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Divorce - Defenses - Condonation - The Importance of Forgiveness

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been followed by a number of other courts,[9] including the court in the instant case, thus establishing a trend.[10]

There are however a number of recent decisions which deny recovery.[11] The theory advanced in these cases is that the wrongful death statutes are in derogation of the common law and to permit recovery is to indulge in judicial legislation.[12] It is reasoned that there is no person in being at the time of the injury to whom the defendant owes a duty of care.[13] It has also been pointed out that if the action can be maintained, it would necessarily follow that an infant could recover against its own mother for injuries occasioned by her negligence while pregnant with it.[14]

The question has not yet arisen in North Dakota. It is submitted that where independent existence is possible and life is destroyed through a wrongful act, a cause of action arises under our wrongful death statute. This view is in accord with a growing trend and seems to be supported by the better reasoning.

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DIVORCE—DEFENSES—CONDONATION—THE IMPORTANCE OF FORGIVENESS—The plaintiff, husband, filed suit for divorce on the ground of extreme cruelty. The defendant filed a motion to dismiss the case on the ground that the parties had resumed cohabitation during pendency of the suit. During this period the defendant moved her personal effects back into the abode and the parties occupied the same double-bed and indulged in sexual intercourse. The defendant appealed from the court's granting of a divorce. On appeal the Florida Supreme Court *held*, one justice dissenting, that resumption of cohabitation during pendency of suit was not condonation requiring dismissal of the suit, where the element of forgiveness was lacking. The dissent argued that under the circumstances condonation appeared as a matter of law and was re-

9. Porter v. Lassiter, 91 Ga. 712, 87 S.E.2d 100 (1955); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959).
10. PROSSER, TORTS, § 36 (2d ed. 1955); 9 Kan. L. Rev. 343 (1961).
11. Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); Howell v. Rushing, 261 P.2d 217 (Okla. 1953); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958).
12. See Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958).
13. See West v. McCoy, 233 S.C. 369, 105 S.E.2d 88 (1958).
14. Gorman v. Budlong, 23 R.I. 169, 49 Atl. 704, 707 (1901) (dictum).

quired from the public interest in morality. *Seiferth v. Seiferth*, 132 So. 2d 471 (Fla. 1961).

Forgiveness, either express or implied, is an essential element of condonation, and is more readily presumed against the husband than the wife.[2] The importance of this essential element is that although condonation is an affirmative defense and must be specifically pleaded,[3] the court may in its discretion deny the divorce, if there is evidence that the party wronged actually forgave the other.[4]

Differences exist among the various jurisdictions regarding the necessity of forgiveness and methods for determining the presence of forgiveness. Some states will imply forgiveness from the circumstances,[5] while others require an express forgiveness in cases of cruelty.[6] However, even in states where forgiveness can be implied from the circumstances,[7] the majority of courts hold that cohabitation[8] or sexual intercourse[9] alone will not establish condonation without the intent to forgive.[10]

However, there is authority holding that as a matter of public policy, acts of intercourse after filing of a suit amount to condonation.[11] In fact, one court has held that sexual intercourse is conclusive proof of condonation.[12] This argument has little merit when applying what may be termed the "patient forbearence rule". This rule enables the innocent party to try and save the marriage by continuing sexual cohabita-

