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# THE MEANING OF CONDONATION IN THE LAW OF DIVORCE

FRANK EUGENE READER\*

The doctrine that the condonation of a marital offense, constituting a ground for divorce, will bar the condoning spouse from thereafter relying on that offense to obtain a divorce, had its origin in the English Canon Law, being applied by the Ecclesiastical courts in the disposition of petitions for divorce *a mensa et thoro*.<sup>1</sup> From an early period in this country condonation was applied by the courts as a defense to divorce, it being recognized and received as a part of the common law.<sup>2</sup> Today condonation is specifically mentioned in the divorce statutes of twenty-seven states. For the most part these provisions are brief and general in terms and have had little or no effect upon the decisions, the courts construing such provisions as merely declaratory of the Canon Law doctrine;<sup>3</sup> and it has been held that the doctrine will be applied even though no mention is made of it in the divorce statute.<sup>4</sup>

There are many subsidiary rules and ramifications of the doctrine; such as the rule that condonation is conditional upon the wrongdoer thereafter treating the injured spouse with conjugal kindness;<sup>5</sup> that there can be no condonation without knowledge of the offense;<sup>6</sup> that it must be voluntary<sup>7</sup> and will not be

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<sup>1</sup>Worsley v. Worsley, 2 Lee. 572, 161 Eng. Rep. 444 (1730); Beeby v. Beeby, 1 Hag. Ecc. 789, 162 Eng. Rep. 755 (1799). The case of Durant v. Durant, 1 Hag. Ecc. 733, 162 Eng. Rep. 734 (1825), contains a full and excellent discussion of the law of condonation as administered by the Ecclesiastical courts.

<sup>2</sup>Anonymous, 6 Mass. 147 (1809); Delliber v. Delliber, 9 Conn. 233 (1832).

<sup>3</sup>See 2 Vernier, *American Family Laws* (1932) 79, for a resume of the statutes. The California statute has a very complete provision as to condonation and the statutes of Montana, North Dakota, and South Dakota are copied from it.

<sup>4</sup>Turnbull v. Turnbull, 23 Ark. 615 (1861); and see cases cited *infra* from District of Columbia, Connecticut, Illinois, Iowa, Maine, Maryland, Massachusetts, Missouri, New Hampshire, North Carolina, Oklahoma, Rhode Island, Vermont, and Washington, in none of which states is there any statutory provision concerning condonation.

<sup>5</sup>Robbins v. Robbins, 100 Mass. 150, 97 Am. Dec. 91 (1868); Mosher v. Mosher, 16 N. D. 269, 113 N. W. 99 (1907); Holt v. Holt, 77 Fed. (2) 538 (1935).

<sup>6</sup>Rogers v. Rogers, 122 Mass. 423 (1877); Frank v. Frank, 99 Pa. Super. 183 (1930).

<sup>7</sup>Rex v. Rex, 39 Ohio App. 295, 177 N. E. 527 (1930); Leech v. Leech, 82 N. J. Eq. 472, 89 Atl. 51 (1913).

inferred so easily against the wife;<sup>8</sup> and so forth. Obviously the first question that needs to be answered in applying the doctrine is what amounts to condonation? Does condonation refer to a mental state, or words, or acts? Is it merely forgiveness, or is it conduct, or both? It will be the purpose of this article to discuss these questions and its scope will be confined to the problem of what constitutes condonation.

#### FORGIVENESS AS CONDONATION

Text writers invariably speak of condonation as the forgiveness of a marital offense,<sup>9</sup> and the decisions abound with language indicating that "condonation" is synonymous with "forgiveness". For example it is said, "Now condonation is forgiveness legally releasing the injury; it may be express or implied, as by the husband cohabiting with a delinquent wife, for it is to be presumed he would not take her to his bed again unless he had forgiven her";<sup>10</sup> or, "Condonation is forgiveness . . . such intention may be expressed in words, or it may be implied from the act of the injured party;"<sup>11</sup> or, "Forgiveness, or condonation, as it is usually termed, may be expressed or implied."<sup>12</sup> Does this mean that condonation is simply "forgiveness" in the ordinary or lay sense of the term; which denotes to cease to feel resentment against one or to pardon him for a wrong committed? If that is the true meaning, condonation is merely a mental state and could be shown by express words of pardon or might be shown by conduct indicating a cessation of resentment or ill will. Do the actual decisions bear out this construction of the term?

Three decisions sustain this meaning of condonation. The case of *Thompson v. Thompson*<sup>13</sup> is a square holding that condonation is merely forgiveness in the above sense. There the parties entered into an agreement to the effect that the wife was willing to forgive the past and they were to resume the marital relation. The wife retracted and marital relations were not resumed. The court held that the agreement itself was a condonation of all prior offenses, thus barring the wife from a divorce for the husband's prior desertion. *Bush v. Bush*<sup>14</sup> and *Phinizy v. Phinizy*<sup>15</sup> are in accord, but they are weakened somewhat by the fact that there

<sup>8</sup>*Shackleton v. Shackleton*, 48 N. J. Eq. 364, 21 Atl. 935 (1891); *Mitchell v. Mitchell*, 193 Iowa 153, 185 N. W. 62 (1921).

