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CONDONATION.

THE definition of condonation is well and fully given in the late case of *Keats* v. *Keats*, 1859, 1 Swaby & Tristram 334, and we propose to show that the decision of the Judge Ordinary (Sir CRESSWELL CRESSWELL), affirmed by the full bench (Lord Chancellor CHELMSFORD, WIGHTMAN and CRESSWELL, Js.) is sustained by all the adjudications of the English and American courts on the subject, and is in conflict, if at all, only with a few loose dicta of the civilians copied into the text writers, and sometimes carelessly quoted by judges when the facts of the cases before them did not render an examination as to their correctness necessary.

It was attempted in that case to make out a case of condonation by express words of forgiveness with respect to which there was no dispute.

The Judge Ordinary, in charging the jury, after referring to the fact that the Ecclesiastical Reports did not contain any precise definition of what was meant by the word "condonation" in the ecclesiastical courts, says that he has come to the conclusion that it means "*a blotting out of the offence imputed so as to restore the offending party to the same position he or she occupied before the offence was committed.*"

The jury found that Mr. Keats had not condoned the adultery.

On motion for a new trial, for misdirection on this point, Lord

Chancellor CHELMSFORD, giving the opinion of the whole court, denying the motion, says that there can be no condonation "*which is not followed by conjugal cohabitation* (*i. e.* not necessarily *sexual* intercourse, which in certain cases may be impossible,—but a restitution of marital rights—a living together as man and wife); and he further says that "*the forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation, and that this must be shown by the reinstatement of the wife in her former position, which renders proof of conjugal cohabitation or the restitution of conjugal rights necessary.*"

In *Ratcliff v. Ratcliff*, 1 Swaby & Tr. 423, Lord CAMPBELL, C. J., says, conforming to the decision in *Keats* v. *Keats*: "The plea of condonation entirely fails as the doctrine on this subject is now settled, for whatever Christian forgiveness the petitioner may have been ready to extend to his wife after her fall, it is clear he never intended, nor gave her nor any one else reason to believe he intended, to live with her again as his wife."

Mr. Bishop, in the last edition of his work on "Marriage and Divorce," comments upon the case of *Keats* v. *Keats* with apparent approval, seeming, however, to be of the opinion that the ideas intended to be conveyed by the Judge Ordinary were adequately enough expressed in previous definitions of the term, without resorting to new ones. Vol. 2, § 34 (1864), he says: "The first instance in which a definition of condonation is laid down in the English books, occurs in the report of a case tried in 1858. There the Judge Ordinary instructed the jury that condonation means 'a blotting out of the offence imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed.' The conditional nature of the condonation was not presented by the facts of the case; if it had been, the definition would probably have been qualified by the insertion of the word 'conditional' before 'blotting.' The judge considered that condonation means something more than mere forgiveness; it implies a reinstatement of the wife in her former matrimonial position towards her husband. On a motion to set aside the verdict of the jury, the question of the correctness of this definition came before the whole court, and the full bench of judges concurred in holding it to be correct. Said Lord Chancellor CHELMSFORD: 'I think that the forgiveness which is

to take away the husband's right to a divorce must not fall short of a reconciliation, and that this must be shown by the reinstatement of the wife in her former position, which renders proof of conjugal cohabitation or the restitution of conjugal rights necessary.' Without undertaking to criticise this definition, and without seeing any particular occasion to depart from the terms used in our last section as descriptive of the condoning act," the author would suggest as a fuller and more exact definition, the following: "Condonation is the *remission of a matrimonial offence* known to the remitting party to have been committed by the other, on the condition subsequent, that ever afterward the party remitting shall be treated by the other with conjugal kindness." [This differs from the definition given in § 33, 354, and in the previous editions of the work, in the omission of the word "forgiveness" (from the careless use of which most of the inaccuracy has arisen), and the use in its stead of the word "remission," equivalent in its effects to the words "blotting out," and implying the restoration of the wife to her former position.]

The same view of condonation as that expressed in *Keats* v. *Keats*, is taken by Dr. LUSHINGTON, in *Campbell* v. *Campbell* (1857), 3 Jurist N. S. 846. He says: "*Condonation is connubial intercourse, with full knowledge of all the facts.* Innocency and condonation are inconsistent pleas, still they may be pleaded. But the case then resolves itself into this: 'You cannot prove my guilt, but if you can, you have pardoned me.'"

The foregoing are the latest decisions upon the point,—made upon the fullest consideration,—to the effect that there can be no condonation *per verba*, unless it be followed by matrimonial cohabitation and a restoration of conjugal rights. (Whether sexual intercourse is necessary or not, has not been decided,—probably it would be, except in cases where from the age of the parties or physical inability it is impossible.)

