August 2015

An Examination of the Condonation Doctrine

Marvin M. Moore

Please take a moment to share how this work helps you through this survey. Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: http://ideaexchange.uakron.edu/akronlawreview

Part of the Family Law Commons

Recommended Citation
Available at: http://ideaexchange.uakron.edu/akronlawreview/vol2/iss2/1

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.
AN EXAMINATION OF THE CONDONATION DOCTRINE

by Marvin M. Moore*

I. Introduction

U NDER AMERICAN AND ENGLISH LAW a spouse who has once condoned a marital transgression by his mate is thereafter barred from using that transgression as grounds for divorce. 1 All of the common grounds for divorce, including adultery, cruelty, habitual drunkenness, and desertion, are subject to the condonation principle. 2 The doctrine had its origin in the canon law of the Roman Catholic Church, 3 where it was applied by the ecclesiastical courts in adjudicating petitions for divorce (a

* Associate Professor of Law, University of Akron College of Law.

1 A common, although general, definition of condonation is "the forgiveness of an antecedent matrimonial offense on condition that it shall not be repeated, and the offender shall thereafter treat the forgiving party with conjugal kindness." 27A C.J.S. Divorce § 59 (1959). Pobst v. Pobst, 317 S.W. 2d 655 (Mo. 1958) and Henning v. Henning, 89 Ariz. 330, 362 P. 2d 124 (1961) give a definition virtually identical with this.


2 However, the courts—sometimes under statutory compulsion—invoke the doctrine less readily against petitioners relying upon so-called "continuing" grounds of divorce (such as cruelty and personal indignities) than they do against plaintiffs aggrieved by transgressions of a non-continuing character (such as adultery). See Part II B infra.

3 Annot., 32 A.L.R. 2d 107, 112 (1953) and Collins v. Collins (1884) 9 A.C. 205.
mensa et thoro)\(^4\) grounded on cruelty or adultery.\(^5\) The principle survived the changes caused by the Reformation to subsist as part of English ecclesiastical law,\(^6\) was brought to America by the English colonists,\(^7\) and was received by the American courts (none of which were ecclesiastical tribunals)\(^8\) as a part of the common law.\(^9\) Today over half the states have statutes providing for the application of condonation,\(^10\) and the doctrine operates as a common law rule in the remaining jurisdictions.\(^11\)

It appears that the ecclesiastical courts had two reasons—one theoretical and one policy-oriented—for devising and applying the rule. First, the canonists regarded divorce (a mensa et thoro) as a remedy allowed an innocent spouse who has been wronged, and they viewed the divorce decree as both a vindication of the petitioner-spouse and a condemnation of the defendant.\(^12\) (This view should be contrasted with the modern socio-logical concept of divorce as being simply a formal recognition that a marriage has ceased to function.)\(^13\) The canonists reasoned, logically enough, that if the aggrieved spouse had once forgiven his errant mate for particular misconduct, it would be

\(^{4}\) The divorce a mensa et thoro (legal separation) was the only kind of divorce obtainable in the ecclesiastical courts, for the Catholic Church did not recognize an absolute divorce under any circumstances. 1 W. Blackstone, Commentaries on the Laws of England 440 (21st ed. 1857) and Note, Divorce and Recrimination, 13 Ore. L. Rev. 335, 339 (1924).


\(^{7}\) J. Bishop, Bishop on Marriage and Divorce 54-56 (12th ed. 1881).

\(^{8}\) Id. at §§117 and 120. Also see Cotter v. Cotter, 225 Fed. 471 (C.C.A. Alaska 1915).


\(^{10}\) Statutory citations are given at note 101 infra.


By the weight of authority condonation is an affirmative defense which must be pleaded. 1 W. Nelson, Nelson on Divorce and Annulment § 11.12 (1945). Nevertheless, a number of cases have held that the court may properly deny a divorce if the evidence discloses condonation, even though the doctrine has not been pleaded. Among such decisions are Buck v. Buck, 205 Ark. 918, 171 S.W. 2d 939 (1943); Doose v. Doose, 198 Ill. App. 387 (1923); and Sewell v. Sewell, 160 Neb. 173, 69 N.W. 2d 549 (1955).


\(^{13}\) See Alexander, Legal Science and the Social Sciences: The Family Court, 21 Mo. L. Rev. 105 (1956).
unfair to allow the former to subsequently complain of the pardoned transgressions (in the absence of later misdeeds serving to revive the initial misconduct). 14 Secondly, the ecclesiastics wished to hold divorces to a minimum, 15 and they believed that the doctrine would serve this policy by creating a bar to some divorces that would otherwise have to be granted. 16

It is apparent from the foregoing that the condonation principle has achieved both widespread acceptance and historical respectability. Nevertheless, it is submitted that an examination of the doctrine will disclose that its merits are open to serious question. The purpose of this article is to provide such an examination. The material comprising this study is (excluding the Introduction and Conclusion) divided into five principal sections: (1) the elements of condonation, including knowledge and (express or implied) forgiveness; (2) the revival doctrine; (3) the present status of condonation in the United States and England; (4) objections to the bar; and (5) possible reforms.

II. Elements of Condonation

A. Knowledge of the Offense

(1) Extent of knowledge required to render doctrine applicable:

An essential ingredient of condonation is knowledge of the infraction alleged to have been condoned. 17 Although this re-

14 MacDougall, supra note 12, at 296. One can argue, plausibly enough, that if a person cannot revoke an inter vivos gift of personal property (a principle that has long been recognized, R. Brown, The Law of Personal Property, § 37 (2d ed. 1955)) he should not be allowed to revoke a gift of forgiveness.


There is considerable evidence that today condonation, by discouraging efforts at reconciliation, tends to promote divorce, instead of minimizing the phenomenon. Mayer, Suspension of Condonation Defense Increases Reconciliations, 28 Tex. Bar J. 737 (1965). If the doctrine had this effect in the past, the ecclesiastics apparently were not aware of the fact.

17 Dase v. Dase, 78 Ohio L. Abs. 144, 152 N.E. 2d 20 (1958); Cunningham v. Cunningham, 278 Ala. 90, 176 So. 2d 22 (1965); and Rosenthal v. Rosenthal, 311 S.W. 2d 294 (Tex. 1958). Quoting from the Dase decision: "Condonation is a voluntary forgiveness of a matrimonial offense by an aggrieved spouse; for it to be voluntary, there must be knowledge of the offense. . . ." Page 22 of 152 N.E. 2d.

Twenty-three of the twenty-six states with statutes providing for the application of condonation expressly require knowledge in their code pro-

(Continued on next page)
quirement is applicable regardless of what grounds are relied upon for divorce, it seldom presents a problem except when the suit is grounded upon adultery; for when the transgression complained of is cruelty, indignities, or desertion, the aggrieved spouse will necessarily have been cognizant of the misbehavior.

Although it is well established that knowledge is a requisite of condonation, the degree of knowledge necessary to satisfy this requirement has been questioned. Certainly, knowledge does not embrace mere suspicion, but neither does it require absolute certainty. The gradations of knowledge demanded by the decisions range from "full knowledge" at one end of the spectrum to "probable knowledge" at the other, with a number of decisions adopting a middle course and demanding "reasonable knowledge." A case in which the "full knowledge" standard was applied is Day v. Day. There the husband sought a divorce on the grounds of adultery and extreme cruelty, and defendant cross-petitioned for the same relief on the ground of extreme cruelty. The trial court denied both parties a divorce, ruling that plaintiff had condoned defendant's transgressions and that defendant's cross-petition was barred by the recrimination doctrine. On appeal plaintiff contended that though he forgave defendant and cohabited with her for nearly two years after learning of her sexual relations with one H. C., plaintiff's conduct did not amount to condonation, since he long believed that defendant yielded to H. C. against her will. Speaking to this issue, the Supreme Court of Kansas declared:

(Continued from preceding page)


18 Reader, Knowledge or Belief as a Prerequisite to Condonation in the Law of Divorce, 21 Minn. L. Rev. 408, 409 (1936).
21 71 Kan. 385, 80 Pac. 974 (1905).
22 The prevailing view in the United States today is that a misdeed which has been condoned cannot be used for recrimination purposes. 24 Am. Jur. 2d Divorce and Separation § 232 (1966). However, Kansas apparently follows the old ecclesiastical rule, which permitted a condoned offense to be used as a recriminatory defense. See Beeby v. Beeby, 1 Hagg. Ecc. 789, 162 Eng. Rep. 755 (1799).
“An essential element of condonation is a full knowledge by the injured spouse of the marital misconduct of the offender. If the plaintiff had only an unconfirmed suspicion that his wife had gone astray, or if he believed that the numerous acts of adultery brought to his attention were without her consent, his continuance of the marital relation would not amount to an effective forgiveness or condonation.”

A case illustrating use of the “probable knowledge” test is Connelly v. Connelly, an action brought by the husband and grounded on intolerable indignities. At the trial it was disclosed that plaintiff had continued conjugal cohabitation with defendant after becoming apprised of evidence suggesting that the latter was conducting a serious flirtation, if not an illicit affair, with one P. M. The trial judge found that defendant was guilty of the indiscretions charged and that her conduct had created a public scandal, but it nevertheless dismissed plaintiff’s petition, ruling that plaintiff had debarred himself from relief by condoning defendant’s misbehavior. Discussing this issue, the St. Louis Court of Appeals said:

“(T)he doctrine of condonation is usually . . . stated to be that cohabitation after probable knowledge of the offense, is a presumptive remission of it . . . Circumstances of mere suspicion are not adequate. . . .”

