezley v. Beezley, 5 U (2) 20, 296 P(2) 274.....	12
Burchfield v. Burchfield (Wash.), 105 P (2) 286.....	14-15
Griffiths v. Griffiths, 3 U (2) 82, 278 P(2) 983.....	16,20
Johnson v. Johnson, 116 U. 27, 207 P(2) 1036.....	12,13
Lane v. Superior Court (Calif.), 285 P(2) 860.....	14
MacDonald v. MacDonald, 120 U. 573, 236 P(2) 1066.....	11,12,22
Openshaw v. Openshaw, 105 U. 574, 144 P(2) 528.....	23
Smith v. Smith (Wash.), 269 P. 821.....	15-16

TEXTS

17 Am. Jur. 258, sec. 213.....	14
17 Am. Jur., 365, sec. 441.....	14

MISCELLANEOUS

Burns, R., "The Tyrant Wife"	22
Pope, A., "Essay on Criticism"	18

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Plaintiff and Appellant

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The parties will be referred to as in the lower court.

On the 10th day of September, 1953, Polly J. Lund filed a divorce suit against Orin L. Lund, showing the parties had been married since March 10, 1942, and had one son, James, at that time seven years of age. The parties had acquired an equity in a home at 908 Millcreek Way, Salt Lake City, Utah, and they also had a mink operation valued at \$5,000.00, and the complaint alleged an equity of \$1,100.00 in certain real property in Salt Lake County, however the trial of the case showed there was no written evidence of this latter equity. The parties had two automobiles, a 1950 Buick and a 1946

Mercury, together with chattel property and furnishings in the home on Millcreek Way. The husband, Orin, was then and now is a switchman on the Union Pacific Railroad and in addition is a pilot in the Utah National Guard.

The defendant filed an answer and counterclaim, denying the amount of his earnings claimed by the plaintiff, admitting the joint occupancy of the properties set forth in the complaint during the marriage.

After several days of interrupted trial, on the 10th day of February, 1954, Judge Martin M. Larson entered an interlocutory decree of divorce (R. 12-24), granting to Mrs. Lund the equity in the house, the mink operation in its entirety, one of the automobiles, all the household furnishings, various insurance policies, and \$175.00 a month alimony and child support, and granting to defendant one automobile, and the equity, if any, in the Salt Lake County property.

On February 15, 1954, the defendant, through his attorney filed a motion for new trial and to amend findings and judgment (R. 25-26). On that same date Mrs. Lund noticed the motion for hearing for February 23, 1954 (R. 27). Though no formal pleading was filed, the minute book shows the hearing was continued without date by stipulation of the parties. An order to show cause for child visitation was filed for defendant by new counsel on April 14, 1954 (R. 28). This matter was never heard. About the 11th day of May, 1954, the

parties reconciled and returned to the marital domicile. They resided there together happily as husband and wife. They had a joint bank account. They made payments on the house, paid mink expenses and living expenses from all sources of income including the defendant's checks from the railroad and the National Guard. They had sexual relations. They went out together socially, raised their son, James, and behaved in all respects as a normal wife and husband relationship, until September of 1955, when they again separated.

Defendant's attorney in the interim had moved out of this jurisdiction, and apparently plaintiff's counsel was not contacted relative to setting aside the interlocutory decree. On October 12, 1955, the plaintiff procured an order to show cause for delinquent child support and alimony based on the decree (R. 29-32). On January 18, 1956, plaintiff filed a motion noticing up for hearing defendant's motion for new trial and for amendment of findings and decree (R. 33). Appearances were made by counsel on these matters but the hearing was continued by Judge Martin M. Larson.

On June 14, 1956, defendant noticed up a motion to set aside the interlocutory decree of February 10, 1954, for June 22, 1956 (R. 34-36). This motion was also put over without date by Judge Larson. On December 16, 1956, plaintiff filed an order to show cause for alimony and support money, delinquent and future, set for December 22, 1956 (R. 36-39). Defendant filed a motion

to dismiss the order to show cause (R. 40-42) on the basis that defendant's motion to vacate the interlocutory decree had not been heard. Plaintiff filed an answer to this motion (R. 43-44). The court set all matters for hearing on December 22, 1956, and on that date heard the motion for new trial and to amend the findings of fact and decree of February 10, 1954, and denied said motions and refused to participate further in the case. On January 15, 1957, the court entered its order denying the motion for new trial and to amend the findings and decree, and reserved the matter of vacating the interlocutory decree, the various orders to show cause, and defendant's motion for a further hearing concerning the change in property status during the sixteen months of reconciliation to be heard before another judge (R. 45-46).