<sup>9</sup>"Condonation is the forgiveness of a marital offense", Madden, *Dom. Rel.* (1931), 300. "Condonation is the defense that the plaintiff after knowledge of the offense, forgave it." Peck, *Dom. Rel.* (1930), 170.

<sup>10</sup>*Beeby v. Beeby*, supra note 1.

<sup>11</sup>*Sayles v. Sayles*, 41 R. I. 170, 103 Atl. 225 (1918).

<sup>12</sup>*Quincy v. Quincy*, 10 N. H. 272 (1839).

<sup>13</sup>49 Nev. 375, 247 Pac. 545, 47 A. L. R. 569 (1926). The court said, "Condonation, as that word is used in divorce suits, is merely a forgiveness by the aggrieved spouse of past offenses."

<sup>14</sup>135 Ark. 512, 205 S. W. 895, 6 A. L. R. 1153 (1918).

<sup>15</sup>154 Ga. 199, 114 S. E. 185 (1922).

was evidence in both cases which would have supported a finding that the parties had resumed marital relations after the offense; and, in the former, the court said that words alone could not be enough unless acted upon by resuming to some extent the marital relation, and then proceeded to hold that the wife's walking three miles to their former home was sufficient resumption.<sup>16</sup> It is submitted that the rule of these cases is not sound as a matter of policy. A wife who has been wronged by the adulterous philanderings of her husband, out of compassion elicited by the memory of happiness together in former days or simply out of the goodness of her heart, may say, "I forgive you your weakness and will hold no ill will against you, but I cannot go on living with you as your wife." Should her forgiveness, even though the husband remains faithful thereafter, deprive her of the right to terminate legally a relationship which her husband cruelly breached?<sup>17</sup> We can admire a husband or wife who is big enough to forgive his or her spouse for destroying that which was sacred, but we can have little respect for one who, after knowledge of such misconduct, receives the adulterer to conjugal embraces;<sup>18</sup> yet these cases would penalize a spouse who does the former by imposing a legal duty to submit to the latter.<sup>19</sup> Such a rule is not consonant with human nature or the rudiments of fair play and these decisions which propound it are the unfortunate result of a literal application of the loose and general language of prior

<sup>16</sup>In *Merriam v. Merriam*, 207 Ill. App. 474 (1917), cited in the Thompson case, it was said that the wife's drunkenness and desertion was condoned by the husband's agreement that if she would leave and not drink for three months she could resume living with him, she having performed and he having refused to take her back. This, however, was but dictum since the court had already held that the wife's prior judgment for separate maintenance was conclusive against the husband on the question of desertion and drunkenness, and that the ground of drunkenness was not made out anyway. See *Teal v. Teal*, 324 Ill. 207, 155 N. E. 28, 33 (1926).

<sup>17</sup>As Lord Chelmsford said, in *Keats v. Keats*, 1 Sw. & Tr. 334, 164 Eng. Rep. 754 (1859), at 764. "Those who felt that perpetual separation must be the inevitable consequence of the unpardonable fault, might still anxiously desire to lighten the load of despair by some kind words of consolation and peace. This is not the forgiveness which amounts to condonation, but rather which declares it to be impossible."

<sup>18</sup>As one court quaintly put it, "A husband who admits his wife to conjugal embraces after he knows that she has committed adultery, is looked on as a disgraced man— 'a cuckold, a beast with horns.'" Pearson, J., in *Horne v. Horne*, 72 N. C. 530 (1875).

<sup>19</sup>By the rule of these cases verbal forgiveness is a condonation and has the effect of legally wiping out the offense of adultery. If that is the law, if the wife thereafter refuses to live with him it would be desertion; or if she lived with him, but withheld intercourse she would, in some jurisdictions, be guilty of cruelty or desertion. Desertion; *Baker v. Baker*, 99 Ore 213, 195 Pac. 347 (1921); *Klein v. Klein*, 146 Md. 27, 125 Atl. 728 (1924); contra, *Wacker v. Wacker*, 55 Pa. Super 380 (1913). Cruelty: *Nordlund v. Nordlund*, 97 Wash. 475, 166 Pac. 795 (1917); Compare *Currie v. Currie*, 162 So. 152 (Fla. 1935); contra, *Johnson v. Johnson*, 31 Pa. Super. 53 (1906).

cases and of a failure to analyze the actual decisions and to appreciate the real problem involved.<sup>20</sup>