23 Page 975 of 80 Pac. Since the evidence presented made it apparent that plaintiff could not possibly have failed to realize defendant’s guilt, the Supreme Court of Kansas affirmed the judgment of the trial court. Accord, Turton v. Turton, 3 Hagg. Ecc. 338, 162 Eng. Rep. 1178 (1830); Zuerter v. Zuerter, 238 Iowa 402, 27 N.W. 2d 260 (1947); and Stone v. Stone, 378 S.W. 2d 824 (Mo. 1964). In the latter case the St. Louis Court of Appeals held that the husband did not condone his wife’s adultery, because he did not have “full knowledge” of it. Quoting from the opinion: “The term ‘condonation,’ as used in divorce law, means forgiveness and pardon after full knowledge of past wrong. . . . (I)n our judgment plaintiff did not become aware of the full extent of defendant’s misconduct . . . until a few days before the final separation, and there was no condonation of this marital offense.” Pages 838-39 of 378 S.W. 2d.

24 98 Mo. App. 95, 71 S.W. 1111 (1903).

25 Page 1113 of 71 S.W. Although recognizing that “probable knowledge” is something less than “absolute knowledge” (and presumably, than “full knowledge”), the Court of Appeals concluded that plaintiff had not even acquired the former until after the parties’ separation, and it reversed. Accord, Anonymous v. Anonymous, 4 Mass. 147 (1803) and Delliber v. Delliber, 9 Conn. 233 (1832). In the latter case the Connecticut Supreme Court of Errors, invoking the condonation doctrine, dismissed the divorce petition of a wife who had voluntarily spent three nights in prison with her husband, knowing that he had been convicted of the adultery now alleged as divorce grounds. Said the court:

(Continued on next page)
Quincey v. Quincey\(^2^6\) appears to be the leading American case to apply the "reasonable knowledge" standard. There the husband, a mariner, instituted a divorce suit grounded on adultery, charging that defendant had been unfaithful while plaintiff was at sea. Defendant did not deny the adultery, but argued that plaintiff had condoned the offense by living with defendant (as husband and wife) for several days after gaining knowledge of facts strongly suggestive of her disloyalty. Addressing itself to this defense, the New Hampshire Superior Court of Judicature declared:

"If, having reasonable knowledge of the infidelity of his wife, and of his power to make proof of it, the husband, notwithstanding, cohabits with her as a wife, this is an implied condonation and bars him of any right to avail himself of the . . . adultery as a cause of divorce. . . . It could not be contended that a confession would not furnish reasonable knowledge of her guilt." \(^2^7\)

Since the terms "full knowledge," "reasonable knowledge," and "probable knowledge" have different dictionary meanings, one would suppose that a jurisdiction which uses the last-named standard will more readily invoke the condonation bar against a divorce-plaintiff than will a state which employs the first-mentioned test. In practice, however, no such pattern is discernible in the reported cases.\(^2^8\)

(Continued from preceding page)

"It is a rule that the party seeking a divorce must have probable knowledge of the crime committed, when cohabitation is indulged, to lay a foundation for a pardon. . . . The knowledge need not arise from vision of the fact, nor from the confession of the accused. It is sufficient that she knew that he had been convicted." Page 234 of 9 Conn. 26 10 N.H. 272 (1839).

27 Page 274 of 10 N.H. Since it appeared that plaintiff had refused to cohabit with defendant after becoming informed of the most incriminating evidence against her, and since his earlier suspicions were based upon evidence too insubstantial to provide him with reasonable knowledge of her infidelity, the court held that there was no condonation and that plaintiff was entitled to a divorce. Accord, Melinn v. Melinn, 329 Mich. 96, 44 N.W. 2d 886 (1950); Greims v. Greims, 80 N.J. Eq. 233, 83 Atl. 1001 (1912); and Dunn v. Dunn, 2 Phill. Ecc. 403, 161 Eng. Rep. 1182 (1817). In the Melinn case the principal question in issue was whether the plaintiff's recriminatory adultery had been condoned. Concluding that it had not been condoned, the Supreme Court of Michigan said:

"(I)t is sufficient as a basis for a condonation that the non-offending spouse had such knowledge as would satisfy a reasonably prudent person that the offense had been committed." Page 888 of 44 N.W. 2d.

28 A reading of the condonation cases listed in the Fifth, Sixth, and Seventh Decennial Digests discloses that the States of Kansas and Iowa, which em-
EXAMINATION OF CONDONATION DOCTRINE

The degree of knowledge formally required by a given jurisdiction appears to have much less bearing on a given decision than does the court's (or jury's) judgment on whether the plaintiff believed the evidence—whether extensive or tenuous—of his spouse's misconduct.29 In general the cases seem to support the following observation:

"It is the acceptance [by plaintiff] of the information as true or the discarding of it as unworthy of belief, in other words the belief in guilt or innocence, that is controlling. . . . (D)espite the judicial language, the motivating principle of the cases . . . is that belief in guilt is a condition precedent to the condonation of a marital offense." 30

That the court should regard a belief test as preferable to a quantum-of-knowledge test is understandable. One cannot pardon a transgression unless he believes that one has been committed. One cannot forgive his spouse unless he believes that the latter is guilty of some misdeed. Certainly the facts of which the injured spouse was apprised—i.e., the extent of his knowledge—have a bearing upon what he probably believed, but it would seem that the ultimate determinant should be his subjective belief, not the completeness of his knowledge.

(Continued from preceding page)

ploy the "full knowledge" test are not perceptibly slower to invoke the bar of condonation than are the jurisdictions of Connecticut and Missouri, which use the "probable knowledge" standard.

29 Occasionally a court has expressly stated that it considers the plaintiff's belief to be the decisive issue, as in the following three cases:

"In order to establish condonation, it is not enough to prove that the husband took his wife back after certain facts had come to his knowledge . . . tending to prove her adultery; it is necessary to prove that the husband took his wife back . . . believing her to be guilty. If the evidence leads the court to the conclusion that the husband did not thoroughly believe that his wife had been guilty, . . . condonation is not established." Ellis v. Ellis, 4 S.W. and Tr. 154, 164 Eng. Rep. 1475 (1865).

"But the true import of the rule, in my opinion, is that the cohabitation of the husband, after the commission of the offense, and after he believes, on probable evidence, the guilt of his wife, is conclusive evidence of the remission . . . Without that belief he cannot have knowledge of the crime; for he may have received the information without giving it credit." Anonymous v. Anonymous, 4 Mass. 147 (1809).

"Knowledge of a spouse's adultery required to establish condonance . . . exists when there is either actual [apparently visual] knowledge or a belief that the offense has been committed; and the existence of such belief in libellant's mind is a question to be determined on the basis of credible testimony." Shumaker v. Shumaker, 50 Lanc. Rev. 431 (Pa. 1955).

30 Reader, supra note 18, at 415.
(2) Means of proving case in court:

There is substantial treatise authority, supported by considerable dicta in the cases, that a plaintiff's knowledge (or belief) will not be deemed adequate to activate the condonation rule unless he had the means of proving his mate's misconduct.\(^{31}\) Declares Corpus Juris Secundum:

"(A)lthough the innocent spouse entertains a suspicion or conviction of the other's infidelity, a continuance of the marital cohabitation is not condonation, unless he has the means of proving the offense. . . ."\(^{32}\)

And states the Supreme Court of Florida in *Von Funk v. Von Funk*:\(^{33}\)

"(M)arital infidelity is only to be regarded as condoned where there is a definite continuation of cohabitation after evidence sufficient to legally establish the offense has come to the knowledge of the condoning party."

Notwithstanding the comparative frequency with which this proposition is encountered (mostly in the older cases), the writer has been unable to find one decision that actually rested on it—that is, one case in which a spouse who continued to cohabit after obtaining knowledge of his mate's transgressions was nevertheless granted a divorce because he did not have the means of establishing defendant's guilt in court. Furthermore, a search has unearthed no case decided within the last twenty years that even contains dicta supporting the proposition. Whether the alleged rule is devoid of all life is questionable, but one can safely assert that its pulse beat is exceedingly faint.


"It has been held that the innocent spouse must have the means of proving such misconduct before he may be held to have condoned the offense; otherwise the aggrieved spouse is placed in a dilemma where he cannot prove the offender's guilt but will be charged with desertion if he acts on his information by leaving the offender."


\(^{32}\) 27 A.C.J.S. *Divorce* § 60 (1959).