1. Cox v. Cox, 267 Ala. 72, 100 So. 2d 35 (1958); Barber v. Barber, 327 Mich. 5, 41 N.W.2d 463 (1950); Mandelin v. Mandelin, 120 Minn. 198, 139 N.W. 152 (1913); Ramsay v. Ramsay, 69 Nev. 176, 244 P.2d 381 (1952).
2. Brinson v. Brinson, 201 Ga. 540, 40 S.E.2d 535 (1946) stating that in the case of the wife forgiveness was not to be presumed; Glass v. Glass, 175 Md. 693, 2 A.2d 443 (1938).
3. McGaughy v. McGaughy, 410 Ill. 596, 102 N.E.2d 806 (1951); Winnard v. Winnard, 62 Ohio App. 351, 23 N.E.2d 977 (1939).
4. Crews v. Crews, 130 Fla. 499, 178 So. 139 (1938).
5. Phinizy v. Phinizy, 154 Ga. 199, 114 S.E. 185 (1922); Collins v. Collins, 195 La. 446, 193 So. 702 (1940).
6. Whinnery v. Whinnery, 21 Cal. App. 59, 130 Pac. 1065 (1913); Bickford v. Bickford, 94 Mont. 314, 22 P.2d 306 (1933); Hollingsworth v. Hollingsworth, 191 Ore. 374, 229 P.2d 956 (1951).
7. Phinizy v. Phinizy, 154 Ga. 199, 114 S.E. 185 (1922); Collins v. Collins, 195 La. 446, 193 So. 702 (1940).
8. Heckman v. Heckman, 235 Ind. App. 472, 134 N.E.2d 695 (1956); Mandelin v. Mandelin, 120 Minn. 198, 139 N.W. 152 (1913); Norman v. Norman, 88 W. Va. 640, 107 S.E. 407 (1921).
9. Fordice v. Fordice, 126 Ind. App. 562, 132 N.E.2d 618 (1956); Ramsey v. Ramsey, 69 Nev. 176, 244 P.2d 381 (1952) (making the distinction that in cases of adultery, the general rule is that a single act of intercourse will suffice as condonation).
10. Cox v. Cox, 267 Ala. 72, 100 So. 2d 35 (1958); Mitchell v. Mitchell, 126 Ind. App. 377, 133 N.E.2d 79 (1956); Norman v. Norman, 88 W. Va. 640, 107 S.E. 407 (1921).
11. Cf. Baumgartner v. Baumgartner, 16 Ill. App. 2d 286, 148 N.E.2d 327 (1958).
12. Phinizy v. Phinizy, 154 Ga. 199, 114 S.E. 185 (1922) (holding that although sexual intercourse was not an essential element of condonation, it was conclusive evidence thereof).

tion without weakening his other right to relief.[13]

Several states have adopted statutes which require an express agreement to condone acts constituting the cause for divorce on the grounds of cruelty.[14] Under such statutes express forgiveness in cases of cruelty is required,[15] and acts of sexual intercourse alone are not enough to establish the defense of condonation.[16] The law of condonation in North Dakota is governed by such a statute,[17] which requires in cases of cruelty, an express agreement to condone the offense.[18]

It is submitted that the result reached by the majority in the instant case was the correct one; as implying forgiveness as a matter of public policy will not save a marriage which has all but failed. Of course, divorce should not be encouraged nor allowed without cogent proof of marital discord; but in the same vein the defense of condonation should be one that must be established by more than mere physical acts of the parties without any intent to restore conjugal rights.

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RELEASE—CONSTRUCTION AND OPERATION—JOINT TORTFEASORS—The plaintiff was a passenger in an automobile which was involved in a collision with defendant's truck. The release he gave to the driver of the automobile recited the release of the driver and any and all other persons of any and every claim or cause of action arising out of the collision. The plaintiff later brought an action against the defendant as a joint tort-feasor. The Supreme Court of Pennsylvania *held*, two justices dissenting, that under the Uniform Contribution Among

13. Brown v. Brown, 171 Kan. 249, 232 P.2d 603 (1951) (stating that the patient endurance by one spouse of the ill-treatment of the other should never be allowed to weaken his or her right to relief); Fansler v. Fansler, 344 Mich. 569, 75 N.W.2d 1 (1956).

14. An example of such an enactment is: Cal. Civil Code § 118. "Where the cause of divorce consists of a course of offensive conduct, or arises, in cases of cruelty, from excessive acts of ill-treatment which may, aggregately, constitute the offense, cohabitation, or passive endurance, or conjugal kindness, shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone."

15. Whinnery v. Whinnery, 21 Cal. App. 59, 130 Pac. 1065 (1913); Brennan v. Brennan, 183 Ore. 269, 192 P.2d 858 (1948).

16. Schletewitz v. Schletewitz, 85 Cal. App. 2d 366, 193 P.2d 34 (1948).

17. N.D. Cent. Code § 14-05-13 (1961). ". . . .When the cause of divorce consists of a course of offensive conduct or arises in cases of cruelty from successive acts of ill treatment, which aggregately may consitute the offense, cohabitation, or passive endurance, or conjugal kindness shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone."

18. Fleck v. Fleck, 79 N.D. 561, 58 N.W.2d 765 (1953).