A study of the decisions discloses that these are the only cases which have actually held that forgiveness alone or, in fact, that anything short of the resumption of marital cohabitation<sup>21</sup> can constitute condonation. In the English case of *Crocker v. Crocker*<sup>22</sup> and in several American cases it has been squarely held that though the marital offense was admittedly forgiven there was no condonation because there was no marital cohabitation.<sup>23</sup> Further, many cases have held that there must be marital cohabitation to constitute condonation, without deeming it relevant or necessary to consider the presence or absence of forgiveness.<sup>24</sup> A modification of the requirement of marital cohabitation is suggested in a few cases where it has been said that sexual intercourse is not always essential to condonation, the courts pointing out that if such was the rule the circumstances might be such as to render a condonation impossible, as where the injured spouse

<sup>20</sup>*Keats v. Keats*, supra note 17, was the first English case to state fully the nature and elements of condonation. There the Lord Chancellor affirmed the Judge Ordinary's charge to the jury, to the effect that forgiveness alone is not enough but that there must be a restoration of the offending spouse to the same position she occupied before the offense, saying, "But words, however strong, can at the highest only be regarded as imperfect forgiveness, and unless followed up by something which amounts to . . . . a reinstatement of the wife in the condition she was in before she transgressed, it must remain incomplete." In *Bush v. Bush*, the court quoted this language and adopted the implication that condonation is merely forgiveness, but must be acted upon to be irrevocable. *Thompson v. Thompson*, and *Phinizy v. Phinizy* cite and quote from the *Bush* case for their authority and also quote forgiveness language from various sources. In the latter case the court said, "Sexual intercourse is not a *sine qua non* of condonation . . . . if this were not the case, the impotent husband could never condone the wife's divorceable offenses." True, but does it follow that his mere forgiveness alone should wipe out the offense?

<sup>21</sup>"Cohabitation", literally, means merely "to dwell together" and does not always imply sexual intercourse. However, when the courts employ the term "marital cohabitation" or the phrase "living together as husband and wife" they usually use it as meaning sexual intercourse. To avoid any ambiguity, whenever the term "marital cohabitation" is employed in the body of this article it shall be understood as including one or more acts of sexual intercourse.

<sup>22</sup>[1921] P. 25.

<sup>23</sup>*Taber v. Taber*, 66 Atl. 1082, (N. J. Eq., 1904); *Goeger v. Goeger*, 59 N. J. Eq. 15, 45 Atl. 349 (1900); *Anderson v. Anderson*, 89 Neb. 570, 131 N. W. 907 (1911); and see *Christensen v. Christensen*, 125 Me. 397, 134 Atl. 373 (1926), where it was said, "To be effectual, condonation must include a restoration of the offending party to, or a continuance of, all marital rights . . . . the offended party may forgive, in that he may not bear any ill will, yet withhold a complete reconciliation in the sense of reinstating the offender to conjugal cohabitation and full marital rights."

<sup>24</sup>Letters of affection, *Forrester v. Forrester*, 101 Miss. 155, 57 So. 553 (1912); an offer by the wife to return to her husband, *Quarles v. Quarles*, 19 Ala. 363 (1851); or even living together in the same house or room do not constitute condonation so long as full marital rights are withheld, *Massie v. Massie*, 202 Iowa 1311, 210 N. W. 431 (1926); *Greenwell v. Greenwell*, 98 Atl. 53, (R. I., 1916); *Faulkner v. Faulkner*, 90 Wash. 74, 155 Pac. 404 (1916); *Hartnett v. Hartnett*, 59 Iowa 401, 13 N. W. 408 (1882); *Elder v. Elder*, 139 Va. 19, 123 S. E. 369 (1924). And see cases cited in note 27 infra, holding intercourse to be necessary.

was impotent.<sup>25</sup> If such a principle is confined to cases of physical impossibility it would seem proper to hold that a restoration of all marital rights insofar as that is possible and to the full extent that they were enjoyed prior to the offense is sufficient; though it might well be required that such living together should be for some period of time before it could be given the effect of an act of sexual intercourse.<sup>26</sup> The statement that condonation is simply forgiveness is then without support in reason or law and the too common practice of employing language to that effect is misleading and confusing and is to be deprecated.

#### CONDONATION WITHOUT FORGIVENESS

It having been determined that forgiveness alone is not condonation there remains the further question of whether there need be any forgiveness at all. That is, if marital cohabitation is necessary to condone a marital offense is it such intercourse alone which precludes a party from a divorce, or is it such action coupled with and preceded by forgiveness which raises the bar? With respect to this it will be found that a number of the cases<sup>27</sup> which hold that there can be no condonation without intercourse treat the intercourse as proof of forgiveness. They indicate that it is the forgiveness which is important, but that forgiveness, cannot be clearly or sufficiently proved without proving marital cohabitation. These cases are not satisfactory in that they do not consider the problem that arises where there is intercourse, but admittedly no forgiveness. That intercourse, and nothing short of it may be treated as adequate proof of forgiveness is one thing; the converse, that intercourse shows forgiveness, is not necessarily true. A husband or wife may take his or her errant spouse into conjugal relations for reasons and prompted by motives entirely disassociated from the intention to forgive. Thus a husband after learning of his wife's infidelity may have no compassion or kind feeling towards her and intend to leave and divorce her, but decides to exact his conjugal dues before he does. A wife may remain and cohabit with her husband long

<sup>25</sup>See *Keats v. Keats*, *supra* note 17; *Phinizy v. Phinizy*, *supra* note 15; *Cramp v. Cramp*, [1920] P. 158 (Eng.).