\(^{33}\) 120 Fla. 103, 162 So. 145, 147 (1935).
(3) **Condonation of known misdeed as embracing unknown offenses:**

A number of cases have presented the question of whether the pardoning of one offense constitutes condonation of a like or comparable offense of which the aggrieved spouse had no knowledge at the time. The courts have usually answered this question in the negative.34

An illustrative case is *McKee v. McKee.*35 Here the plaintiff, a naval officer, sought a divorce for adultery committed with one G. R. on Labor Day of 1963 and New Year's Day of 1964. Defendant argued that plaintiff had condoned her unfaithfulness by expressly forgiving her (and afterwards copulating with her) for committing adultery with one R. P. on January 19, 1964. However, the evidence revealed that when plaintiff condoned the January 19 transgression he had not yet learned of the other affairs and that he promptly left the defendant upon being informed of them. The Virginia Supreme Court of Appeals affirmed a decree granting plaintiff a divorce, saying:

"Where a defendant is guilty of several matrimonial offenses, and the plaintiff, when he forgives the defendant, knows of one of them but not of the others, the condonation operates as to the known offense; but because of the lack of knowledge the forgiveness does not bar an action based on the others."36

---

34 Alexandre v. Alexandre, 2 P. and D. 164 (1870); Davis v. Davis, 145 Pa. Super. 473, 21 A. 2d 419 (1941); Wetenkamp v. Wetenkamp, 140 Neb. 392, 299 N.W. 491 (1941); and Shackleton v. Shackleton, 48 N.J. Eq. 364, 21 Atl. 935 (1891). Quoting from the last-named case:

"The doctrine that the pardon implied from sexual intercourse shall extend only to offenses known to the pardoning party when the intercourse occurs is no less a dictate of sound reason than of justice. Willingness to forgive a single offense, or even a series of offenses committed under circumstances of strong temptation, would not give the least support to a presumption that the injured party, if he knew the whole truth, would forgive a long course of profligacy." Page 936 of 21 Atl.

Declares Rayden: "Condonation of an offense which is known will not operate as a condonation of other prior offenses not known; though neither will the fact that there exist other offenses not known preclude the condonation of the known offenses from being effective." L. Rayden, *Rayden's Practice and Law of Divorce* 286 (10th ed. 1967).


36 Page 166 of 145 S.E. 2d. Accord, Uhlmann v. Uhlmann, 17 Abb. (N.Y.) 236, 237 (1885), where the court observed: "A man might forgive a wife sinning once, and yet would abhor to dwell with a Messalina or Theodora."

However, where the offending spouse has been guilty of numerous transgressions of an equally culpable character and the aggrieved spouse (Continued on next page)
B. Forgiveness. Express or Implied

(1) Whether the forgiveness requirement may be satisfied by words alone:

It is generally (if not universally)\(^{37}\) accepted that forgiveness is the major ingredient of condonation.\(^{38}\) Declares American Jurisprudence 2d:

"An essential element of condonation is an express or implied forgiveness of past misconduct. In fact, so predominant is the factor of forgiveness that many courts have stated broadly, ‘condonation is forgiveness.’" \(^{39}\)

One might suppose that since forgiveness constitutes the essence of condonation, any unequivocal manifestation of forgiveness would amount to condonation, and that a simple verbal statement of pardon would consequently be enough to invite the doctrine’s application. A few cases have so held. Illustrative decisions are *Bush v. Bush*\(^{40}\) and *Thompson v. Thompson*.\(^{41}\) In the former case, an action grounded on adultery, it was disclosed that following the separation which resulted when plaintiff (husband) learned of defendant’s infidelity plaintiff called upon

(Continued from preceding page)

obtains knowledge of a number of them, if the latter condones the offenses of which he has knowledge, he thereby condones all of the misconduct. *Farley v. Farley*, 278 Mich. 361, 270 N.W. 711 (1936); *Keats v. Keats*, 1 Sw. and Tr. 334, 164 Eng. Rep. 754 (1859).

The same is true where the guilty spouse confesses his malfeasance in general terms and his partner condones the misbehavior without inquiring about specific instances of wrongdoing. *Rogers v. Rogers*, 122 Mass. 423 (1877) and *Moorhouse v. Moorhouse*, 90 Ill. App. 401 (1900). Quoting from the Rogers decision: "It is not necessary when the terms of the condonation indicate an intention to forgive, without inquiry, all previous injury, that there should be actual knowledge of each distinct offense." Pages 424-25 of 122 Mass.

\(^{37}\) At least one authority believes that condonation rests on a concept of waiver, or election, rather than on forgiveness. Reader, supra note 9. This is discussed in part II B (2) infra.

\(^{38}\) Virtually all definitions of condonation found in judicial opinions stress the element of forgiveness. The following definition, found in *Maughan v. Maughan*, 89 Ohio L. Abs. 282, 184 N.E. 2d 628 (1961) is typical: "Condonation is the voluntary forgiveness, either express or implied, by an aggrieved spouse of a breach in marital duty . . . with an implied condition that the offense shall not be repeated." Similar definitions are found in: *Henning v. Henning*, 80 Ariz. 330, 362 P. 2d 124 (1961); *Workman v. Workman*, 164 Neb. 642, 83 N.W. 2d 368 (1957); and *McLaughlin v. McLaughlin* 244 S.C. 265, 136 S.E. 2d 537 (1964).


\(^{40}\) 135 Ark. 512, 205 S.W. 895 (1918).

\(^{41}\) 35 Nev. 375, 247 Pac. 545 (1926).
EXAMINATION OF CONDONATION DOCTRINE

defendant, agreed upon terms of reconciliation, and invited de-
fendant to return home with him. About ten minutes after the
couple had returned home plaintiff changed his mind, told de-
fendant that they could not be happy together, and over the lat-
ter's protest took her back to her parents' home. The Supreme
Court of Arkansas held that even though there had been no re-
sumption of marital relations, plaintiff had done enough to effect
a condonation. Said the court:

"It is true that he (plaintiff) changed his mind and
undertook to rescind his acts of forgiveness and reconcilia-
tion before the resumed relations with his wife had pro-
cceeded to the extent of actual cohabitation or sexual inter-
course, but it is not essential that the relation should have
proceeded to that extent in order to become complete and
binding. . . . 'It has been argued that nothing less than re-
newed sexual intercourse will be sufficient to establish con-
donation. It is obvious . . . that in some cases this may be
a test wholly inapplicable.'" 42

In the Thompson case the husband sought a divorce on the
ground of desertion, and his wife argued, in defense, that plain-
tiff had deserted her earlier. Plaintiff countered this defense with
evidence that subsequent to his desertion of defendant (and
other misconduct) the couple executed a written agreement of
reconciliation in which each expressly pardoned the other for all
offenses. The Supreme Court of Nevada affirmed a decree grant-
ing plaintiff a divorce, ruling that by signing the reconciliation
agreement defendant condoned plaintiff's desertion and other
misbehavior—even though the couple never re-established mari-
tal relations afterwards. Quoting from the opinion:

"But it is contended by counsel that there can be no
condonation where there is no cohabitation and that there
was no cohabitation between the parties after the agreement
was signed. While it is true, as contended, that there was no
cohabitation, we are not in accord with the contention made.
. . . (F)orgiveness is generally established by the conduct of
the party, but an express forgiveness may be shown, and
when shown, is as binding as one shown by proof of co-
habitation." 43

42 Page 897 of 205 S.W. In the last sentence the court was quoting from
43 Page 546 of 247 Pac. Accord, Phinizy v. Phinizy, 154 Ga. 199, 114 S.E. 185
(1922) and Pitman v. Pitman, 66 D.L.R. 702 (Manitoba 1940).
Seven jurisdictions have statutes which provide that forgiveness can be
(Continued on next page)
However, the distinct weight of authority supports the proposition that condonation cannot occur without the resumption of sexual relations.44 "It is almost universally held that there can be no condonation of a marital offense without any act of marital cohabitation." 45 In ten states the statute providing for operation of the condonation doctrine demands a resumption of sexual intercourse.46 Among the cases which have held the reestablishment of coition to be essential are Lowensten v. Lowensten47 and Christensen v. Christensen.48 The former was a divorce action instituted by the wife, who grounded her suit on both adultery and cruelty. The evidence revealed that defendant, a dentist, had been sexually intimate with several of his patients and that plaintiff had condoned one of the transgressions by cohabiting with defendant after surprising the couple in flagrante delicto. However, after pardoning the offense in question plaintiff learned, through an office diary kept by defendant, that he was guilty of other adulteries, and following this discovery, she ceased to cohabit with him. At the trial defendant testified that though there were no further marital relations after plaintiff read the diary, plaintiff verbally forgave defendant and promised to

(Continued from preceding page)


44 27A C.J.S. Divorce § 60 (1959); H. Clark, Cases and Problems on Domestic Relations 585 (1965); Crocker v. Crocker (1920) P. 25; Taber v. Taber, 66 Atl. 1082 (N.J. 1904); Thomason v. Thomason, 332 S.W. 2d 148 (Tex. 1959); and Buck v. Buck, 205 Ark. 918, 171 S.W. 2d 929 (1943).


The Montana and Tennessee acts read, respectively, as follows:

"The following requirements are necessary to condonation: . . .
2. Reconciliation and remission of the offense by the injured party.
3. Restoration of the offending party to all marital rights."

"(I)t shall be a good defense and perpetual bar . . . if the defend-ant allege and prove:

. . . (2) That the complainant has admitted the defendant into conjugal society and embraces after knowledge of the criminal act."