Defendant filed timely notice of appeal and designation of the record with regard to denial of the motion for new trial and amendment of findings and decree, but has not perfected his appeal because the matters pending before the district court had not yet been disposed of, and Judge Harding's order of May 16, 1957, (R. 144) has made the question of the interlocutory decree moot at this time.

A supplemental order to show cause, together with defendant's motion of June 14, 1956, to vacate the interlocutory decree, were heard before Judge Maurice Harding on April 23, 1956. The issue of vacation of the original decree due to sixteen months' reconciliation was

heard first, and the other matters reserved pending that decision. On May 14, 1957, after having received written briefs on the question of reconciliation by both parties, Judge Harding entered his memorandum decision (R. 141), and on May 19, 1957, the court entered findings of fact, conclusions of law, and an order vacating the interlocutory decree of February 10, 1954 (R. 142-144). Plaintiff filed a motion for rehearing (R. 145), which was denied (R. 146), and on June 10, 1957, plaintiff appealed by filing notice of appeal (R. 148) and impecunious affidavit (R. 147), and her designation of the record on appeal (R. 149-150).

STATEMENT OF FACTS

The statement of facts in plaintiff's brief is fragmentary, to say the least, and as plaintiff has unduly emphasized certain testimony and entirely disregarded other important facts, the defendant is constrained to restate the facts in their entirety.

The defendant, a switchman for the Union Pacific Railroad and also a pilot in the Utah National Guard, was divorced by the plaintiff on February 10, 1954. They lived separate and apart until April or May of the same year, their only contact being legal sparring as appears *supra*.

According to her testimony, there were several meetings, and one was with a church official. Discussion in that meeting, according to plaintiff, concerned defendant becoming a good church member and going through

the temple so they could have their son, Jimmy, sealed to them. There was also discussion concerning prophylatics and filthy handkerchiefs and a cigaret lighter (part of the cruelty in the original case). Because of the saintliness of the counsellor, plaintiff spared him the sight of the hankies at this meeting and the subsequent one (R. 56 and 79). The defendant's version is that he was opportuned by the plaintiff to resume the marital relationship, and that he told her he would never consider going back with her until she cleared his name and at least admitted to the lies she had told about him in the divorce action. She replied that when you go into court, you go in to win. He asked her about hiding the money, and she admitted she had given or loaned her brother more than \$5,000.00 of the mink farm money. The church official at this meeting brought out the fact that he had had sons in the service and he knew prophylatics were issued, and he recommended that they live their own lives and move away from their folks, who had not recognized their marriage for years.

They then went back together and resumed marital relations. They moved into the home on Millcreek Way (R. 108). From Mother's Day, 1954, until about Labor Day, 1955, they lived as husband and wife. They had a joint bank account and the defendant used his salary for the upkeep of the family and payments on their obligations (R. 109), and he worked around the place and on the mink farm. They resumed their marital life as though there had been no divorce at all. According

to the plaintiff's own testimony, for thirteen months they lived happily together with their son (R. 58). Then, according to plaintiff, the cruelty of the defendant recommenced.

The plaintiff has listed various acts of claimed cruelty, listing them from (a) to (p) inclusively in her brief. Practically every allegation was merely a suspicion or surmise. They are listed as absolute facts. As the defendant views the record, here is what she claims:

1. Mother's Day, 1955 (Sunday): The defendant worked on the east "40", which belonged to his folks, and evidently did not go to church (R. 60).

2. The defendant failed to visit plaintiff in the hospital, but he did call her on the telephone (R. 61).

3. He read the newspapers in bed (R. 61-62).

4. Notwithstanding the plaintiff was not in favor of the defendant being in the National Guard, in the middle of June, 1955, he went to Albuquerque for the Guard, and the man that he went with had a bottle of liquor in his car (R. 62).

