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judicial favor in the past, it is to be noted that the two most recent decisions involving retractions have sustained the more drastic type statutes. Perhaps this represents a new trend in the law of libel. If so, it is possible that the Oregon statute construed in *Holden* will become a model for other states. One of the better features of the Oregon act is that it allows a retraction to preclude recovery of general damages only for inadvertent libels. Although the Oregon statute requires the plaintiff to plead and prove malice or failure to retract upon demand, it would perhaps be desirable to establish a presumption against malice and to require the plaintiff to prove malice in fact. This would have the effect of taking the issue of good faith from a jury which might be oversolicitous of the plaintiff.

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COHABITATION DURING PENDENCY OF A DIVORCE ACTION

When a court hearing an action for divorce learns that the parties have cohabited during pendency of such suit, the court is presented with an interesting question involving conflicting policies. Ordinarily the courts hold that voluntary cohabitation during the pendency of the suit bars the suit[1] and dismiss the action.[2] Some courts, though, have held that while the facts of such cohabitation should be brought to their attention, their jurisdiction to grant the divorce is not affected.[3] In accordance with the latter view it has been held that the original cause of action may be revived in the same action, after subsequent acts of aggression have taken place, by the filing of a supplemental petition.[4]

Recently, a Florida District Court of Appeals in *Seiferth v. Seiferth*[5] reached a different result concerning the effect of cohabitation of the parties during the pendency of a divorce action. A husband sued

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[1]Givens v. Givens, 304 S.W.2d 577 (Tex. Civ. App. 1957).

[2]Byrne v. Byrne, 93 N.J. Eq. 5, 114 Atl. 754 (Ch. 1921); Givens v. Givens, 304 S.W.2d 577 (Tex. Civ. App. 1957).

[3]Cabral v. Cabral, 323 Mass. 441, 82 N.E.2d 616 (1948); Tackaberry v. Tackaberry, 101 Mich. 102, 59 N.W. 400 (1894); Payne v. Payne, 157 Ore. 428, 72 P.2d 536 (1937).

[4]Huffine v. Huffine, 74 N.E.2d 764 (Ohio C.P 1947).

[5]132 So. 2d 471 (Fla. Ct. App. 1961).

for divorce on the ground of extreme cruelty.[6] The chancellor granted the divorce and the wife appealed contending that the court below should have dismissed the suit because the resumption of cohabitation during its pendency established condonation of the marital offense as a matter of law.[7] In affirming the decision below, the District Court of Appeals, in a divided opinion,[8] agreed with the finding of the chancellor that the defendant wife had not shown the element of forgiveness implicit in the defense of condonation.[9] One judge dissented, being of the opinion that the cohabitation in the marital home, which admittedly included several acts of sexual intercourse subsequent to the institution of the divorce proceedings, constituted condonation as a matter of law.[10]

The court in the *Seiferth* case, in its preoccupation with the legal sufficiency of the defense of condonation,[11] seemingly failed to con-

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[6]It has been held that either a husband or a wife may maintain an action for divorce based on cruelty. Levy v. Levy, 388 Ill. 179, 57 N.E.2d 366 (1944); Nall v. Nall, 287 Ky. 355, 153 S.W.2d 909 (1941); Persinger v. Persinger, 133 W Va. 312, 56 S.E.2d 110 (1949). The chief distinction made here is that a wife is ordinarily granted a divorce for cruelty on less provocation than a husband. Woolley v. Woolley, 113 Utah 391, 195 P.2d 743, 744 (1948).

[7]The appeal was actually taken from a refusal to dismiss upon the facts as set forth in the wife's amended answer. These are the facts as found by the special master upon re-referral of the cause to him by the chancellor: The defendant wife went to the plaintiff husband's place, the marital abode, for dinner. A violent argument developed, during the course of which the wife received a broken wrist. The plaintiff took his wife to the hospital and paid for her bill there. After the wife's release from the hospital she returned to the marital home, with her personal effects, and she shared the same bed with plaintiff. It was admitted by both parties that they had indulged in sexual intercourse. Seiferth v. Seiferth, 132 So. 2d 471, 473 (Fla. Ct. App. 1961).

[8]The decision was three to one.