48 125 Me. 397; 134 Atl. 373 (1926).
EXAMINATION OF CONDONATION DOCTRINE

return to him. The Appellate Division of the New Jersey Superior Court ruled that such an oral pardon would not serve to work a condonation. Said the court:

"It has been stated that . . . nothing short of a renewal of sexual relations will amount to a condonation. . . . Forgiveness by mere words or promises not followed by restoration of the forgiven party to the matrimonial home and bed will not suffice. We thus do not find condonation from plaintiff's implied promises to defendant . . . to return to him." 49

The Christensen controversy was another case in which the wife sought a divorce for adultery. Defendant argued that plaintiff condoned the offense by receiving him back into the home after learning of the transgression. It was shown however, that though plaintiff accepted defendant's return and treated him with civility, she did not resume sexual relations. The Supreme Judicial Court of Maine affirmed a decree granting plaintiff a divorce, saying:

"To be effectual, condonation must include a restoration of the offending party to, or a continuance of, all marital rights after the offense becomes known. While condonation imports forgiveness, the converse is not necessarily true. 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." 50

(2) Whether the forgiveness requirement may be satisfied by sexual intercourse alone:

The law presumes that a spouse who willingly copulates with his mate after learning that the latter has committed a marital offense intends to forgive—and therefore condone—the transgression.51 However, there is a conflict of authority on the question of whether this presumption is rebuttable or conclusive. The prevailing view is that the presumption of forgiveness is rebut-

49 Page 890 of 190 Atl. The Appellate Division did not actually grant plaintiff a divorce, but rather, remanded the case for further findings of fact on certain collateral issues.


51 Madden, op. cit. supra note 36, at § 91; Nelson, op. cit. supra note 1, at § 11.03; and Peck, The Law of Persons and of Domestic Relations § 46 (3rd ed. 1930). Quoting from the last source: "Ordinarily the living in marital relations with the guilty party after knowledge of the offense is proof of condonation."
table.\textsuperscript{52} (In instances when the wife is the aggrieved spouse or when the suit is grounded on cruelty or some other continuing offense, the presumption is more easily rebutted than it is in other situations.)\textsuperscript{53} However, a significant number of decisions have ruled that the presumption is absolute.\textsuperscript{54} Two cases illustrative of the prevailing view are \textit{Seiferth v. Seiferth},\textsuperscript{55} and \textit{Kinley v. Kinley}, 115 N.Y.S. 2d 341 (1952). In the former case the husband filed for a divorce on the ground of cruelty. The defendant argued that plaintiff had condoned her misbehavior by resuming conjugal cohabitation for a period during the pendency of the suit. The trial court nevertheless granted plaintiff a divorce, and the Florida Third District Court of Appeal affirmed, speaking as follows:

"The resumption of cohabitation, per se, is not necessarily condonation. It may imply a condoning, but the principal element of the defense of condonation is the freely exercised intent to forgive. . . . The denial of the motion to dismiss was based on a finding that the element of forgiveness, essential for condonation, was completely lacking in the resumption of the relationship herein."\textsuperscript{56}

In the \textit{Kinley} case the wife (defendant) moved to vacate an interlocutory decree of divorce obtained by the husband, who had based his suit on the former's adultery. Defendant presented evidence that following the granting of the decree plaintiff visited her one day and engaged in coitus with her. Although plaintiff did not deny the sexual episode, the Tompkins County Supreme Court nevertheless denied defendant's motion to vacate the decree, saying:

\textcolor{red}{\textsuperscript{52} "The majority of American decisions allow the inference of condonation from sexual intercourse to be rebutted by clear and convincing evidence that no pardon had been intended." Freed, \textit{Defenses Against Divorce in French and American Law}, 38 Tex. L. Rev. 303, 313 (1959). Also see Nelson, \textit{supra} note 1, at § 11.03.\textsuperscript{53} As discussed in Part II B (4) \textit{infra}, the courts are slower to invoke condonation in bar of relief in cases where the wife is the injured spouse or where the action is based on a transgression of a continuing character. Six states have statutes providing that condonation of a continuing transgression will not be inferred in the absence of an express agreement to forgive. Alaska Comp. Laws § 56-5-11 (1960); Cal. Civ. Code § 118 (1954); Mont. Rev. Codes Ann. § 21-124 (1961); N. D. Cent. Code § 14-05-13 (1960); Or. Rev. Stat. § 107.070 (1965); and S. D. Code § 14.0716 (1939).\textsuperscript{54} "Many courts state outright that sexual intercourse alone occurring after the marital wrong is condonation—regardless of intent to forgive (knowledge being assumed)." Note, \textit{supra} note 11, at 106.\textsuperscript{55} 132 So. 2d 471 (Fla. 1961).\textsuperscript{56} Pages 472-73 of 132 So. 2d.}
EXAMINATION OF CONDONATION DOCTRINE

"We must bear in mind that the fact to be established is forgiveness. Proving cohabitation is one method of proving forgiveness. In the absence of any other evidence tending to establish forgiveness, we hold that the single act of intercourse alleged by defendant is not such a voluntary cohabitation of the parties as to prove forgiveness."  

Cases representative of the minority view that any sexual intercourse between the spouses subsequent to defendant’s misconduct automatically operates as a condonation (assuming knowledge of the misbehavior) are Huffine v. Huffine and Collins v. Collins. In the Huffine controversy plaintiff (husband) sued defendant for a divorce on the ground of cruelty, and the latter testified, in defense, that subsequent to the filing of the suit the parties had on several occasions had sexual contact. Although it found plaintiff’s charge of cruelty to be established, the Van Wert County Common Pleas Court nevertheless denied plaintiff a divorce, declaring:

“If there is condonation in this case, it must arise solely from the resumption of marital intercourse, as there has been no general forgiveness. ... Purely as a moral proposition, this Court does not feel that parties should be allowed to maintain sexual relations and at the same time seek a divorce, as the two acts are completely incompatible. The Court feels that a single voluntary act of marital intercourse, where the injured party is in full knowledge of the other party’s aggression, shall act as a condonation of all aggressions up to that time.”

In the Collins suit the wife petitioned for a legal separation, basing her action on cruelty. The evidence presented sustained plaintiff’s charges but also revealed that three days before the trial the plaintiff had held a rendezvous with defendant at a secluded place outside the city and had voluntarily submitted to

57 Pages 342-43 of 115 N.Y.S. 2d. This decision required an interpretation of §171 of N. Y. Dom. Rel. Law, which reads as follows: "In either of the following cases the plaintiff is not entitled to a divorce, although the adultery is established: ... (2) Where the offense charged has been forgiven by the plaintiff. The forgiveness may be proved, either affirmatively, or by the voluntary cohabitation of the parties with knowledge of the fact." In accord with the Seiferth and Kinley holdings are Blackshear v. Blackshear, 45 So. 2d 675 (Fla. 1950); Hickman v. Hickman, 188 Iowa 697, 176 N.W. 698 (1920); and Dion v. Dion, 128 Conn. 116, 23 A. 2d 314 (1941).

58 48 Ohio L. Abs. 430, 74 N.E. 2d 764 (1947).

59 194 La. 446, 193 So. 702 (1940).

60 74 N.E. 2d at 766.
sexual relations with him in his car. The Supreme Court of Louisiana ruled that plaintiff was barred from relief, having condened defendant's cruelty. Said the court:

"The wife's conduct towards her husband on that occasion (the rendezvous) was a complete condonation of all offenses on his part that she had knowledge of, and was not consistent with an intention on her part to prosecute her suit for separation from bed and board. . . . (T)he suit is ordered dismissed for having become abated by the reconciliation of the parties." 61

(3) The tendency to demand more evidence of forgiveness when the wife is the aggrieved party:

Participation in marital coitus signifies forgiveness only when such participation is voluntary. 62 Since the wife has, historically, been economically dependent upon her husband, and since (being the weaker sex) she sometimes submits to her mate’s advances out of fear, the courts have long been slower to draw inferences of forgiveness from an aggrieved wife’s actions than from an injured husband’s conduct. 63 Illustrative cases are *Beeby v. Beeby* 64 and *Glass v. Glass*. 65 In the *Beeby* case the

61 Pages 703-04 of 193 So. Accord, *Henderson v. Henderson* (1943) A.C. 49 and *Rushmore v. Rushmore*, 114 N.J. Eq. 151, 168 Atl. 614 (1933). The rule of the *Henderson* case (prohibiting an aggrieved husband who had coitus with his wife, knowing of her misconduct, from denying that he had forgiven her) is no longer operative in England today, for an English statute now provides: "Any presumption of condonation which arises from the continuance or resumption of marital intercourse may be rebutted by evidence sufficient to negative the necessary intent." Matrimonial Causes Act, 1965, c. 72, s. 42 (1).


63 "(I)n the case of an innocent wife intercourse may not be as decisive. When the innocent wife resumes sexual intercourse with her husband, the resumption raises a presumption that she has condoned his wrong, but this presumption can be rebutted by evidence that she was 'not her own mistress' in the sense that her freedom of action was limited by her financial dependence on her husband and her family responsibilities." MacDougall, *Proposals to Reform the Law of Condonation*, 39 Australian L. J. 295, 297 (1966). Also see A. Jacobs and J. Goebel, *Cases and Materials on Domestic Relations* 465 (4th ed. 1961).