5. He came home from Albuquerque looking as though he had been dragged through a knot hole (R. 63).

6. Next day defendant acted stupid.

7. Defendant came home heavily laden with perfume (R. 64).

8. Middle of July: Plaintiff found cigarette in defendant's car. (This prompted her to say: "Well, Orin, that fact that you deceived me about the cigarettes brings back all the other things, and until you prove to me you mean what you say and until you prove to me that you can be a good, clean husband, I cannot be a wife to you".) (R. 65).

9. He did not repent (R. 66).

10. He received telephone calls. (She thought callers disguised their voices). (R. 67).

11. In August, 1955, defendant went on National Guard encampment and took some good clothes with him. (This made her suspicious.) (R. 68).

12. Plaintiff claimed defendant returned from a flying trip to Cincinnati; she said he was to be back Sunday morning but did not come home until the wee hours of Monday morning; she claimed that he returned from piloting this plane in a drunken condition. (She suspected he was having fun away from home.) (R. 69).

13. Labor Day, 1955: His clothes reeked of cigarettes and liquor.

14. The same day the plaintiff found out that defendant had a checking account in his own name with less than \$100.00 in it (R. 70).

15. Plaintiff, with the help of locksmiths, prowled defendant's army chest in the basement and found old

army prophylactics and a letter dated the 22nd of September, 1946. (This enhanced her prying suspicions.) (R. 72, 77, and 88).

16. Plaintiff had duplicate keys made and prowled the defendant's wardrobe; found liquor and hankies (R. 72-73).

17. The day after Labor Day, 1955, or thereabouts, she claimed defendant struck her and also her mother and that he left home (R. 81).

18. The worst blow of all: He failed to obtain a deed from his parents to the east "40" to himself and plaintiff (R. 100).

The parents of the plaintiff objected to the plaintiff and defendant going back together (R. 98).

As to the hankies, Mrs. Berger, sister of the defendant, testified that her deceased husband, a urologist in the service, in his lifetime had been the recipient of gifts from soldiers, and the hankies and Exhibit 45 were among them. The plaintiff was not shocked when Mrs. Berger showed them to her, but, on the contrary, laughed at them. Later she gave these hankies and Exhibit 45 to the defendant. Counsel for the plaintiff was also very much interested in the hankies and Exhibit 45, as appears from the record. He compelled Mrs. Berger to describe the hankies and operate Exhibit 45 in court (R. 103-105).

The defendant testified that on Mother's Day of 1954 until about September 6, 1955, he and the plaintiff cohabited as man and wife, had joint bank accounts, both worked on the mink ranch, and that he made payments towards the house (R. 109), and that during that time he worked for the railroad from 3 p.m. to 11 p.m. at night so he could work daytime on the mink ranch.

In regard to the trip to Cincinnati, the defendant testified he took a rifle team to Cleveland, then flew to Fort Worth, Texas, picked up Doctor Parmalee and brought him back to Salt Lake City, and arrived here at approximately 3:00 or 4:00 in the morning. He was gone from Salt Lake City, total ground-to-ground 38 hours, of which 28 hours and 4 minutes were in the air. According to defendant, there was no trouble whatsoever until he came back from Albuquerque. When he got back, she had moved into the boy's bedroom and never came back.

He testified that the hankies given to him by his sister, Mrs. Berger, were in his dresser drawer. As to the checking account, defendant had that checking account just after the divorce, and that when he went back to live with plaintiff, he told her about the checking account. There was \$132.00 expense pay that was placed in the bank on January 7, 1955, and his salary checks all went into his and his wife's joint account (R. 116-120).

The plaintiff soon after the reconciliation on May 14, 1954, deposited \$698.50 in her own account, Mrs.

P. J. Lund (R. 92-93, Exhibit 44, bank book). The plaintiff also loaned her brother \$5,000.00 out of the mink farm money. This was prior to the divorce and was not mentioned by her in the divorce trial (R. 107 and 112).