[9]All courts require forgiveness, either implied or express, by the aggrieved spouse to constitute a valid defense of condonation. York v. York, 280 S.W.2d 553 (Ky. 1955); Ramsay v. Ramsay, 69 Nev. 176, 244 P.2d 381 (1952); Duff v. Duff, 126 N.E.2d 466 (Ohio Ct. App. 1954).

[10]132 So. 2d 471, 474 (Fla. Ct. App. 1961).

[11]Another problem which might have been behind this court's reluctance to accept condonation as a defense in this case is the distinction frequently applied by courts concerning condonation as a defense to a divorce based on the ground of cruelty as opposed to one based on the ground of adultery because of the different character of the offenses. Wolverton v. Wolverton, 163 Ind. 26, 71 N.E. 123 (1904); Brown v. Brown, 171 Kan. 249, 232 P.2d 603 (1951); Weber v. Weber, 195 Mo. App. 126, 189 S.W 577 (1916); Ramsay v. Ramsay, 69 Nev. 176, 244 P.2d 381 (1952); Fisher v. Fisher, 223 App. Div. 19, 227 N.Y. Supp. 345 (1st Dep't 1928); Wilson v. Wilson, 16 R.I. 122, 13 Atl. 102 (1888); Humphreys v. Humphreys, 39 Tenn. App. 99, 281 S.W.2d 270 (1954); Cudahy v. Cudahy, 217 Wis. 355, 258 N.W. 168 (1935).

There have been many cases holding that the resumption of marital relations constitutes condonation of cruelty. Obennoskey v. Obennoskey, 214 Ark. 358, 220

sider the "overwhelming weight of authority,"[12] which denies relief to the parties who cohabit during pendency of a suit for divorce.[13] This view is typically reflected by the words of a New York court:[14] "We think it is contrary to the policy of the law and incongruous to separate parties judicially who have not separated themselves."[15] The Virginia Supreme Court of Appeals in *Tarr v. Tarr*,[16] added its support to this view with these graphic words: "It would be shocking to the moral sense for a court of equity to grant a divorce to parties, who, during the pendency of the suit, litigated by day and copulated by night."[17]

While the authorities denying relief to parties who cohabit during the pendency of a divorce action are unanimous in their conclusion, they are also unanimous in refraining from enunciating the exact reasons behind their conclusion.[18] One can speculate as to the reasons.

Possibly a kind of the "clean hands" doctrine[19] is involved. This would not be an application of the doctrine in its usual sense, *i.e.*, denial of relief to a wrongdoer,[20] but rather a denial of relief to parties

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S.W.2d 610 (1949); Buck v. Buck, 205 Ark. 918, 171 S.W.2d 939 (1943); Johnson v. Johnson, 210 Ga. 795, 82 S.E.2d 831 (1954); Moore v. Moore, 362 Ill. 177, 199 N.E. 98 (1935); Babcock v. Babcock, 317 Mass. 772, 59 N.E.2d 471 (1944); Sewell, v. Sewell, 160 Neb. 173, 69 N.W.2d 549 (1955); Shinn v. Shinn, 148 Neb. 832, 29 N.W.2d 629 (1947); Lazarczyk v. Lazarczyk, 122 Misc. 536, 203 N.Y. Supp. 291 (Sup. Ct. 1924); Greer v. Greer, 178 Pa. Super. 643, 115 A.2d 794 (1955); Brooks v. Brooks, 200 Va. 530, 106 S.E.2d 611 (1959). But see Cox v. Cox, 343 S.W.2d 395 (Ky. 1961); Nixon v. Nixon, 329 Pa. 256, 198 Atl. 154 (1938); Hollister v. Hollister, 6 Pa. 449 (1847).

[12]"The overwhelming weight of authority is to the effect that when the parties to a suit for divorce have... resumed their marital relations, such action operates to end the litigation." Givens v. Givens, 304 S.W.2d 577, 580 (Tex. Civ. App. 1957).

[13]Holt v. Holt, 77 F.2d 538 (D.C. Cir. 1935); Baumgartner v. Baumgartner, 16 Ill. App. 2d 286, 148 N.E.2d 327 (1958); Wright v. Wright, 153 Neb. 18, 43 N.W.2d 424 (1950); Ross v. Ross, 4 Misc. 2d 399, 149 N.Y.S.2d 585 (Sup. Ct. 1956); Sommer v. Sommer, 285 App. Div. 809, 137 N.Y.S.2d 1 (1st Dep't 1955); McCarthy v. McCarthy, 199 Misc. 680, 103 N.Y.S.2d 808 (Dom. Rel. Ct. 1951); Berman v. Berman, 277 App. Div. 560, 101 N.Y.S.2d 206 (1st Dep't 1950); Tarr v. Tarr, 184 Va. 443, 35 S.E.2d 401 (1945).

