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Divorce--Condonation as Defense to Action Based on Cruelty

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the search in the principal case was more than incidental to the arrest. The right to search after making an arrest is recognized for two reasons: to search for concealed weapons and to search for pertinent evidence which, if on the person of the arrestee, might be hidden or destroyed by him. It is admitted that the right to search an arrestee has gone beyond the limits which would be set if these two factors were all that were involved in the problem.[12] Even so, it is submitted that this case goes too far. To be "incident to" an arrest, the search should be contemporaneous with the arrest, as was pointed out in the *Lewis* case. That portion of the *Lewis* rule apparently has been disregarded here. It is to be regretted that the court did not spell out exactly why it found the *Lewis* case inapplicable.

By way of summary, it is the opinion of the writer that the court made a perfectly reasonable extension of the law of arrest without a warrant by upholding the legality of the arrest in the instant case. While not a direct accusation of guilt, the testimony on which the arrest was based definitely afforded a reasonable belief that the defendant had committed a felony.

It is also believed that the court has reached a just, workable, logical solution to the problems which arise from the recognition of the policeman-informer privilege. In permitting the trial court to rule on the question of the reasonableness of the officer's belief that the defendant had committed a felony, the court followed the well-established Kentucky rule, which also appears to be the majority rule.[13] The opinion's only weakness is in the court's failure to elaborate on its conclusion that the search of the defendant's car was proper. More analysis of the *Lewis* case and its relation to the case at bar would have served to clarify the present court's position on the law of search and seizure incidental to an arrest.

TOM SOYARS

DIVORCE—CONDONATION AS DEFENSE TO ACTION BASED ON CRUELTY—Plaintiff-wife brought action in the Fayette Circuit Court for divorce on grounds of cruelty. The lower court found that the parties were,

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made in his presence. Since this is surely not the law, it is believed that the court intended to require that the search be both in the presence of the arrestee *and* incident to the arest.

[12] The best-known American case on the subject is U.S. v. Rabinowitz, 339 U.S. 56, 70 S. Ct. 430, 94 L. Ed. 653 (1950). Other cases on the same subject are collected and annotated at 32 A.L.R. 697 (1924); 51 A.L.R. 434 (1927); 74 A.L.R. 1394 (1931); 82 A.L.R. 786 (1933). A group of typical Kentucky cases can be found at 51 A.L.R. 434 (1927).

[13] *Supra*, note 8.

at the time of the action, living together with their two children in a three room apartment. The plaintiff was sleeping on a couch in the living room and the defendant was sleeping in the bedroom. Testimony of the children established that the parties had not been engaging in sexual intercourse. The lower court dismissed the complaint. Held: Judgment reversed. *York* v. *York*, 280 S.W. 2d 553 (Ky. 1955).

To constitute grounds for divorce for cruelty the Kentucky statutes require cruel and inhuman treatment extending over a period of not less than six months.[1] Thus, the theory upon which the lower court dismissed the complaint in the principal case would seem to have been that as soon as the statutory ground arises, or at least soon thereafter, the injured party must take up a separate residence or he will be barred from asserting such ground because it has been condoned. The Kentucky Court of Appeals, in reversing the lower court, said:

> In cases of continuing offense—such as cruel treatment . . . condonation will not be implied from either living together or acts of coition. . . .
>
> A spouse's endurance of cruelty and indignities in hope that the other will change has as much the character of probation as of condonation, and the continuation of all marital relations will raise no presumption against the true facts.[2]

Obviously the theory of the lower court as to the facts necessary for condonation was wrong and the reversal by the Court of Appeals on the facts presented right. Mere cohabitation will not usually constitute condonation.[3] However, the importance of the case arises from the dictum of the Court of Appeals quoted above. The question with which this comment will deal is whether the court has, by dictum, too severely limited condonation implied from conduct as a defense to a divorce based on cruelty.

The principles of condonation have their origin in the canon law of the Roman Catholic Church.[4] Today only a few states have statutes[5] concerning the nature and effect of condonation, and in other states the basic principles are still those applied by the ecclesiastical courts, with modern innovations to cope with new problems. The theory was

[1] KY. REV. STAT. sec. 403.020 (3)(b); sec. 403.020(4)(d) (1953).