65 175 Md. 693, 2 A. 2d 443 (1938).
husband sought a divorce (a mensa et thoro) for adultery, and the wife recriminated, charging that plaintiff was also guilty of adultery. Plaintiff argued that defendant had condoned his transgressions by continuing to cohabit with him for several months after learning of his guilt. The Consistory Court (Lord Stowell) ruled in favor of the wife, dismissing the husband's suit, speaking thus:

"(T)he effect of cohabitation is justly held less stringent on the wife; she is more sub potestate, more inops concilii; she may entertain more hopes of the recovery and reform of her husband; . . . It would be hard if condonation by implication was held a strict bar against the wife. It is not improper she should for a time shew a patient forbearance; she may find a difficulty either in quitting his house or in withdrawing from his bed. The husband, on the other hand, cannot be compelled to the bed of his wife; a woman may submit to necessity." 67

The Glass controversy was a legal separation suit instituted by the wife, who alleged cruelty. Defendant testified that the parties occupied the same bedroom for two nights after the last act of cruelty charged and that they had sexual relations on both nights. Although defendant's testimony was corroborated by other evidence, the Baltimore City Circuit nevertheless granted plaintiff the relief sought by her, and the Maryland Court of Appeals affirmed, saying:

"Condonation . . . with respect to a woman, is held not to bear so strictly, because she should for a time show forbearance. . . . She may have no means of support except under his roof; and under such circumstances it would be hard . . . to term submission mere hypocrisy. . . . (T)he rule does not apply with equal force to the wife as to the husband." 68

---

66 Translation: more "subject to the power of another."
Since women today are, for the most part, less economically dependent upon their husbands than wives used to be, \(^{69}\) since women now play a less submissive role in the household than they did in the past, and since the authorities are now more willing than formerly to restrain and prosecute wife-beating husbands, \(^{70}\) it is questionable whether the law should continue to discriminate in favor of the wife in this matter. \(^{71}\)

(4) The tendency to demand more evidence of forgiveness when the divorce ground relied upon is a continuing transgression:

The courts recognize a distinction between the condonation of immediately-consummated offenses, such as adultery, and the condonation of continuing transgressions, such as cruelty. When the malfeasance of the defendant-spouse involves a course of conduct, rather than a single intolerable incident, the aggrieved spouse is often inclined to endure the misconduct for a while in the hope that his mate's comportment will improve. The courts, recognizing this—and not wishing to penalize such forbearance—are slow to interpret the continuance of conjugal cohabitation as sufficient evidence of forgiveness to produce a condonation. "The

(Continued from preceding page)

the truth of Anna's allegations but testified that following the separation occasioned by his misconduct she slept with him two nights at his sister's house. The Court of Appeals nevertheless affirmed a decree granting Anna a divorce, observing: "In divorce proceedings, cohabitation offers strong evidence of . . . forgiveness of past conjugal offenses. . . . Much must depend, however, on the circumstances of the particular case. The doctrine of condonation is not applied with such strictness to the rights of the wife as it is to those of the husband. . . ." Page 578 of 189 S.W.

\(^{69}\) In the period during which the Beeby case was decided a wife had virtually no property of her own (because of such doctrines as seisen jure uxoris and curtesy). She could not even make a valid contract or (without acting through her husband) collect her choses in action. Moreover, it was very difficult for a woman to earn a living outside the home, since few jobs were open to women, and those that were (such as governess work and domestic service) generally paid little. The women's position in society today is different in all these respects. See A. Casner and W. Leach, Cases and Text on Property 283 and 287 (1951); Beamer, The Doctrine of Recrimination in Divorce Proceedings, 10 Kan. City L. Rev. 213, 253 (1942); and H. Clark, Domestic Relations 70-76 (1954).

\(^{70}\) "According to Blackstone and the early cases, the husband formerly had the right to give his wife moderate correction. No such right, however, is recognized today. Chastisement is unlawful in any case, and will render the husband guilty of assault and battery." J. Madden, Handbook of the Law of Persons and Domestic Relations § 52 (1931).

\(^{71}\) This statement should not be interpreted as an endorsement of the condonation doctrine. (In Part VI, infra, the writer recommends the abolition or modification of the doctrine.) However, as long as the rule is retained in its present form it probably should henceforth be applied to husbands and wives with equal force.
EXAMINATION OF CONDONATION DOCTRINE

better established rule seems to be that cruelty, as well as adultery, may be the subject of condonation, . . . but the principle requires evidence of an unequivocal intent to forgive and to voluntarily resume marital relations." 72

Illustrative cases are *McCarthy v. McCarthy* 73 and *Heckman v. Heckman*. 74 The *McCarthy* controversy was a cruelty-grounded divorce suit instituted by the husband, who charged his wife with misbehavior committed over the period of a year. Defendant argued that plaintiff condoned her misconduct by resuming cohabitation with her for two months following a period of separation. The Connecticut Supreme Court of Errors affirmed a judgment granting plaintiff a divorce, saying:

"The cruelty which affords cause for divorce ordinarily is cumulative and augmented by addition, consisting of a continued and persistent course of conduct or a series of acts or circumstances occurring while the parties are still living together. Continuance of marital relations, if maintained and endured with a reasonable hope for better treatment or a better understanding, until forbearance ceases to be a virtue, does not constitute condonation, nor do concessions made or a reconciliation entered into with like sentiments and to a like end." 75

In the *Heckman* case the wife petitioned for a divorce based on a pattern of cruel conduct extending over a period of three years. Since the parties continued to cohabit throughout this time (except for a four-month period that defendant spent working in North Carolina), defendant contended that plaintiff had

72 Note, *Condonation—Effect of a Single Act of Sexual Intercourse*, 44 Ky. L. J. 241, 243 (1955). "(I)n the cruelty cases, where the offense is a course of conduct, rather than a single act, the rule seems almost uniform that the defense of condonation arises only where there is actual forgiveness." Note, *Condonation as Defense to Action Based on Cruelty*, 28 N.Y.U.L. Quar. 1047, 1048 (1953).

Six jurisdictions have statutes (cited at note 44 supra) providing that condonation cannot be invoked in cases grounded on misdeeds of a continuing character without evidence of express forgiveness.

The California enactment exemplifies these statutes:

"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." 77

73 123 Conn. 409, 195 Atl. 607 (1937).

74 235 Ind. 472, 134 N.E. 2d 695 (1956).

75 Page 608 of 195 Atl.
condoned his misconduct. The Supreme Court of Indiana affirmed a decree awarding plaintiff a divorce, speaking as follows:

"The rule is that sexual cohabitation after acts of cruelty cannot be considered as condonation in the sense in which it would be after an act of adultery. The effort to endure unkind treatment as long as possible is commendable; and it is obviously a just rule that the patient endurance by the wife of her husband's continuous ill-treatment should never be allowed to weaken her title to relief."  

Assuming that the condonation rule should be retained, one questions whether there is really any need to apply the doctrine with greater restraint in continuing-transgression cases than in other situations. If Jack, an injured spouse, continues to cohabit with his wife, Jill, after the latter has acted cruelly, and Jill thereafter treats Jack with kindness, then Jack has no cause for complaint. He elected to continue the marriage in the hope that Jill would reform, and his hope has been realized. On the other hand, if Jill's behavior does not improve, then Jack is protected by the principle of revival—that is, by the principle that Jill's earlier cruelty, though condoned, has been resurrected by her later malfeasance. One authority speculates that when the courts say that a spouse's cruelty has not been condoned what they probably mean is that, though condoned, it has been revived.  

(5) The argument that the forgiveness requirement should be eliminated and that condonation should be regarded as a rule of waiver:

Professor Frank Reader, in an article which has received considerable attention, has proposed that the forgiveness requirement be abolished and that condonation be considered a rule of election. More specifically, under this proposal an injured spouse who voluntarily had sexual intercourse with his mate,
EXAMINATION OF CONDONATION DOCTRINE

knowing that the latter had committed a marital transgression, would automatically be deemed to have condoned the offense. It is said that two advantages would accrue from the adoption of this recommendation: First, the difficulties involved in attempting to ascertain the mental state of the plaintiff-spouse would be obviated, thereby making for more certainty in the application of the condonation doctrine. Secondly, equitable results would be achieved with more consistency, since it would no longer be possible for an aggrieved husband to continue for a time enjoying the benefits of marital intercourse—thereby in reality affirming the marriage—and to then obtain a dissolution of the marriage (by showing that he never actually forgave his wife). Amplifying upon the second advantage, Reader says:

“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? . . . Looking at the situation realistically, it is the adultery that terminates the marriage and not the subsequent proof thereof in the lawsuit. . . . 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.” 79

Reader’s concept of condonation finds some support in the cases. In Cramp v. Cramp80 an adultery-based divorce suit instituted by the husband, it was revealed that plaintiff had copulated with defendant after learning of her licentiousness, but defendant admitted that plaintiff never forgave her. The Probate Division nevertheless ruled that plaintiff had condoned his wife’s misbehavior and thereby barred himself from relief. Quoting from the opinion:

“In the Oxford Dictionary the meaning of the word ‘forgive’ is said to be ‘To give up resentment against, to pardon.’ Forgiveness in this sense is not . . . essential to the proof of condonation. . . . (T)he truer definition of condonation is that it is a conditional waiver of the right of the