<sup>26</sup>It is suggested in *Cramp v. Cramp*, [1920] P. 158, 166, that if the husband tells his adulterous wife that he will continue to live with her and thus preserve an impression of marital harmony to the public, but that marital relations shall never be resumed, this living together will constitute condonation. This, however, does not seem wholly fair to a husband who later finds he cannot continue the sham but feels he should cease giving his name to a woman whose misconduct renders her undeserving of it. In the cases in note 24 *supra* and note 27 *infra* it was held that though the parties lived in the same house and even slept in the same bed, after knowledge of the offense, it would not be condonation if in fact there was not intercourse.

<sup>27</sup>*Marshall v. Marshall*, 55 App. D. C. 173, 3 Fed (2d) 344 (1924); *Truitt v. Truitt*, 154 Ill. App. 242 (1910); *Clague v. Clague*, 46 Minn. 461, 49 N. W. 198 (1891); *Giles v. Giles*, 181 N. E. 505 (Mass. 1932), but compare *Holsworth v. Holsworth*, *infra* note 33. Compare: *Rudd v. Rudd*, 66 Vt. 91, 28 Atl. 869 (1894). Occasional dicta is found to the effect that there must be both forgiveness and marital cohabitation: see *Martin v. Martin*, 92 So. 46, 49 (La., 1922).

enough to obtain some personal benefit, material or otherwise, before she denounces him and leaves. Will such conduct be ineffectual as a bar to his or her divorce because it was not prompted by forgiveness?

In a very early Massachusetts case<sup>28</sup> it was held that intercourse constituted condonation, the court saying, "If afterward he will cohabit with her as his wife, he exhibits conclusive evidence of his forgiveness." If, as the court says, intercourse is conclusive of forgiveness and forgiveness is condonation the court has either adopted an absurd conclusive presumption, for intercourse does not always show forgiveness, or else it gives the forgiveness a connotation not in keeping with its ordinary meaning. Actually the case holds that intercourse alone and unaccompanied by any particular mental state is condonation barring the party from a divorce,<sup>29</sup> and nothing can result except confusion by calling it proof of forgiveness. This case was approved and followed in *Delliber v. Delliber*<sup>30</sup>, an early Connecticut case. In neither case was there any evidence or contention that the libellant did not intend to forgive the respondent by his act, but it is apparent in both that such a contention would have been of no avail.

In recent years a few courts have met the problem of intercourse without forgiveness in a more realistic and practical manner. They have dispersed the fog enveloping the doctrine as a result of forgiveness terminology and have simply identified condonation with the principle of election. In *Rogers v. Rogers*<sup>31</sup> the Chancellor found that the libellant had had sexual intercourse after the adultery complained of and that he at no time forgave her in the sense that he wiped out the past. The court held it was nevertheless a condonation and said,

"If the essence of condonation is forgiveness in the usual signification of that word, then the conduct of the petitioner in this case does not amount to condonation.

But I conceive that, although the etymology of the word and its definition and use by many courts imply forgiveness, the application of the principle of condonation to proven facts by our own and other courts is with no reference whatever to presence or absence of forgiveness . . . I think that, if we treat the doctrine of condonation as based upon the election of the offended party to forego the remedy which a full knowledge of the offense enables him to apply if he

<sup>28</sup>Anonymous, 6 Mass. 147 (1809).

<sup>29</sup>The further language of the court strengthens this conclusion: "If therefore a husband, believing his wife's guilt, will afterwards cohabit with her, whether influenced by his compassion or his affection, or induced by her tears, her penitence, or her fascination, he cannot afterward avail himself of that offense to obtain a dissolution of the marriage." 6 Mass. at 149.

<sup>30</sup>9 Conn. 233 (1832).

<sup>31</sup>67 N. J. Eq. 534, 58 Atl. 822 (1904), affirmed 63 Atl. 1119 (1906), but on the ground adultery of respondent not proved. Approved in *Leech v. Leech*, 82 N. J. Eq. 472, 89 Atl. 51, (1913).

will, we will be able more readily to reconcile the decisions of courts upon this subject."

In England a similar case was presented in *Cramp v. Cramp*<sup>32</sup> where the respondent admitted that her husband never forgave her though he did cohabit with her after her adultery. The court held that there was condonation saying, "A man cannot at the same moment exercise the rights of a husband and disclaim the continuance of the marriage bond." Judge McCardie, after quoting from many English cases in which the word "forgiveness" occurred, concluded that such emphatic use of the word tends to obscure the true meaning of the doctrine of condonation and concluded, "It will be found, I think, that the truer definition of condonation is that it is a conditional waiver of the right of the spouse to take matrimonial proceedings, and it is not forgiveness at all in the ordinary sense." The Massachusetts case of *Holsworth v. Holsworth*<sup>33</sup> is a similar holding.