The lower court refused to allow the defendant to justify the assault on plaintiff and her mother right after Labor Day (R. 99). The plaintiff's attorney testified that in his opinion he was entitled to a \$750.00 fee.

ARGUMENT

As to the law

There is a difference between (a) condonation that occurs after the filing of the complaint and before the decree, and (b) reconciliation after the interlocutory decree is entered. In situation (a) the court has all the facts before it at the time of entering a decree, both as to grounds of divorce and equities in property settlement. In a condonation after the interlocutory decree is entered, as in this case, there is no provision to determine the change of equities at the time of any subsequent breakdown of the marriage.

The plaintiff depends on the case of *MacDonald vs. MacDonald*, 120 U. 573, 236 P(2) 1066. In that case a divorce was brought in 1948. That complaint was dismissed and the parties reconciled. Then the defendant resumed her misconduct and another suit for divorce was filed. The fact that the 1948 complaint was dismissed and the parties reconciled did not condone her

prior conduct so as to wipe it out from consideration at the time of the trial of the second complaint.

The case of *Beezley vs. Beezley*, 5 U(2) 20, 296 P(2) 274, is a case where a divorce was filed on May 8, 1952. The case was never brought to trial, and on July 17, 1953, defendant pleaded that the cruelty complained of in plaintiff's complaint had been condoned. On the 19th of February, 1954, a supplemental complaint was filed alleging that the reconciliation on the part of the defendant was fraudulent and he had resumed his cruel treatment. The court held in this case the same as in the *MacDonald case, supra*. As in the MacDonald case, this was a condonation prior to trial and interlocutory decree.

Counsel for plaintiff did not see fit to quote *Johnson vs. Johnson*, 116 U. 27, 207 P(2) 1036, wherein the court discusses a reconciliation and condonation after the interlocutory decree but before the decree became final, and the court says:

"Nevertheless, if a divorce decree can be set aside on the petition of both parties after the interlocutory period has expired under statutes such as are found in Colorado and Utah, then there seems to be no logical reason why the decree could not be set aside upon application of one of the parties, if actual resumption of marital relations could be shown. The matter would resolve itself into one of proof." (P. 1038)

And again on Page 1039:

“Similarly when the parties to a divorce proceeding have resumed marital relations during the interlocutory period, and have notified the court to this effect, during the interlocutory period, it is the policy of the law and the view favored by public policy, that the court vacate the decree, so that it will appear of record that no divorce in fact was ever granted.”

The case goes on to say that if the interlocutory period is extended, that indicates the marriage is still in existence, and if a showing is made before the decree has become final that the parties have resumed marital relations, there will appear no divorce of record, and all uncertainties would be resolved in favor of the existence of the marriage.

The plaintiff quotes from *Angell vs. Angell* (Dist. Court of Appeals, 1st Dist., Calif., Mar. 15, 1948), 191 P(2) 54. In that case the interlocutory decree was granted on account of drunkenness. There was a written reconciliation entered into, signed and acknowledged, an express agreement that defendant would refrain from drinking for one year. This he did not do. His conduct became as bad or worse. This court reversed the trial court and held there was a resumption of the cruel treatment, and entered the final decree. The court however says on page 57 the California cases have established the law to be as follows:

“If a reconciliation based on an unconditional forgiveness is effected before the entry of a final decree the trial court should deny such a decree to either party.”

The above case was decided by a divided court. Justice Ward claimed the contract in the above case was void and made the following observation:

“Such a contract would permit parties to enjoy marital relations for over eleven months and then upon the whim or caprice of one spouse obtain a final decree irrespective of the declaration of law or the views of the courts on the merits of the motion.”

Lane vs. Superior Court (Dist. Ct. App., Calif., March 5, 1930), 285 P(2) 860, quoted by the plaintiff, holds where wife has been granted an interlocutory decree of divorce on account of fault of her husband and reconciliation has been effected and cohabitation resumed for considerable length of time, court may exercise discretion in granting or refusing final decree of divorce, and in this case the final decree was denied.

Plaintiff has cited 17 Am. Jur. 258, section 213, which deals with condonation, either pending the divorce action or during the divorce action. Section 441, at page 365, discusses the effect of cohabiting before the final decree, and says that condonation or reconciliation and resumption of marital relations after the entry of an interlocutory decree will prevent the entry of a final decree of divorce sought by either party.