79 Reader, supra note 9, at 98.
80 (1920) P. 158.
injured spouse to take matrimonial proceedings, and it is not forgiveness at all in the ordinary sense. . . . 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." 81

Holsworth v. Holsworth, 82 represents a similar holding. There the wife sought a divorce for cruelty. Although the evidence sustained her allegations of cruel treatment, it also disclosed that after the brief separation which followed his last act of cruelty plaintiff returned to defendant for several days, in order to obtain custody of her child. During this period she lived with defendant as his wife, although arranging to file for a divorce. The Supreme Judicial Court of Massachusetts held that plaintiff waived her right to obtain a divorce by resuming cohabitation with defendant, regardless of whether she actually forgave him. Said the court:

"Her return was for the purpose of taking the child from its father, and with no intention of forgiving her husband. . . . Her conduct nevertheless constitutes condonation of the offenses charged in the libel. The husband or wife who, knowing of marital offenses committed by the other, continues to live with that other in marital relations, condones the offense and cannot set it up as a ground of divorce." 83

If the condonation doctrine is to be retained at all, then the general adoption of Reader's recommendation would probably represent an improvement. The first-mentioned advantage of Reader's proposal—that it would lead to greater certainty in the doctrine's application—is by no means an illusory one, for it is unquestionably easier to determine whether a couple have resumed (or continued) coital relations than it is to ascertain whether the offended spouse has in fact forgiven his mate. However, the general acceptance of Reader's recommendation would necessitate changing the law in those states (a minority) 84 which hold that words of forgiveness alone can amount to condonation and in those jurisdictions (a majority) 85 which hold that

81 Pages 163 and 170 of (1920) P.
82 252 Mass. 132, 147 N.E. 578 (1925).
83 Page 579 of 147 N.E.
84 Supra part II B (1).
85 Supra part II B (2).
EXAMINATION OF CONDONATION DOCTRINE

the resumption (or continuation) of conjugal intercourse is merely presumptive evidence of forgiveness and consequently not an absolute bar to relief.

III. Revival of Condoned Transgressions

It is well established that condonation is conditional and that the condoned infraction will be revived if the errant spouse thereafter fails to treat his mate with substantial conjugal kindness.86 Five jurisdictions have statutes expressly so providing.87 This feature of condonation has been recognized at least since the early English case of Worsley v. Worsley.88

The later misbehavior need not, to revive the earlier misconduct, constitute cause for divorce of itself.89 "Subsequent offenses on the part of a spouse after condonation of former offenses, which were sufficient to warrant a divorce, nullify the condonation and revive the original offenses as a cause for divorce, even though the fresh acts are not in themselves sufficient to warrant a divorce. . . ."90 To require that the reviving trans-


"In any action or suit for divorce for the cause of adultery, if the respondent shall allege and prove, or if it shall appear in the evidence, 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 and a perpetual bar against the same."


The Montana enactment, which typifies those comprising this group, reads as follows: "Condonation implies a condition subsequent, that the forgiving party must be treated with conjugal kindness."

88 2 Lee 572, 161 Eng. Rep. 444 (1730). It was there held that a husband's subsequent acts of cruelty revived his earlier adultery.


gression amount to an independent ground for divorce would obviously render the revival principle useless, for there is no need to rely upon the earlier misbehavior if one can obtain a divorce by proving the later misdeeds alone.\(^{91}\)

If the subsequent offenses need not of themselves represent grounds for divorce, how culpable must they be to produce a revival? What constitutes a breach of "conjugal kindness"?

Four jurisdictions\(^{92}\) have statutes providing that a condonation is nullified "when the condonee is guilty of great conjugal unkindness, not amounting to a cause of divorce, but sufficiently habitual and gross to show that the conditions of condonation had not been accepted in good faith or not fulfilled." In other states the courts have devised a variety of tests. Different jurisdictions have declared that the reviving misconduct must be:

(a) "both grave and weighty, repugnant not merely to the feelings of the condoned spouse, but to the standards of conduct imposed on each of the spouses by the marital bond";\(^{93}\) (b) "such as to place the innocent party in fear of being subjected again to the original offense";\(^{94}\) (c) "conduct which in the eye of the court is wrong . . . provided always that it be sufficiently serious for the court to regard it as a substantial breach of duty";\(^{95}\) (d) "of such a character to indicate the bad faith of his (the offender's repentance";\(^{96}\) (e) "of such a grave nature as to raise a reasonable probability that the condition upon which forgiveness was given was not accepted in good faith";\(^{97}\) and (f) "so pronounced as to raise a reasonable probability that if the marital relations is continued, a new cause for a divorce will be given."\(^{98}\) The diversity of the tests used by the courts indicates that one cannot precisely measure the minimum of misconduct which will nullify a condonation. One can merely assert that it

\(^{91}\) See Wilson, Revival of Condoned Adultery, 14 The Fortnightly L. J. 294 (1945).


\(^{93}\) Bridges v. Bridges (1944), 45 S.R. (N.S.W.) 164, 179.


\(^{95}\) Beard v. Beard (1946) P. 8, 22.

\(^{96}\) Currence v. Currence, 123 W. Va. 599, 18 S.E. 2d 656, 658 (1942).

\(^{97}\) Kollar v. Kollar, 155 Fla. 705, 21 So. 2d 356 (1945).

EXAMINATION OF CONDONATION DOCTRINE

must classify as misbehavior more serious than a trifling delinquency. 99

It has long been established that the reviving transgression need not be an offense of the same character as the original wrong. 100 Thus adultery is revivable by cruelty 101 or desertion, 102 and cruelty is revivable by adultery 103 or desertion. 104 Similarly, desertion may be resurrected by subsequent cruelty. 105 "It is not necessary that the subsequent injury be of the same kind or be proved with the same clearness." 106

Since the operation of the revival principle is not restricted by any specific time limit, it is theoretically possible for an offense committed many years past to be reactivated by subsequent misconduct. This means that an erring spouse who induces his mate to pardon his transgressions occupies a probationary position for an indefinite period thereafter. This feature of the revival rule has been eloquently criticized:

"Must these people really be told that the law actually forbids them to re-establish their marriage on any other than a precarious basis; that they were mistaken in supposing that they had thrown into the sea—twenty years before, it may be—the hatchet that might then have severed their lives; and that the hatchet was, in fact (without their knowledge and contrary to their wishes) buried in quite a shallow grave, and has lain there ready to be disinterred, for use with fatal results, on the happening of comparatively slight matrimonial misconduct in the future? . . . I have the great-

99 Annot., 32 A.L.R. 2d 107, 167 (1953) and Nelson op. cit. supra note 1, at § 11.08. Quoting from the latter authority:

"Condonation is not nullified by harmless . . . acts or circumstances not violative of the spirit of the compact. . . . This (conditional character of condonation) does not require that the offending spouse become, overnight, a model husband or wife. . . ."

100 This was first recognized in the old English case of Worsley v. Worsley, 2 Lee 572, 161 Eng. Rep. 444 (1730).


106 Tootle v. Tootle, 329 S.W. 2d 218 (Mo. 1959). In this case the court held that adultery was revived by cruelty.
est difficulty in persuading myself that this can be the law, and that the invariable consequence of, and penalty for, a condoned offense is a lifelong period of probation, rendering the offender liable to be called up for inevitable judgment thereon if he or she commits any other conjugal offense whatsoever at any time, however distant, thereafter." 107

This criticism, though not devoid of merit, fails to acknowledge three mitigating factors. First, in England (where the criticism was voiced) it has long been possible to effect an absolute (non-nullifiable) condonation by executing a deed containing a clause stating that the spouses agree to refrain from pleading or mentioning any past offense in any subsequent proceedings between them. In *Rose v. Rose*, 108 a divorce suit grounded on cruelty and adultery, it was disclosed that the parties had executed such a deed and that the defendant-husband had thereafter committed adultery. Plaintiff contended that the clause in question was against public policy and therefore unenforceable, but the Probate Division rejected this argument and held that the clause prevented the later adultery from reviving the earlier cruelty. Quoting from the opinion:

"It appears to me perfectly consistent with public policy to hold that there may be what, for want of a better term, I will call final condonation. In the old Ecclesiastical Courts condonation was never final, but I do not see that public policy is against final condonation. . . . That by-gones should be by-gones is as advantageous between husband and wife as between any other parties." 109

Secondly, in England and at least ten American jurisdictions there are statutes imposing a time restriction on divorce ac-

107 *Beard v. Beard* (1946) P. 8, 29-30 (dissenting opinion of Justice Vaisey). In this case the Probate Division held that a wife's adultery, though condoned, was revived by her subsequent desertion for less than the statutory three-year desertion period. The English statute making condoned adultery not revivable (Matrimonial Causes Act, 1965 (c. 72) s. 42 (3)) was not enacted until 1963.

108 (1883) 8 P. and D. 98.