This approach to the problem is commendable for its fairness and certainty. There seems to be no good reason why it should be necessary for a spouse to forgive the other a breach of marital vows in order to estop the former from later calling up that offense to terminate the marriage. Where a wife has committed adultery and the husband knows that fact why should he not be required to choose between a continuance of marital cohabitation and the right to a divorce? This is no hardship. It does not require him to make a hasty decision or promptly proceed for a divorce. It merely requires him to refrain from conjugal embraces if he wishes to retain the power to divorce her. Looking at the situation realistically, it is the adultery that terminates the marriage and not the subsequent proof thereof in the law suit. The divorce decree is merely an adjudication in law of the termination of a marriage that was terminated in fact by the adultery. Continued marital cohabitation by the husband after such factual termination of the marriage no more deserves the stamp of approval, moral or legal, than intercourse after divorce; unless we treat it as a waiver of the offense and as a factual reinstatement of the marriage by mutual consent. For the court to say you may have a divorce since you did not forgive her is to countenance sexual intercourse after the termination of the relationship which gave legal and moral sanction to that conduct.<sup>34</sup> The

<sup>32</sup>[1920] P. 158.

<sup>33</sup>252 Mass. 133, 147 N. E. 578 (1925). There the wife returned and cohabited with her husband for the purpose of taking her child from the father and with no intention of forgiving him. And see *Turnbull v. Turnbull*, 23 Ark. 615 (1861) where the court said the husband's voluntary cohabitation was an election, but also said that he "forgave" her and having forgiven her he could not later retract.

<sup>34</sup>The husband may have been motivated by anything except forgiveness but, nevertheless the court may and should import to him the intention to preserve the marital ties where he in fact continues the basic incident of marriage, rather than import to him the intention to engage in immoral conduct. In *Cramp v. Cramp* [1920] P. 158 (Eng.) it was said, at p. 170, "A man cannot, I think, use the body of his wife for sexual ends and announce to her at the same time that he will not forgive her adultery, but will present a petition to dissolve the marriage bond. Such acts of intercourse would be immoral unless the woman he embraced be still his wife."

court must either do this or hold that since the husband chose to continue the marriage in fact the relationship of husband and wife was in fact restored and is legally existent and inseverable. Any other doctrine would be disruptive of morals and hazardous to the welfare of issue that might result from the acts of the husband after discovery of the wrong.

Further, the rule of these cases has the practical advantage of being certain and easily applied, and it eliminates the difficult task of delving into the mental state of the libellant and determining whether he had forgiven and ceased to hold resentment towards the guilty spouse. So far as the authorities are concerned no decision has been found which has held that condonation did not result from marital cohabitation because there was no forgiveness, except where a statute expressly required both cohabitation and forgiveness.<sup>35</sup> On the other hand many cases have held that such cohabitation is condonation without bothering to consider the presence or absence of the intent to forgive, the courts simply taking it for granted that condonation is made out by proof of intercourse after knowledge of the offense.<sup>36</sup> Yet despite the obvious soundness of the doctrine that forgiveness need not be shown and the many decisions applying the doctrine, in fact, if not in words, the courts persist in emphasizing the element of forgiveness.<sup>37</sup> Though the statutes, following judicial language, usually speak of forgiveness, even where they state the doctrine correctly and omit any mention of forgiveness the courts insist on saying that forgiveness is the important factor.<sup>38</sup>

<sup>35</sup>The Cal. Statute provides there can be no condonation of cruelty by cohabitation "unless accompanied by an express agreement to condone." *Hunter v. Hunter*, 30 Pac. 590 (Cal., 1892). And see *Bordeaux v. Bordeaux*, 30 Mont. 36, 75 Pac. 524 (1904) and *Saville v. Saville*, 103 Ore. 117, 203 Pac. 584 (1922), applying similar provisions.

<sup>36</sup>*Shaffer v. Shaffer*, 181 N. W. 261 (Iowa, 1921); *Sackner v. Sackner*, 224 Mich. 615, 195 N. W. 311 (1923); *Shirley v. Shirley*, 87 Ark. 175, 112 S. W. 369 (1908); *Toulson v. Toulson*, 53 Md. 754, 50 Atl. 401 (1901); *Costello v. Costello*, 191 Pa. 379, 43 Atl. 240 (1899). And see *Phillips v. Phillips*, 91 Ga. 551, 17 S. E. 633 (1893); *Land v. Mullin*, 46 La. Ann. 1246, 15 So. 657 (1894).

<sup>37</sup>Even in New Jersey and Massachusetts the cases since *Rogers v. Rogers* and *Holsworth v. Holsworth* talk of the need for forgiveness: See *Rushmore v. Rushmore*, 12 N. J. Misc. 575, 174 Atl. 469 (1934); *Giles v. Giles*, supra n. 27.

