1945 *Present:* **Keuneman and Jayetileke JJ.**

S. W. E. DIAS, Appellant, *and* MENSALINE HAMINE *et al.*, Respondent.

234—D. C. Colombo, 619.

Divorce—Wife lives in the same house after knowledge of husband's adultery—No proof of condonation—Further proof required of forgiveness and reinstatement of offending spouse.

The fact that a wife after knowledge of her husband's adultery shares his bed is not strong or conclusive proof of condonation; still less, the fact that she merely resided in the same house with her husband. There should be, in addition, proof of forgiveness and of the reinstatement of the offending spouse.

THE plaintiff sued her husband the first defendant for divorce on the grounds—(1) of constructive malicious desertion by him, (2) of his adultery with a servant woman. The first defendant denied these allegations and himself claimed a divorce on the ground that the plaintiff had committed adultery with the second defendant in 1940 and 1942 and thereafter. The District Judge found that the first defendant had committed adultery with the servant woman and dismissed the defendant's claim for divorce. The District Judge further held that the plaintiff had condoned the first defendant's adultery, but that his misconduct later had revived the earlier condoned adultery. He thereupon entered decree for divorce in favour of the plaintiff.

N. Nadarajah, K.C. (with him *H. W. Jayawardene*) for the first defendant, appellant.—There is clear evidence in this case that the plaintiff had condoned the first defendant's adultery. Although the best evidence of reinstatement is the continuance or resumption of sexual intercourse there may be a resumption of conjugal cohabitation, sufficient to constitute a reinstatement, without sexual intercourse. Restoration of conjugal cohabitation as distinguished from sexual intercourse will carry condonation with it—Rayden on Divorce (4th ed.) p. 134; *Cramp v. Cramp* [1]; *Germany v. Germany* [2]. In Roman-Dutch law, too mere reconciliation is sufficient to establish condonation—*Voet 24.2.5*; *Young v. Young* [3]; *De Hoedt v. De Hoedt* [4].

The next question is whether a matrimonial offence, once it is condoned, can, in Ceylon, be revived by a subsequent offence. The trial Judge has held that it can be revived. The common law governing divorce in Ceylon is the Roman-Dutch law—*Seneviratne v. Panishamy, et al.* [5]; *Le Mesurier v. Le Mesurier* [6]; *Karonchihamy v. Angohami et al.* [7]; *Wright v. Wright* [8]. The Roman-Dutch law does not recognize such a thing as a revival of a matrimonial offence after a reconciliation has taken place. The reconciliation completely extinguishes the antecedent misconduct,

[1] *L. R. 1920 p. 158 at 165–6.*
[2] *(1938) 3 A. E. R. 64.*
[3] *S. African L. R. (1908) 25 S. C. 428.*
[4] *(1910) 4 Leader 66.*
[5] *(1927) 29 N. L. R. 97 at 101.*
[6] *(1895) 1 N. L. R. 160 at 164.*
[7] *(1896) 2 N. L. R. 276.*
[8] *(1903) 9 N. L. R. 31.*

and any subsequent proceedings for a divorce must be upon a new matrimonial offence which in itself would entitle the innocent spouse to such relief—*Young v. Young* (*supra*) which is directly in point in the present case; Sande's *Frisian Decisions 2. 6. 2.* Even in English law there is no such thing as contigent condonation—*Henderson v. Henderson* [1]. The alleged misconduct of the first defendant subsequent to the reconciliation cannot, in the present case, be regarded as a matrimonial offence of such a nature as is sufficient to revive the earlier condoned adultery—*Collins v. Collins* [2]; 27 *Empire Digest* 135, para. 3174; *Hart v. Hart* [3]; *Palmer v. Palmer* [4]; Rayden on Divorce (4th ed.) p. 135.