109 Page 99 of 8 P. & D. The wife was attempting to combine the earlier cruelty with the later adultery and thereby obtain a divorce a vinculo. The Probate Division ruled that the deed precluded consideration of the former and that she was therefore entitled merely to a legal separation. It appears that to accomplish such a non-erasable condonation the spouses must either execute a deed or make a formal agreement supported by consideration. See *Crocker v. Crocker* (1921) P. 25 and Mitchell, Condonation and the Matrimonial Hatchet, 62 L. Quar. Rev. 121 (1946).
EXAMINATION OF CONDONATION DOCTRINE

... and the limitation fixed by these statutes cannot be circumvented by use of the revival principle. All but one of the American acts designate a specific time limit within which to sue, while the English statute merely prohibits an "unreasonable delay." All but three of the American statutes absolutely bar an action not instituted within the specified time, while the English act makes failure to bring suit promptly merely a discretionary bar to relief. The enactments of New York and California are illustrative:

"In either of the following cases, the plaintiff is not entitled to a divorce, although the adultery is established:

... 3. Where there has been no express forgiveness, and no voluntary cohabitation of the parties, but the action was not commenced within five years after the discovery by the plaintiff of the offense charged." 116

"A divorce must be denied:

One—When the cause is adultery and the action is not commenced within two years after the commission of the act of adultery, or after its discovery by the injured party; or,

Two—When the cause is conviction of a felony, and the action is not commenced before the expiration of two years after a pardon, or the termination of the period of sentence.

Three—In all other cases when there is an unreasonable lapse of time before the commencement of the action." 117


111 N. D. Cent. Code §14-05-16 (1960). This act provides that a decree must be denied when there has been "an unreasonable lapse of time" between commission of the offense and the commencement of the action.


113 The English statute reads thus: (4) "The Court may dismiss a petition for divorce if—... (c) in its opinion the petitioner has been guilty—(i) of unreasonable delay in presenting or prosecuting the petition"; Matrimonial Causes Act, 1965 (c. 72) s. 5. (4).


115 Matrimonial Causes Act, 1965 (c. 72) s. 5 (4).


Thirdly, even in jurisdictions having no statutes compelling the aggrieved spouse to bring suit within a given time the courts are usually unreceptive to a claim that an offending husband or wife has revived a transgression committed a long time previously. The judicial antipathy toward such a claim is exemplified by the cases of Singewald v. Singewald,118 and Welch v. Welch.119 The former was a cruelty-grounded legal separation instituted by the wife. Plaintiff rested her case in substantial part on cruelty committed in 1919. However, plaintiff admitted that following a brief separation in the latter part of 1919 she had resumed marital cohabitation with defendant until shortly before commencing her suit (in 1932). To counter the argument that she had condoned the 1919 cruelty, she contended that defendant's misconduct in 1932 had revived the earlier malfeasance. The Maryland Court of Appeals rejected plaintiff's contention and affirmed a decree denying plaintiff a divorce, saying:

"While condonation is based upon . . . the implied condition that a breach of the promise revokes the condonation . . . there must of necessity be some limitation to that rule. And where the offenses sought to be revived are so remote in point of time, and the conduct of the parties has been of a character indicating that the complainant has finally and unconditionally surrendered any and all rights to complain of such offenses, they may not be revived as a separate and sufficient ground for divorce."120

In the Welch controversy, a divorce suit initiated by the wife and based on cruelty, plaintiff relied heavily on two acts of physical cruelty committed early in the marriage, one occurring in 1946 and the other, in 1948. Plaintiff admitted that she continued to live with defendant until August of 1954, but she argued that any condonation resulting from her continuance of cohabitation was cancelled in August of 1954, when defendant struck her during a domestic dispute. The New Jersey Superior Court rejected plaintiff's revival argument and dismissed her complaint, speaking as follows:

"Even if the assault were found to have occurred in August, 1954, it would not . . . operate to revive the acts of cruelty in 1946 and 1948 as a basis for the instant cause of

118 165 Md. 136, 166 Atl. 441 (1933).
119 34 N.J. Super. 197, 111 Atl. 2d 793 (1955).
120 Page 443 of 166 Atl.
EXAMINATION OF CONDONATION DOCTRINE

action. The long and continued period of subsequent co-
habitation must be deemed to wipe the slate clear, so far
as the early incidents are concerned. . . . It is not consonant
with stability of the marriage relationship or the encour-
agement of domestic concord that an early act of cruelty should
be held, notwithstanding long years of subsequent marital
cohabitation free from cruelty, necessarily to constitute an
effective basis of dissolution of the marriage at the instance
of a spouse offended by an entirely isolated act of conjugal
unkindness at a later time. Such a concept would hang a
sword of Damocles over the threshold of many a normal
household.”

In view of the availability of the Rose v. Rose clause, the
statutes of limitation on divorce suits in a number of juris-
dictions, and the courts’ general antipathy toward the revival of old
transgressions, it seems fair to say that Justice Vaisey’s criticism
of the revival principle reflects a fear of abuse that the realities
of the situation do not justify. It is nevertheless submitted that
those jurisdictions without statutes of limitations on divorce ac-
ctions would do well to enact such legislation. It should not be
even theoretically possible for a person to resurrect some ancient
misdeed of his mate and use the same as ammunition in a divorce
action.

IV. Present Legal Status of Condonation
in the United States and England

A. In the United States

Twenty-six jurisdictions have statutes declaring condonation
to be a bar to divorce and in the remaining states it is con-
sidered a common law defense, inherited from the ecclesiastical


and 1528 (1953); Ga. Code Ann. § 30-109 (1960); Hawaii Rev. Laws tit. 324-
152 (1957); Mich. Comp. Laws § 552.41 (1967); Minn. Stat. Ann. § 518.08
(1947); Miss. Code Ann. § 2735 (1957); Mont. Rev. Codes Ann. §§ 21-118 and
tit. 23, § 52 (1955); S. D. Code §§ 14.0713 and 14.0716-17 (1939); Tenn. Code
Four jurisdictions have extremely comprehensive enactments, that is, statutes which contain: a definition of condonation, a listing of the elements comprising the rule, a statement of the revival principle, a description of the kind of evidence which establishes condonation of a continuing transgression, and a specification of how a condonation can be nullified. The statutes of three jurisdictions provide that condonation is merely a discretionary bar to relief. The acts of fourteen

125 The North Dakota act exemplifies the four making up this group:
§ 14-05-10. "Divorces must be denied upon showing: . . .
3. Condonation . . .
§ 14-05-13. "Condonation is the conditional forgiveness of a matrimonial offense constituting a cause of divorce. The following requirements are necessary to condonation:
1. A knowledge on the part of the condoner of the facts constituting the cause of divorce;
2. Reconciliation and remission of the offense by the injured party; and
3. Restoration of the offending party to all marital rights.
Condonation implies a condition subsequent that the forgiving party must be treated with conjugal kindness. 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 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. In such cases, condonation can be made only after the cause of divorce has become complete as to the acts complained of.
§ 14-05-14. "Revocation of condonation.—Condonation is revoked and the original cause of divorce revived:
1. When the condonee commits acts constituting a like or other cause of divorce; or
2. When the condonee is guilty of great conjugal unkindness, not amounting to a cause of divorce, but sufficiently habitual and gross to show that the conditions of condonation had not been accepted in good faith or not fulfilled."
127 The Minnesota act, which is very similar to those of the other two states, reads as follows:
"In any action brought for a divorce on the ground of adultery, although the fact of adultery be established, the court may deny a divorce in the following cases:
1. . . .
2. When there has been an express forgiveness of the adultery charged, or a voluntary cohabitation of the parties, with knowledge thereof."
states expressly provide for the doctrine's application only when the divorce ground relied upon is adultery; however, the courts of the last-mentioned states do not in practice restrict use of the doctrine to suits based on adultery. One jurisdiction, Illinois, has a statute enabling the parties to a divorce action to have the condonation rule suspended as to them, so that they can attempt a reconciliation without prejudicing their rights to obtain a divorce in the event their peace-making efforts prove unsuccessful. The act reads as follows:

"During the pendency of any suit for divorce, the Court shall, upon the written stipulation of both the husband and the wife that they desire to attempt a reconciliation, enter an order suspending any or all orders and proceedings for such time as the Court in its discretion may determine advisable under the circumstances so as to permit the parties to attempt such reconciliation without prejudice to their respective rights. During the period of such suspension the parties may resume living together as husband and wife and their acts and conduct in so doing shall not be deemed a condonation of any prior misconduct. Such suspension shall be revoked upon motion of either party, by order of the Court."