<sup>38</sup>For example the Pennsylvania statute provides, "In any action or suit for divorce for the cause of adultery, if the respondent shall . . . . prove . . . . that the libellant . . . . has admitted the respondent into conjugal society or embraces after he or she knew of the criminal fact, . . . it shall be a good defense." Act of May 2, 1929, P. L. 1237, sec. 52; 23 Purdon St. sec. 52. This act continues the provision of the Act of Mar. 13, 1815, P. L. 150. Yet in *Gosser v. Gosser*, 183 Pa. 499, 503, 38 Atl. 1014 (1898) it is said, "Condonation may be inferred from cohabitation after knowledge . . . . Forgiveness implies a knowledge of the offense to be forgiven and there can be no condonation without a belief in guilt and an intention to forgive it." And see *Talley v. Talley*, 215 Pa. 281, 64 Atl. 523 (1906). The cases actually decided that there was no condonation where no intercourse after knowledge and condonation where there was intercourse. And see *Wright v. Wright*, 6 Tex. 3, 21-23 (1851) (construing a similar statute).

A clear avowal by the courts that condonation is simply voluntary sexual intercourse after knowledge of the marital offense in question and a cessation by them of the use of forgiveness terminology would do much to remove the doubts and uncertainty apparently surrounding the doctrine and would prevent in the future unsatisfactory decisions like *Thompson v. Thompson*.

#### CONDONATION OF CRUELTY

One further question requires comment. That is, whether more is required for the condonation of cruelty than for the condonation of adultery. More specifically, will one act of voluntary sexual intercourse condone all prior cruel treatment as it will prior adultery? Prefatory to answering this, certain subsidiary considerations should be noticed. As distinguished from adultery, cruelty and especially "indignities to the person" consist of a course of conduct over a period of time "so that something of a condonation of earlier ill treatment must in such cases necessarily take place;"<sup>39</sup> and a wife who continues marital cohabitation in the hope of a cessation of such mistreatment should not be deprived of divorce when that hope is not realized.<sup>40</sup> The avoidance of such an unjust result does not preclude the application of condonation to cruelty, however, but merely calls for the application of the well settled principle that condonation is upon the implied condition of future conjugal kindness. It is, therefore, the almost universal rule that condonation applies to cruel treatment,<sup>41</sup> and that any subsequent cruel-

<sup>39</sup>Owens v. Owens, 96 Va. 192, 195, 39 S. E. 72, 74 (1898).

<sup>40</sup>Id.; and see McLanahan v. McLanahan, 104 Tenn. 217, 56 S. W. 858, 861 (1900).

<sup>41</sup>Gardner v. Gardner, 2 Gray (Mass.) 434 (1854); Note (1921) 14 A. L. R. 931. It has been held in Pennsylvania that the doctrine of condonation has no application to cruelty or indignities. In Hollister v. Hollister, 6 Pa. 449 (1847) (divorce *a mensa et thoro*) the court so concluded by applying the doctrine of *expressio unius est exclusio alterius* to the statute, which expressly provided for condonation of adultery, but made no such provision for cruelty. If that is the law, where a husband is guilty of cruelty, but the wife continues to live with him and he reforms and treats her with kindness ever after she could still at any time leave him and obtain a divorce for his early cruelty. It is interesting to note that the later Pennsylvania cases do not give such a strict result to the Hollister case, but construe it as merely meaning that condonation does not apply to cruelty in the same sense that it does to adultery; i. e., that condonation is applied to cruelty "with this proper qualification, that any conduct, which, after a reconciliation of the parties, creates reasonable apprehension of personal violence, will revive the condoned cruelty." Augenstein v. Augenstein, 45 Pa. Super. 258, 264 (1911). And see Lacock v. Lacock, 74 Pa. Super. 378 (1920); Epstein v. Epstein, 93 Pa. Super. 398 (1928). In Moore v. Moore, 7 D. & C. 423 (Pa., 1926), the court goes into an exhaustive discussion of the question and concludes that the real rule of the Pennsylvania cases is that there may be a condonation of cruelty or indignities, though it is of course conditional. In all of these Pennsylvania cases there was misconduct after the cohabitation. If the situation suggested above should arise in Pennsylvania today it is felt that it would be held that the cruelty was condoned. The language in the early case of Hollister v. Hollister should not preclude the courts today from falling in line with the doctrine adhered to in all other jurisdictions. Contra to Hollister v. Hollister is Wright v. Wright, 6 Tex. 3 (1851). The Texas statute is the same as that of Pennsylvania, but the court refused to apply the *expressio unius* maxim, saying that as to cruelty "we may with propriety recur to the doctrines of the Canon law . . . on the subject" (at p. 21).