Burchfield vs. Burchfield (Sup. Ct., Wash.), 105 P(2) 286, says, at page 288:

“A clear and concise statement of the meaning of the phrase ‘resumed the marital relation,’ as it should be applied in the case at bar, is set forth in the quotation from the memorandum decision of the learned trial court: ‘From all the acts, conduct and practices of the parties the court is to determine whether there was a real intent, carried into execution, to resume the relations of husband and wife. If that can be found, then the final decree should be denied, since the parties should not be at liberty to change their minds a second time, and proceed on the basis of the action when it has once been abandoned by an actual resumption of the marital relations’”.

Smith vs. Smith (Sup. Ct., Wash.), 269 P. 821, holds that if, after the entry of the interlocutory order, the parties resumed the marital relationship and lived together openly and travelled together, and held themselves out to the world as husband and wife, they have estopped themselves from availing themselves of the interlocutory order for the purpose of using it as a basis for a final decree of divorce. To hold that they can resume the marital relation, as did the parties to this action, and then proceed to a final decree, would make a farce of judicial procedure and open the door to fraud; it would result in intolerable situations, and involve innocent children, creditors in good faith, to say nothing of the parties themselves, and create an inextricable confusion, that could result in nothing but harm to all concerned. Quoting from that case, at page 824:

“If, after the entry of such an order, the parties deliberately resume the marital status, and

live together openly as husband and wife, whether or not they wish or intend to do away with the effect of the interlocutory order, the law must assume that they intended the reasonable consequences of their act, and, in our opinion, the only conclusion which can follow is that the action for divorce has been abandoned and the interlocutory order, as the basis for a final decree, wholly done away with."

The question of whether or not there was a reconciliation, the question of whether it was conditional, and the question of whether the cruelty has been resumed to such an extent as to justify the entry of a decree are for the trial court to decide. As has been repeatedly said by this court, a trial court has a better opportunity to view the witnesses and observe them on the stand, and the decision of the trial court should not be disturbed unless the evidence definitely shows that there was an abuse of discretion.

Griffiths vs. Griffiths, 3 U(2) 82, 278 P(2) 983.

POINT 1.

THE COURT DID NOT ERR IN FAILING TO MAKE FINDINGS ON THE ISSUE OF RESUMPTION OF MISCONDUCT.

Judge Harding could not have made a finding of the resumption of misconduct. There was no misconduct. The plaintiff and defendant went back together again in May of 1954. They lived together in their home on Millcreek Way. They had a joint bank account. They worked on the mink farm together, and the defendant used his

salary from the National Guard and from the railroad for the upkeep of the family. In addition to the National Guard and the railroad, he worked on the mink farm. He arranged his work on the railroad so that he had the shift from 3:00 p.m. to 11:00 p.m., to enable him to work on the mink farm. For over a year they lived together happily and harmoniously; in fact, the trial court asked her specifically whether there was anything to suggest to her that their marriage was not happy and harmonious between Mother's Day of 1954 and 1955. Her only objection was that he worked on Sunday on the east "40" and that she wanted a deed to the east "40". The court pressed his question and asked her: "Until that day, there had been nothing wrong from the time you went back together?" She said there had been a few things, but she accepted them, like flying and going to the Guard, but she answered the court that he was considerate of her during that period of time. (R. 99-100) Both of them held out to the world that they were husband and wife, and so continued until after Labor Day of 1955.

Plaintiff and her counsel lay great stress on the defendant having a bank account containing less than \$100.00, yet fail to mention the \$5,000.00 that plaintiff loaned to her brother prior to commencing the divorce action. This plaintiff proclaims she hates lies yet fraudulently kept this information from the trial court in the divorce action, and thus gained an unconscionable advantage in the property settlement. No mention was made in plaintiff's brief concerning plaintiff depositing

\$698.50 in the account of P. J. Lund immediately after the reconciliation.