B. In England

An English statute provides for the operation of condonation as a defense in suits grounded on adultery or cruelty. The act specifies that adultery, once forgiven, cannot be revived. In 1963 the statute was amended to allow estranged spouses to resume (or continue) cohabitation for a period of up to three months without forfeiting their rights to procure a divorce if their efforts at reconciliation prove futile. The amendment reads thus:


131 Matrimonial Causes Act, 1965 (c. 72) s. 5 (3).
"For the purposes of this Act . . . adultery or cruelty shall not be deemed to have been condoned by reason only of a continuation or resumption of cohabitation between the parties for one period not exceeding three months, or of anything done during such cohabitation, if it is proved that the cohabitation was continued or resumed . . . with a view to effecting a reconciliation." ¹³²

The obvious purpose of the amendment is to encourage efforts at reconciliation.¹³³ This purpose appears to have been at least partially frustrated by the recent decision of Brown v. Brown.¹³⁴ Under this holding the immunity conferred by the amendment does not cover the situation where the cohabitation is resumed (or continued) in consequence of a reconciliation effected at the outset, rather than in the hope of achieving a reconciliation. The wife in the Brown case confessed to her husband that she had committed adultery. The husband expressly forgave her and continued for two months to treat her as his wife. Then he changed his mind and left her, whereupon she sued him for support, alleging desertion. The husband contended that he was justified in leaving, since his mate was guilty of infidelity. To the argument that he had condoned the adultery he replied that under the 1963 amendment he was permitted to continue marital cohabitation for up to three months without having his conduct deemed a condonation of his wife's misbehavior. The Probate Division rejected the husband's contention and held for the wife, saying:

"The previous law could be said to have had the following disadvantage: a resumption of cohabitation—and particularly perhaps a resumption of sexual intercourse between the spouses—may actually promote reconciliation; that is, promote a reconciliation which has not yet taken place, but which might take place if the parties can live together and have sexual intercourse again. But a spouse who has been wronged might well be reluctant to resume cohabitation with a view to reconciliation lest, if it were found that the parties could not really be reconciled, he or she might be held to have lost thereafter the right to complain of the wrong that had been done. . . . It was to meet this problem that section 2 (1) of the Act of 1963 was passed. . . . It therefore does not

¹³² Matrimonial Causes Act, 1965 (c. 72) s. 42 (2).
¹³⁴ (1967) P. 105.
cover cases where a continuation or resumption of cohabitation is in consequence of reconciliation: only where it is with a view to it.\(^\text{135}\)

Such a restrictive interpretation of the amendment threatens to defeat its purpose. When the courts are still so ready to find condonation within the three-month period an aggrieved spouse must realistically recognize that it is still not safe to resume (or continue) conjugal cohabitation (unless he is certain that a reconciliation can be accomplished). It appears unlikely that the amendment will effectively serve the purpose for which it was designed unless it is reworded (or re-construed) to give the injured spouse assurance that nothing done by him during the statutory period will be treated as a condonation.

V. Objections to the Bar of Condonation

The doctrine of condonation, as it now operates throughout most of the United States, is open to criticism on two grounds: First, it is conceptually wedded to a fault-oriented concept of divorce and has no relevance to the more modern, sociological view of divorce as being simply a remedy for a couple whose marriage—for whatever reason—has failed. Under the former concept of divorce, which has clearly predominated until recent years,\(^\text{136}\) it was at least logical to apply the condonation doctrine. For if divorce is a remedy limited to spouses who have been wronged, it is reasonable to hold that if a husband has once pardoned his wife's transgressions, thereby cancelling her moral indebtedness to him, he no longer classifies as a wronged spouse and is therefore no longer entitled to a divorce. Under this line of reasoning it makes no difference whether or not the couple have any prospects of making a success of their marriage. On the other hand, under the sociological concept of divorce, if the marriage has proven a failure, then the offense in question ought

\(^{135}\) Page 903 of 3 W.L.R. (1964). In Mackleworth v. Mackleworth (1964) 5 C.L. 371 (decided within a few months of the Brown case) it was held that notwithstanding enactment of the new amendment, if the spouses' words and actions are clearly indicative of a completed reconciliation within the statutory period, then the court may properly hold that a condonation has taken place. For a discussion of the Brown and Mackleworth cases see MacDougall, \textit{supra} note 63, at 298-99.

to be seized upon to dissolve the marriage, whether it has been condoned or not.

The second basis of criticism is that the condonation doctrine discourages efforts at reconciliation. In 1956 the Royal Commission on Marriage and Divorce declared:

"In our opinion the factor most likely to promote a successful reconciliation is that husband and wife should be able to live together for a time (after commission of the misdeed) in the matrimonial home. Reconciliation cannot thrive in the atmosphere of a solicitor's office or over the table in a restaurant." 137

Under the present law, however, an aggrieved spouse who makes an effort to forgive his mate and save his marriage forfeits his right to subsequently use his partner's misbehavior as grounds for divorce, if the marriage proves unsalvageable. Unless his desire for a reconciliation is unwavering and his confidence of being able to achieve one is great, he is likely to decide that the cost of attempting salvage operations is too dear to pay. A Texas marriage counselor has related that during a recent counseling session one of his clients told him the following:

"To tell you the truth, I would like to try our marriage again. I even mentioned it to my lawyer, but he discouraged me a lot. He pointed out something I didn't know about—called condonation. He said that if I let my husband come back into the home again, even for one night, my divorce suit was null and void. If the attempt to make up didn't work out, I would have to start an entirely new action and pay another retainer fee. That's not for me. I've already sweated out fifty days waiting for my divorce. . . . I'm not going to start all over again if we can't live together. . . ." 138

Since a stable family life contributes to the welfare of society, it would seem obvious that our divorce laws should be designed to foster reconciliation efforts, rather than to discourage them. 139

139 Even under the present law nearly thirty percent of those who file for a divorce settle their differences and drop the proceedings at some point before the end. id. at 789. This shows that a substantial percentage of those who institute divorce proceedings are still not positive that they want to dissolve their marriage, and suggests that in a legal environment more favorable to reconciliation efforts perhaps as many as half of those who commence divorce proceedings would salvage their marriage.
VI. Possible Reforms

There are two possible remedial measures either of which would avert the chief evil of the present law, its tendency to deter attempts at reconciliation. The first approach would be to simply abolish the bar of condonation. After all, the fact that the petitioner is complaining of his mate's transgression is convincing evidence that though perhaps forgiven, it has not been forgotten; and the fact that the parties are in court demonstrates that the marriage has not succeeded. Why, then, should so much significance be attached to a resumption (or continuation) of marital cohabitation, or to an oral expression of forgiveness? If such conduct signifies anything, it suggests that the marriage ought to be dissolved, for it shows that the petitioner attempted to preserve his shattered marriage and was unable to do so. It is submitted that these considerations justify elimination of the condonation doctrine altogether.

There are some, however, who object that the complete abolition of condonation would make possible the reopening of old wounds and that there ought to be some point in time when action on a given grievance is foreclosed. This objection is afflicted with two weaknesses: First, it overlooks the fact that a number of jurisdictions have statutes of limitations barring suit on a given marital offense after a specified period of time. Secondly, it fails to recognize that in states without statutes of limitations the courts generally restrict application of the revival principle to misdeeds committed within the recent past, which makes it reasonable to assume that if condonation were abrogated most courts would remain unreceptive to suits grounded on stale grievances. However, in view of this objection—whether valid or not—and in view of the apparently widespread feeling that it is unfair to revoke a forgiveness once expressed or implied, it is probably unrealistic to expect that many jurisdictions will completely abolish condonation in the foreseeable future.

The second approach, however, might well achieve acceptance by state legislatures. This measure would involve retaining

140 MacDougall, supra note 63, at 300.
141 Supra Part III.
142 Supra Part IV.
the condonation doctrine but allowing a six-month period following commission of a given marital transgression, during which the injured spouse may continue (or resume) conjugal cohabitation and/or orally express his forgiveness, without thereby condoning his mate's malfeasance. To implement this measure a state might enact a statute worded as follows:

"None of the divorce grounds listed in this chapter (or title) shall be deemed to have been condoned by anything said or done by the aggrieved spouse within one hundred and eighty days after performance of the act(s) constituting the ground."

This measure would have two advantages over the English statute\(^{144}\) and one advantage over the Illinois act:\(^{145}\) (1) Since it allows the spouses six months to strive for a reconciliation, rather than the three months permitted by the English act, the measure would give the couple more ample time to determine whether their marital problems are solvable. (2) Since it imposes no restrictions on the motives or intentions of the spouses, the measure would forestall stultifying judicial interpretations such as that given the English act in *Brown v. Brown*.\(^{146}\) (3) Since it provides for operation of the grace period in all situations, the measure would embrace more cases than does the Illinois act, which permits a nonprejudicial resumption of cohabitation only when the spouses, following the commencement of divorce proceedings, apply in writing for the right to attempt a reconciliation.

**VII. Conclusion**

The preceding pages have considered: the history of condonation; the elements comprising the doctrine; the revival principle; the present state of the law on condonation in the United States and England; the demerits of the doctrine; and the alternative reforms that might be undertaken to improve this area of the law.

In his Essay on Criticism Alexander Pope declares:

"Good-nature and good sense must ever join:
To err is human, to forgive, divine."\(^{147}\)

\(^{144}\) Matrimonial Causes Act, 1965 (c. 72) s. 42 (2).


\(^{146}\) (1967). P. 105. Discussed *supra* Part IV B.

EXAMINATION OF CONDONATION DOCTRINE

The Christian doctrine which Anglo-American society has long professed to embrace supports this esteem for forgiveness.\textsuperscript{148} That nearly all American jurisdictions nevertheless recognize and enforce a law which discourages forgiveness in the marital context is therefore mystifying, as well as deplorable.

\textsuperscript{148} "Leave there thy gift before the altar, and go thy way; first be reconciled to thy brother, and then come and offer thy gift." Matthew 5:24.

"For if ye forgive men their trespasses your heavenly Father will also forgive you: But if ye forgive not men their trespasses, neither will your Father forgive your trespasses." Matthew 6:14-15.

"Judge not, and ye shall not be judged: condemn not, and ye shall not be condemned: forgive and ye shall be forgiven." Luke 6:37.