ty,<sup>42</sup> or misconduct not in itself sufficient to warrant a divorce, but creating a reasonable apprehension that the cruelty will be repeated, or simply showing lack of reformation by the condonee,<sup>43</sup> wipes out the effect of the condonation and revives, for the purposes of divorce, all misconduct occurring prior to the condonation. A second principle, particularly applicable to cruelty, is that condonation must be voluntary. Thus, if a wife is cruelly treated by her husband, and out of fear of physical injury, submits to his demands for intercourse such is not voluntary nor effective as a condonation.<sup>44</sup> The oft-stated rule that condonation will not be construed so strictly against the wife, on analysis will be seen to be merely a specific application of this principle, the wife being more subject to compulsion and being dependent upon her husband for protection and support.<sup>45</sup>

In the vast majority of cases where the defense of condonation has been pleaded to the libel alleging cruelty, cruelty or other mistreatment following the marital cohabitation has been shown and hence the defense held invalid.<sup>46</sup> Of the remainder, in some the alleged cohabitation is shown to have been not voluntary,<sup>47</sup> and in others the defense has been sustained where the marital cohabitation was long continued after the last instance of ill treatment.<sup>48</sup> But few cases, therefore, present the situation where there is but one or a few acts of intercourse after cruel treatment and persistent good conduct by the condonee thereafter. These we will consider.

In *Weber v. Weber*,<sup>49</sup> the husband being guilty of adultery, cruelty, indignities, and habitual drunkenness, his wife left him. She refused to return but ad-

<sup>42</sup>*Deusenberry v. Deusenberry*, 82 W. Va. 135, 95 S. E. 665 (1918); *Estel v. Estel*, 34 Okla. 305, 125 Pac. 455 (1912); Note (1921) 14 A. L. R. 939.

<sup>43</sup>*Jefferson v. Jefferson*, 168 Mass. 456, 47 N. E. 123 (1897); *Cochran v. Cochran*, 93 Minn. 284, 101 N. W. 179 (1904); *Young v. Young*, 323 Ill. 608, 154 N. E. 405 (1926); *Hilbert v. Hilbert*, 177 Atl. 914 (Md., 1935). Cf. *Abbot v. Abbot*, 192 Ill. 439, 61 N. E. 350 (1901). Compare the rule that condoned adultery is revived by conduct which looked adulterous: *Appar v. Appar*, 59 Atl. 230 (N. J. Ch., 1904).

<sup>44</sup>*Harnett v. Harnett*, 55 Iowa 45, 7 N. W. 394 (1880); *Wolverton v. Wolverton*, 163 Ind. 26, 71 N. E. 123 (1904); *Norman v. Norman*, 88 W. Va. 640, 107 S. E. 407 (1921).

<sup>45</sup>See *Hickman v. Hickman*, 188 Iowa 697, 176 N. W. 698 (1920); *Shirey v. Shirey*, 87 Ark. 175, 112 S. W. 369, 372 (1908). Actual force or even fear of physical injury need not be shown. Continued cohabitation impelled by fear for the well being of her children, by financial dependence upon her husband, by physical inability to leave due to illness, etc. may be sufficient to treat it as really not voluntary. See *Egidi v. Egidi*, 37 R. I. 481, 93 Atl. 908 (1915); *Saville v. Saville*, 103 Ore. 117, 203 Pac. 584 (1922).

<sup>46</sup>*Sisterhen v. Sisterhen*, 60 Iowa 301, 14 N. W. 333 (1882); *Davies v. Davies*, 55 Barb. (N. Y.) 130 (1869); *Tackaberry v. Tackaberry*, 101 Mich. 102, 59 N. W. 400 (1894); *Teal v. Teal*, 324 Ill. 207, 155 N. E. 28 (1926); and cases cited supra notes 42 and 43. Cf. *Reese v. Reese*, 23 Ala. 785 (1853) (facts showed cruelty continued until bill filed, but court speaks of no condonation rather than revival).

<sup>47</sup>Supra, notes 44 and 45.

<sup>48</sup>*Price v. Price*, 127 Ark. 506, 192 S. W. 893 (1917); and see *Davis v. Davis*, 206 S. W. 580 (Mo. App., 1918); *Root v. Root*, 164 Mich. 638, 130 N. W. 194, 195 (1911).

<sup>49</sup>195 Mo. App. 126, 189 S. W. 577 (1916).

mittedly slept with him two different nights. The court held that a divorce was properly granted to her on her cross bill, saying<sup>50</sup>

"Cohabitation offers strong evidence of such pardon . . . increasing in probative force with the fulness of knowledge of the offense committed and the length of time continued. In most cases where the cohabitation is long continued, it will be taken as conclusive evidence . . . . The nature of the conjugal offense has much to do with this question. In cases of adultery condonation from cohabitation is more nearly conclusive than in cases of cruelty or indignities. In *Wolverton v. Wolverton*, 163 Ind. 26, 35, 71 N. E. 123, 126, the court said, 'A distinction has been properly made between actions for divorce on account of conjugal infidelity and actions for divorce for cruelty, and it has been held by courts of other states that a condonation of extreme and repeated cruelty will not be inferred from a single act of sexual intercourse.'"<sup>51</sup>

This decision is considerably weakened, however, by the later language<sup>52</sup> of the court to the effect that, "If there had been a condonation he was the first to violate it. The wife was summoned into court on false charges made by him for the purpose of securing a divorce."<sup>53</sup> An early Tennessee case<sup>54</sup> was very similar in its facts and was decided in the same way, but in it, too, the court emphasized the fact that the husband in his libel maliciously accused her of adultery. The doctrine that one act of intercourse will not condone cruelty is supported by several other cases.<sup>55</sup> Op-

<sup>50</sup>*Id.*, 189 S. W. at 578.