[2] York v. York, 280 S.W. 2d 553, 556 (Ky. 1955). This case is also important, by dictum, of the law of condonation as applied to other grounds for divorce in Kentucky.

[3] Dennison v. Dennison, 189 Ark. 239, 71 S.W. 2d 1055 (1934); Morris v. Morris, 202 Ga. 431, 43 S.E. 2d 639 (1947); Lowe v. Lowe, 229 S.W. 2d 7 (Mo. App. 1950).

[4] Moss v. Moss, Prob. 155 (1916); Collins v. Collins, L.R. 9 App. Cas. 205 (1844).

[5] CAL. CIV. CODE sec. 111, 115-21 (Deering 1949); N.D. REV. CODE sec. 14-0510, 14-0513 (1943).

first applied in actions based on adultery, but in comparatively recent times it has been applied extensively in cases involving cruelty and similar offenses of a continuing nature.[6]

As to the application of condonation as a defense to a divorce action based on cruelty, the text writers seem to take divergent views as to what facts constitute condonation by implication. One leading text writer says:

> Condonation may also be implied from the conduct of the parties, without proof of express forgiveness, and even, it seems from some of the cases, though it could be shown that there was no forgiveness in fact. Sexual intercourse, for instance, with knowledge of a prior offense, is such condonation. Voluntary cohabitation, also, is generally held to be proof of condonation; but condonation will not necessarily be implied from the fact that the husband and wife continued to live together if there was no sexual intercourse, and if there is not in fact intent to forgive.[7]

Thus, Professor Madden says that sexual intercourse is condonation *per se* while cohabitation will at least raise an inference of condonation. Madden's statement is valid as applied to adultery as a ground for divorce and is supported by case authority which holds that sexual intercourse with knowledge of the adultery may be condonation *per se*.[8] The weakness in his position is in his failure to distinguish between adultery and the so-called continuing offenses such as cruelty in regard to facts constituting condonation.

The majority and better rule as to condonation of cruelty by cohabitation and sexual intercourse is well stated by Professor Keezer:

> It has sometimes been said that the doctrine of condonation arising from continued cohabitation was inapplicable to cases of a libel by the wife seeking a divorce for extreme cruelty. But the better established rule seems to be that cruelty, as well as adultery, may be the subject of condonation, by continued cohabitation, *but the principle requires evidence of an unequivocal intent to forgive and to voluntarily resume marital relations.*[9] (Emphasis supplied.)

The cases uniformly support Keezer by recognizing that there is a distinction between the condonation of adultery and the condonation of cruelty because of the differences in the character of the offenses.[10]

[6] Shirey v. Shirey, 87 Ark. 175, 112 S.W. 369 (1908); In Re Adams, 161 Iowa 88, 140 N.W. 872 (1913); Root v. Root, 164 Mich. 638, 130 N.W. 194 (1911); Johnsen v. Johnsen, 78 Wash. 423, 139 Pac. 189 (1914). Condonation may arise in several ways, for instance, as a defense to a marital offense asserted by one party as recriminatory and barring divorce. See Comment in 12 KY. L.J. 169 (1924).

[7] MADDEN, PERSONS AND DOMESTIC RELATIONS, 303 (1931).

[8] Tilton v. Tilton, 16 Ky. Law Rep. 538, 29 S.W. 290 (1895).

[9] KEEZER, ON THE LAW OF MARRIAGE AND DIVORCE, 557-558 (3rd ed., Moreland 1945).

[10] Brown v. Brown, 171 Kan. 249, 232 P.2d 603 (1951); Ramsay v. Ramsay,

The validity of this distinction becomes readily apparent when consideration is given to the position of the parties when cruelty is alleged as a basis for divorce.