[14]Berman v. Berman, 277 App. Div. 560, 101 N.Y.S.2d 206 (1st Dep't 1950).

[15]Id., 101 N.Y.S.2d at 207.

[16]184 Va. 443, 35 S.E.2d 401 (1945).

[17]184 Va. at 449, 35 S.E.2d at 404.

[18]Typical of the language of the courts in this respect is the language of the Supreme Court of Nebraska: "It is elementary that while a divorce is pending the parties must live separate and apart." Ellis v. Ellis, 115 Neb. 685, 214 N.W 300, 301 (1927).

[19]The doctrine that he who comes into equity must come with clean hands has been held applicable to divorce cases. Fritz v. Fritz, 179 Ore. 512, 174 P.2d 169, 174 (1946); Nelson, Divorce and Annulment § 1.03 (1945).

[20]Generally the clean hands principle is applied when the party seeking re-

who, through their actions out of court, show a lack of good faith in participating in the suit.[21] Professor Chafee in an exhaustive article criticizing the application of the clean hands doctrine to matrimonial litigation wrote: "It was an evil day when the first American judge to speak of clean hands had the bright idea of injecting the maxim into the very place where it would work its greatest mischief."[22] Perhaps he would not object to this application of the doctrine. The chief objection of Chafee and others to the use of a clean hands doctrine in divorce actions lies in the intolerable position in which the parties are left after its invocation.[23] This objection hardly applies where the parties show by their actions during the pendency of the suit that their position after denial of relief will not be intolerable.[24]

Another possible reason behind the conclusion of the majority view may be some idea of estoppel. Estoppel has been applied to divorce actions where lack of good faith has been shown.[25] It would not be an unwarranted extension to invoke an estoppel on the ground that the party is asking for judicial relief wholly inconsistent with his extrajudicial conduct.

The foregoing considerations point to the denial of relief where the parties have cohabited during the pendency of their suit for divorce. But a contrary result can be reached if the strong policy favoring reconciliation of the spouses[26] is considered controlling. It is arguable that this policy favoring reconciliation will best be served by allowing the parties to cohabit during the pendency of their divorce suit. They are then permitted to remain in the best possible

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lief is himself guilty of some wrongdoing in connection with the lawsuit. Rhine v. Terry, 111 Colo. 506, 143 P.2d 684, 685 (1943); Christensen v. Christensen, 144 Neb. 763, 14 N.W.2d 613, 616 (1944); Hartman v. Cohn, 350 Pa. 41, 38 A.2d 22, 25 (1944).

[21]Lack of good faith has been described as one of the bases underlying the clean hands maxim. Vulcan Detinning Co. v. American Can Co., 72 N.J.Eq. 387, 67 Atl. 339, 341 (1907); Canfield v. Jack, 78 Okla. 127, 188 Pac. 1040 (1920).

[22]Chafee, Coming into Equity with Unclean Hands, 47 Mich L. Rev. 877, 1083 (1949).

[23]Id. at 1088.

[24]The parties in the Seiferth case have shown by their actions that living together is not an intolerable situation.

[25]Stafford v. Stafford, 163 Kan. 162, 181 P.2d 491 (1947); Bohmert v. Bohmert, 213 App. Div. 103, 210 N.Y. Supp. 1 (1st Dep't 1925); Deutsch v. Deutsch, 141 Pa. Super. 339, 14 A.2d 586 (1940).

[26]Many courts have enunciated this policy favoring reconciliation. DeBurgh v. DeBurgh, 39 Cal. 2d 858, 250 P.2d 598 (1952); Pilliner v. Pilliner, 64 Idaho 425, 133 P.2d 735 (1943); Diamond v. Diamond, 182 Md. 103, 32 A.2d 376 (1943); Iovino v. Iovino, 58 N.J. Super, 138, 155 A.2d 578 (App. Div. 1959); Brown v. Brown, 208 N.Y. Supp. 17 (Sup. Ct. 1924).