From the testimony it is clear that this idea of building up cruelty came to her mind some time in the summer of 1955, when she finally decided she wanted no more of the defendant. No matter what the defendant did, no matter what he owned, to her mind was debasing. In every act of the defendant and in his every possession, she saw the possibility of infidelity, impiety and brutality, which brings to mind:

“All seems infected that the infected spy,
As all looks yellow to the jaundiced eye.”
“A. Pope — Essay on Criticism.”

If there was any cruelty, it was on the side of this carping, querulous, inquisitive and acquisitive plaintiff. The lower court was right. At the importuning of the plaintiff the parties effected a reconciliation. They lived together for over a year as man and wife. No thought was given to the divorce action. Plaintiff abandoned seeking a final decree. Defendant's motion for new trial was undisturbed. Just how long do people have to stay together in this State in order to effect what is termed a reconciliation prior to final decree? The lower court properly held that in this case there had been a full reconciliation for over a year, and the interlocutory decree should be set aside. Judge Harding properly held that he was not interested in the assault just after Labor Day of 1955.

POINT 2.

THE COURT DID NOT ERR IN FINDING A RECONCILIATION.

The facts of this case clearly indicate the parties went back together to make a home, raise their son, and conduct the mink business. The plaintiff solicited this reconciliation. Up until that time the defendant was proceeding in his case by a motion for new trial to correct the inequities and injustices in the lower court's decree.

The only condition to the reconciliation was the defendant's demand that the plaintiff clear his name by admitting the lies she told in the divorce action and to straighten out the matter of concealed moneys. However, there was a condonation by both parties, and, as said before, they went back together and lived harmoniously for one year, when for some reason or other she began to dream up acts of cruelty. We do not admit the plaintiff claims that she condoned the wrongs of the defendant. We do not concede that the defendant had committed wrongs requiring condonation. All there is to it, these people started a divorce and then decided to go back together again, and they did go back together again and they lived together for over a year. A change in conditions arose because of the reconciliation. According to all the cases cited by the plaintiff and the defendant, the reconciliation, coupled with the resumption of cohabitation for a long period of time, amount to reconciliation or condonation sufficiently to justify the setting aside of the interlocutory decree. If either party had any com-

plaint against the other, they condoned it. Condonation does not mean that you go through a certain ritual or sign a pledge. What was their conduct after going back together if it was not condonation or reconciliation? The court was right.

The Griffiths case, *supra*, also holds that provocation is a material fact for consideration in determining whether conduct of defendant spouse constitutes cruelty.

In the case at bar, neither party denies that there was a reconciliation. Plaintiff claims defendant was cruel to her; defendant denies this. Judge Harding, after hearing the evidence, determined that there was a condonation and reconciliation.

POINT 3.

THE COURT WAS CORRECT IN FINDING THE RECONCILIATION WAS NOT CONDITIONAL.

In arguing this point the plaintiff has endeavored to show there were conditions. In the testimony quoted on page 28 of plaintiff's brief, she mentioned her desire along religious lines and about both of them telling the truth. There is not one scintilla of evidence in the record that there was an express condition, save and except the defendant saying that he wanted her to clear his name and confess to her lies. If there were any conditions broken as to the truth, it is all on the part of the plaintiff. She did not clear up the \$5,000.00 loan to her brother, which would have materially changed the original inter-

locutory decree of the trial court. As to the bank accounts, she complained about his small one started prior to the reconciliation, but she does not think anything about her own account with several hundred dollars in it started immediately after the reconciliation made in the name of P. J. Lund. (Exhibit 44).

All through plaintiff's brief, she has attempted to find something on which to base cruelty, or as she terms it, resumption of cruelty, on the part of the defendant. In every respect this attempt has failed. It is almost like a person skinning a flea to get its tallow.

Plaintiff's counsel has brought up complaints that ordinarily would be laughed out of court. He has attempted by the use of adjectives and adverbs to paint every act into one of extreme cruelty. For example, at page 36 of plaintiff's brief, he would have the court believe that defendant beat his child. This is just one of the many misstatements and exaggerations of plaintiff's counsel.