As has been pointed out above, by statute cruelty may not be alleged as a ground for divorce in Kentucky until the cruelty has been endured for a period of six months. Thus, cohabitation and sexual intercourse could not be condonation during this period,[11] but what of the effects of these acts following the initial period of cruelty? It is the belief of this writer that cohabitation and sexual intercourse after the six month period should not necessarily be condonation. It is certainly commendable for an injured spouse to continue cohabitation with a spouse who is commiting a series of cruel acts where the injured spouse has hopes that the other will mend his ways and the marriage will be saved by a patient forbearance. Denying a divorce to an injured spouse in these circumstances would certainly not be equitable. The enduring by one spouse of the other's cruelties in the hope of reform has the character of probation rather than condonation.[12]

When condonation because of cohabitation and sexual intercourse is raised against the wife there is even stronger argument against strict application of condonation. There are many circumstances in which it would be exceedingly difficult, if not impossible, for the wife to withdraw from cohabitation. Frequently an injured wife has no financial resources and no employment, and this deters her from leaving her husband. Courts have generally given the wife leeway and hold that she does not condone her husband's cruelty by remaining with him for a reasonable time because of economic circumstances.[13] The fact that the wife continues the cohabitation for the sake of children is often a fact of much importance in cases holding that a particular continuance of cohabitation did not constitute condonation.[14] When a wife does continue cohabitation in these circumstances, should the fact that she also indulges in sexual intercourse call for a finding of condonation? Probably not, for as the Kentucky Court of Appeals pointed out in the principal case:

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244 P.2d 381 (Nev. 1952); Fisher v. Fisher, 223 App. Div. 19, 227 N.Y.S. 345, aff'd 250 N.Y. 313, 165 N.E. 460 (1928).

[11] Meyer v. Meyer, 226 Ky. 278, 10 S.W. 2d 844 (1928).

[12] Wilson v. Wilson, 16 R.I. 122, 13 A.102 (1888).

[13] Brown v. Brown, 219 Ala. 104, 121 So. 386 (1929); Pichon v. Pichon, 164 La. 272, 113 So. 845 (1927).

[14] Hansen v. Hansen, 86 Cal. App. 744, 261 P. 503 (1927); Rasgaitis v. Rasgaitis, 347 Ill. App. 477, 107 N.E. 2d 273 (1952); Mack v. Handy, 39 La. Ann. 491, 2 So. 181 (1887); Lowe v. Lowe, 229 S.W. 2d 7 (Mo. 1950).

> We do not believe it is cynical to suggest that complete rapport is not always reached. It is not unbelievable that submission is had as a convenient avoidance of imminent trouble.[15]

Thus, this writer is in full accord with the statement of law enunciated by Keezer. Mere cohabitation and probable or actual sexual intercourse following the accrual of the cause of action for divorce based on cruelty should not result in condonation unless there is an unequivocal intent to forgive and resume marital relations. Kentucky has, by dictum in the principal case, seemingly placed itself among the followers of this rule. Although not stating in affirmative language what facts will constitute condonation of cruelty the Kentucky court has stated negatively that, ". . . condonation will *not* be implied from either living together or acts of coition."[16] (Emphasis supplied). The ascertainable affirmative implication from this statement would seem to be that no condonation will arise unless there is proven an unequivocal intent to forgive. Thus Kentucky has not made condonation as applied to cruelty too difficult of proof but has merely declared itself a follower of the better rule.

J. MONTJOY TRIMBLE

PRACTICE AND PROCEDURE—STATUTES OF LIMITATIONS—INTERPRETATION OF SAVING CLAUSES—Plaintiff, as ancillary administrator, brought suit on May 4, 1953, in Oldham Circuit Court against defendant for negligently killing plaintiff's decedent in an automobile accident on Feb. 12, 1951. Decedent's domiciliary administrator, an Ohio resident, had previously on July 12, 1951, brought a similar suit in Federal District Court for the Western District of Kentucky, which had been dismissed on the ground that the Ohio administrator could not maintain the action in Kentucky. Plaintiff was then appointed ancillary administrator, and brought suit in the federal District Court for the Eastern District of Kentucky on January 20, 1952, less than a year after the accident, and thus before the statute of limitations had run. On April 28, 1952, this suit was dismissed because of lack of jurisdiction, the District Court failing to find any diversity of citizenship since both the plaintiff and the defendant were residents of Kentucky. This judgment was affirmed by the United States Court of Appeals on Feb. 16, 1953.[1] Relying upon Kentucky Revised Statutes 413.270,[2] which pro-

[15] *Supra* note 2 at 555. [16] *Id.* at 556.

[1] Ockerman v. Wise, 202 F. 2d 144 (6th Cir. 1953).

[2] "If an action is commenced in due time and in good faith in any court of this state and the defendants or any of them make defense, and it is adjudged