<sup>51</sup>The language quoted from the *Wolverton* case was merely dictum, for the decree there was based upon the fact that the intercourse was not voluntary; and of the five other cases cited in *Weber v. Weber* for the doctrine there stated none support it.

<sup>52</sup>189 S. W. at 579.

<sup>53</sup>That false and malicious charges made by a husband in his bill for divorce against the wife is cruelty see Note (1927) 51 A. L. R. 1191.

<sup>54</sup>*Thomas v. Thomas*, 2 Cold. 124, 42 Tenn. 92 (1865).

<sup>55</sup>*Cox v. Cox*, 52 Hun 613, 5 N. Y. S. 367 (1889); *Doe v. Doe*, 52 Hun 405, 5 N. Y. S. 514 (1889); and see *Beebe v. Beebe*, 174 App. Div. 408, 160 N. Y. S. 967 (1916); *Diedrich v. Diedrich*, 68 Neb. 534, 94 N. W. 536 (1903); *Phillips v. Phillips*, 1 Ill. App. 245 (1878). In all of these there was evidence of subsequent mistreatment, or the case was decided on other grounds, relegating the statement of the rule to the category of dicta. This is the rule in California: *Hawkins v. Hawkins*, 286 Pac. 747 (Cal., 1930), but the California statute specifically requires a "restoration to all marital rights," plus an express agreement, for the condonation of cruelty. In the case of *Quient v. Quient*, 105 Wash. 315, 177 Pac. 779 (1919) it was held that continued cohabitation until the institution of the action would not condone cruelty. This is tantamount to holding that condonation is not applicable at all to cruelty, though the court indicates that the husband's treatment of her never showed any signs of improving. In an earlier case, *Johnsen v. Johnsen*, 78 Wash. 423, 139 Pac. 189 (1914) cohabitation for over a year was held to have condoned cruelty.

posed to these are a few cases holding that one act of sexual intercourse will condone cruelty the same as adultery.<sup>56</sup>

Though the majority of the cases which have touched upon this problem seem to support the rule as stated in *Weber v. Weber* it is difficult to justify this view. True, there are differences between the offense of adultery and that of cruelty and as a result, coerced cohabitation or revival of prior offenses will be found more often where the latter offense is present. The differences, however, merely have an effect upon the result obtained by applying the general rule of condonation and do not call for a different rule for the different offenses. The courts seem to fear in these cases that a wife who is patient will be denied relief because of her forbearance; but to require a long continued cohabitation after the mistreatment has ceased is not needed to avoid this result anymore than it would be necessary to abolish condonation altogether in the case of cruelty. If the wife voluntarily and freely cohabits with her husband after he has treated her cruelly and he thereafter treats her with kindness she has nothing to fear and the law need be no more solicitous toward her than toward a wife who does likewise after her husband's known adultery. She has elected to go on with the marriage in the hope that he will reform and her hope has been realized. If, on the other hand, he thereafter repeats his misconduct, so that she has reason to fear physical injury or further indignities to her person, she will be protected from that by application of the principle that condonation is conditional. The rule stated in these cases seems to be the result of a failure to appreciate the significance and effectiveness of the two subsidiary principles in accomplishing a just result. The rule also has the disadvantage of leaving open the question as to how much cohabitation is necessary to condone cruelty.

From this analysis of the actual decisions and consideration of the human interests involved, the following may be hazarded as a fair and correct exposition of what constitutes condonation: When a spouse is guilty of adultery, or of cruelty or indignities sufficient to constitute a ground for divorce, then if, and only if, the injured spouse, with knowledge thereof, voluntarily has sexual intercourse with the guilty one, such is condonation of the marital offense or offenses.

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<sup>56</sup>*Rushmore v. Rushmore*, 168 Atl. 614 (N. J., 1933), but see *Rushmore v. Rushmore*, 12 N. J. Misc. 575, 174 Atl. 469 (1934); Cf. *Clague v. Clague*, 46 Minn. 461, 49 N. W. 198 (1891) (lived in same room a few days); see *Holsworth v. Holsworth*, 252 Mass. 133, 147 N. E. 578, 579 (1925); *Dunn v. Dunn*, 26 Neb. 136, 42 N. W. 279, 281 (1889); *Shirey v. Shirey*, 87 Ark. 175, 112 S. W. 369, 372 (1908).