In reading plaintiff's brief, one would suppose that the plaintiff was acting as a parol board imposing strict conditions; however, no parol board would ever go so far as to require conditions that came to plaintiff's mind not during the reconciliation but in the summer of 1955. A parol board would give a parolee a hearing. This plaintiff did not do. She obtained a locksmith and searched his chests that had been stored in the basement unopened since prior to the divorce action (R. 109-110). She

begrudged him having anything of his own. She wanted him to go to his folks and get a deed to the east "40". To call this unreasonable would be the understatement of the year. The condition that she wanted to place this defendant in is epitomized by the immortal Burns:

"Curs'd be the man, the poorest wretch in life,
The crouching vassal to the tyrant wife!
Who has no will but by her high permission;
Who has not sixpence but in her possession;
Who must to her his dear friend's secret tell;
Who dreads a curtain lecture worse than hell!"

* * * * *

POINT 4.

THE COURT DID NOT ERR IN REFUSING TO GRANT ALIMONY AND SUPPORT MONEY, AND TO HOLD DEFENDANT IN CONTEMPT.

This point is interesting. Here finally the real reason for this protracted litigation comes to light. The plaintiff not only wanted her provisions in the original unconscionable decree of divorce to revive but the plaintiff also wanted to wreck this man by getting a judgment of some \$3,600.00. In desperation plaintiff in her brief quoted *MacDonald v. MacDonald*, *supra*, where the court said the marriage was a wreck and the court should pronounce a benediction on it. That was all right in the MacDonald case, which is entirely different from this one as is shown in the first part of our argument. There

there were no new property rights to consider. In this case, there is the \$5,000.00 that she loaned her brother and failed to divulge at the original hearing. There is the \$3,600.00 for which they are trying to get a judgment against this defendant. There is also the enhanced value of the mink and real property from joint funds and efforts for sixteen months.

We concede that they probably never can get back together again, but there can be a hearing in which all the facts can be brought out as to their property rights and obligations, and a fair and decent divorce decree entered. If she has suffered during this interim, which the defendant claims she has not, that fact can be taken into consideration.

The plaintiff has quoted *Openshaw v. Openshaw*, 105 U. 574, 144 P(2) 528, in support of the fact that she should get this \$3,600.00. On page 530, this court held:

“When the right to collect money under the terms of a decree has vested, it is not within the province of a court to divest such right, unless the party who claims the right has acted in such a manner as to clearly prejudice the substantial rights of the party against whom the right is sought to be enforced.”

When the lower court set aside the interlocutory decree in this case, he set aside all the provisions of the decree. The plaintiff has her remedy. She is in possession of everything they ever worked for and accumulated, both during their marriage, before and after the

reconciliation. In any subsequent trial she cannot be injured. All matters can be taken into consideration by the court in deciding what she is entitled to.

POINT 5.

THE COURT DID NOT ERR IN FAILING TO AWARD ATTORNEY'S FEES FOR PLAINTIFF.

Plaintiff and her counsel are not entitled to attorney's fees.

CONCLUSION

First, we will say we have not attempted to answer plaintiff's Supplemental Brief to which he refers, as we have not received it, but we do appreciate receiving notice that he is going to file it.

Practically every order he obtained from the lower court judges was obtained without notice to the defendant, and it is interesting to note that he got four orders by four different judges signed in this manner since the decision of Judge Harding.

With apologies we refer to these matters outside of the record, and do so only because of appellate license indulged in by the plaintiff, and we will not be overly concerned when the court disregards these statements along with plaintiff's statements that are not included in the record before this court.

We have no quarrel with the theory advanced by plaintiff that resumption of wrong conduct as a basis

for divorce revives the past misconduct. In this case there was a reconciliation or condonation during the interlocutory period and prior to final decree. What, if you please, is the length of the term of probation as plaintiff would seem to put it? Judge Harding held one year was sufficient. According to plaintiff's theory, she could keep him on probation indefinitely with the right to revoke at will.

Judge Harding was right. There was (a) a reconciliation, and (b) plaintiff and defendant lived together as man and wife for sixteen months. This clearly justified the court in setting aside the interlocutory decree. This court in affirming the lower court will not harm the plaintiff in any way. All this court will do will be to deprive her of taking an unconscionable, unjust advantage of the defendant.

We respectfully submit the lower court's ruling should be affirmed.

Respectfully submitted,

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