There is no case in the books either in England or America in which condonation has been allowed as a bar without sexual intercourse or matrimonial cohabitation, and the dicta of the judges quoting the civilians, that the condonation may be expressed in words *if they are followed by* "*reconciliation*," do not say what meaning they attach to the word "reconciliation," or whether it does not imply or amount to "matrimonial cohabitation."

In *Snow* v. *Snow* (1842), 2 Notes Cases 1, 16, per Dr. LUSH.

INGTON: "Condonation, though a technical term, clearly imposes the forgiveness of an offence done, and is stated by Sanchez and some of the decisions in this court (*Orme* v. *Orme*, 2 Add. 382; *Dunn* v. *Dunn*, 2 Phil. 9), to be of two kinds: the one *remissio expressa,* by express words of forgiveness, *and succeeding reconciliation,*—the other *remissio tacita,* and the *remissio tacita* includes a return to connubial intercourse."

Kent says, vol. 2, p. 73 (101): "So if the injured party subsequently to the adultery cohabits with the other, *or is otherwise reconciled to the other,* after just grounds of belief in the fact, it is in judgment of law a remission of the offence and a bar to the divorce."

By the statute of New York, the court may refuse to decree a divorce, though the fact of adultery be admitted,—if the offence has been forgiven and the forgiveness proved by express proof or by voluntary cohabitation of the parties with knowledge of the fact.

The word "forgiveness" in the statute would, we presume, be construed in the light of judicial decisions as the equivalent of "condonation:" *Wood* v. *Wood,* 2 Paige 108, Reviser's Notes.

"*Condonation is not to be inferred from the husband and wife being in the same house together, when they have separate beds, and no sexual intercourse:*" 2 Bishop, § 46.

"It is not necessary that the husband should instantly close his doors upon an offending, and it may be, a repentant wife; recollecting her former innocence, he may indulge at least in some feelings of pity for her degraded situation, and until a fit retirement is provided allow her the protection of his roof, but not the solace of his bed;" but he thinks, "condonation may *possibly* be inferred, more particularly against the husband, if within a reasonable time the parties do not entirely separate:" Poynter, Mar. & Div. p. 236.

"The general *presumption* is that married persons living in the same house do live on terms of matrimonial cohabitation, but this presumption may be rebutted by the circumstances of the particular case:" Bishop, § 46.

Greenleaf Ev., vol. 2, § 54, says: "Where parties have separate beds, there must, in order to show condonation, be some evi dence of matrimonial connection beyond mere dwelling under the same roof."

Durant v. *Durant*, Hag. 1 Ecc. R. 733, per Dr. LUSHINGTON (in his argument as counsel): "Condonation is where a husband or wife cognisant of the adultery of the other, is voluntarily reconciled."

Ayliffe's Panergon 226: "Mere residence in the house without actual conjugal cohabitation is no condonation."

"Unde si," says Sanchez, "essent in eadem domo, non se alloquentes divisique a mensa et lecto, quasi duo vicini extranei, non censeretur condonatum adulterium:" Sanchez de Mat. Lib. 10 disp. 14, § 17.

And so in *D'Aguilar* v. *D'Aguilar*, 1 Hag. Ecc. R. Sup. 782, per Lord STOWELL: "The parties returned to live together,—not voluntarily on her part, and I cannot consider her acquiescence as amounting to a complete forgiveness. It was almost an extorted consent. There was no return to connubial cohabitation; for though she slept in the house for a few nights, it was in a separate bed, and though it is suggested that the separate bed was not aired, yet the contrary is proved."

In *Dance* v. *Dance*, 1 Hag. Ecc. R. 794, n., the wife remained in the same house with the husband, occupying a separate bed, however, aware that an incestuous connection with her sister was going on.

The wife's permitting the husband, at the urgent request of himself and mutual friends, to occupy for more than a year a separate bed-room in her house, and to dine with her, does not amount to a condonation: *Westmeath* v. *Westmeath*, 2 Hag. Ecc. R., Sup. 1, 118.

The following cases also have a bearing to show that the *mere dwelling in the same house* is not a restoration of conjugal rights, —a restoration *of the position of wife*:—

"A husband who has already deserted his wife cannot so take off the effect of the desertion as to prevent her right to a divorce accruing by offering to support her either in his own house or elsewhere. 'The offer,' said the court, '*was not to live with her in the relation of husband and wife; and as she was by the nature and terms of the marriage contract entitled to stand in that relation to him, she was not bound to accept the offer to stand in any other relation*:'" 1 Bishop, § 779; *Fishli* v. *Fishli*, 2 Littell (Ky.) 337; *Moss* v. *Moss*, 2 Iredell (N. C.) 55.

And the refusal of a husband or wife to dwell with the other

party to the marriage as husband or wife, is a desertion. *The withdrawal from the bed is a sufficient separation to sustain the suit for desertion:* 1 Bishop, §§ 778–781, 782, 799.

"The question, as one of principle, is not without difficulty. Still, if a party to the marriage should refuse to the other whatever lawfully belongs in marriage alone,—refuse, not from considerations of health, not from any other temporary considerations, but from alienated affections, or from perverted religious notions, or from any other cause resting permanently in the will, and not in physical inability,—the refusing party would thereby voluntarily withdraw from whatever the relation of marriage distinguished from any other relation existing between human beings is understood to imply, therefore he should be holden to desert thereby the other:" Bishop, § 782.

And in *Dillon* v. *Dillon*, 3 Curt. Ecc. 86, cited Bishop, vol. 2, § 42, Dr. LUSHINGTON says: "Now I have always understood the legal principle to be this, that when a husband has received such information respecting his wife's guilt, and can place such reliance upon the truth of it as to act upon it, *although he is not bound to remove his wife out of his house, he ought to cease marital cohabitation with her.*"

In *Wright* v. *Wright* (1851), 6 Texas 22, it is said: "Their living in the same house raises a presumption of matrimonial cohabitation; but this may be repelled by circumstances. In this case a witness testifies that they had not slept together for years, and this raises the counter-presumption that during this temporary reconciliation they were not occupants of the same bed. A return to live in the same house with the husband, but without connubial cohabitation, does not operate so complete a forgiveness as when there was a renewal of conjugal society or embraces."

In the case of the wife, even conjugal cohabitation, with a full knowledge of the crime, and without fraud or force, is not conclusive of condonation, but each case depends on its own circumstances: 2 Bishop Mar. and Div. § 52; *D'Aguilar* v. *D'Aguilar*, supra.

In *Popkin* v. *Popkin*, 1 Hag. Ecc. R. 764, where the cohabitation lasted from September to January 6th,—held not to be a bar to wife.

In *Curtis* v. *Curtis*, 1 Swab. & T. 192, 200, where the wife

left her native country with her husband and children for the purpose of avoiding a separation from the children, and preventing their being left unprotected and alone in the hands of a cruel father, the continued cohabitation was held not to amount to a condonation.

In *Whispell* v. *Whispell*, (1848), 4 Barbour 217, 221, where a divorce was granted to the wife, although there had been cohabitation, PARKER, J., says: "If condonation may be inferred from cohabitation, the presumption may be rebutted by the accompanying circumstances."

A late Alabama case holds that a wife complaining of a gross act of cruelty was not barred, though she had continued the cohabitation two years: *Reese* v. *Reese*, 23 Ala. 785 (cited) 2 Bishop, § 52. And see *Gardner* v. *Gardner*, 2 Gray (Mass.) 434, where the wife occupied same room and bed for a night after the act of cruelty, held no condonation.

Quincy v. *Quincy*, 10 New Hamp. 272, is a valuable case, as showing the amount and the character of testimony requisite to establish condonation.

In this case the husband, after full knowledge of his wife's guilt, passed several days in the house with her,—told her several times that if she had exhibited repentance he should have tried to forgive and forget it,—stayed with her all night once when she was ill, lying down on one side of the bed during the night,—held no condonation. Per PARKER, J.: "The evidence, taken together, proves him to be a man of kind feelings, who retained considerable affection for an erring wife, but fails to make out a case of condonation. *A mere promise of future forgiveness*, or an unaccepted invitation to the guilty party to return to the matrimonial bed, with an offer of condonation on this event, amounts to no more than a willingness to condone, or an overture not binding until accepted, and subject to withdrawal like any other offer; it is not condonation, it does not bar the remedy."

2 Bishop, § 47 (disapproving of case of *Christianberry* v. *Christianberry*, 3 Black. (Ia.) 202, which stands alone as holding a contrary doctrine); *Popkin* v. *Popkin*, 1 Hag. Ecc. 766; *Ferrers* v. *Ferrers*, Id. 781, note; *Peacock* v. *Peacock*, 1 Swab. & T. 183; *Cook* v. *Cook*, 3 Id. 137; *Quarles* v. *Quarles*, 19 Ala. 363.

"The contrary doctrine is so foreign to the spirit of all just