H. V. Perera, K.C. (with him *H. Deheragoda*), for the plaintiff, respondent.—The finding of the trial Judge that there was condonation is not correct. Section 602 of the Civil Procedure Code does not contain a definition of condonation. The fact that a wife remains in the house, and even permits intercourse, after knowledge of her husband's adultery is not proof of condonation on her part—*Beeby v. Beeby* [5]; *Cramp v. Cramp* [6]. The conduct of the plaintiff was one of meritorious forbearance for the sake of her children. There was neither forgiveness nor reinstatement. The conduct of the first defendant, on the other hand, amounted to malicious desertion, because he brought about a state of things which made it impossible for the plaintiff to remain longer with the husband. It is not necessary, for the purpose of the present case, to consider whether the doctrine of revival is applicable in Ceylon. If it is applicable, mental cruelty can be regarded as a matrimonial offence—*Bostock v. Bostock* [7].

No specific issue regarding condonation was raised at the trial. The burden is on the plaintiff to show that there was no condonation—*Germany v. Germany* (*supra*). The trial Judge should not have come to any finding on condonation in the absence of an issue and without giving us an opportunity to lead all evidence on the point. Condonation, both in English and Roman-Dutch law, involves forgiveness. There is no evidence of any forgiveness in this case. It is submitted that condonation has not been established in this case and that the plaintiff is entitled to a decree for divorce on the grounds of adultery and malicious desertion.

Kingsley Herath, for the second defendant, respondent.

N. Nadarajah, K.C., in reply.—Condonation is not a bilateral act. See judgment of Lord Simon in *Henderson v. Henderson* (*supra*).

It is the duty of Court to take cognisance of condonation when it is disclosed in the course of the case—Section 601 of the Civil Procedure Code; *Apted v. Apted* [8]; *Forshall v. Forshall* [9]; *Howard v. Howard* [10]; *Goode v. Goode* [11]; *Moosbrugger v. Moosbrugger* [12]; Rayden on Divorce (4th ed.) 137.

Cur. adv. vult.

[1] *(1944) 1 A. E. R. 44.*
[2] *L. R. (1884) 9A. C. 205 at 237.*
[3] *(1854–5) 2 Ecc and Adm. 193 at 200.*
[4] *164 E. R. 914.*
[5] *(1799) 1 Hagg. 789 at 793.*
[6] *L. R. 1920 P. 158 at 167.*
[7] *(1859) 27 L. J. R. (Prob.) 86.*
[8] *L. R. 1930 p. 246.*
[9] *I. L. R. 31 All. 511 at 513.*
[10] *A. I. R. (1923) All. 43.*
[11] *164 E. R. 992.*
[12] *(1918) 29 T. L. R. 715.*

March 13, 1945. KEUNEMAN J.—

The plaintiff brought this action for divorce against her husband the first defendant on the grounds (*a*) of constructive malicious desertion by him, and (*b*) of his adultery with a servant woman, Asilin, in or about May, 1942.

The first defendant replied denying these allegations, and himself claimed a divorce on the ground that the plaintiff had committed adultery with the second defendant between the latter part of 1940 and August 12, 1942, and thereafter.

The case went to trial on a number of issues, and the District Judge found that the first defendant had committed adultery with Asilin in May, 1942, and dismissed the first defendant's claim for divorce on the ground that the plaintiff had committed adultery with the second defendant. Both these findings are fully supported by the facts proved, and I am satisfied that the conclusions arrived at by the District Judge are correct and unassailable in appeal.

The District Judge further held that the plaintiff had condoned the first defendant's adultery but that the first defendant's misconduct later and more particularly on August 12, 1942, revived the earlier condoned adultery. He entered decree for divorce in favour of the plaintiff against the first defendant with costs.

The alleged misconduct of the first defendant consisted in the fact that shortly after he was caught in the act of adultery by the wife, and after Asilin was sent away from the house, he had written the letter P6 to Asilin and met her twice in the neighbourhood of the office in Maradana where he was employed. On the second occasion the plaintiff, who had received information, kept watch and caught the first defendant and Asilin together, and thereafter the plaintiff left the house of her husband with her five children.

Counsel for the first defendant addressed to us an interesting argument to the effect that under our law, there can be no recognition of the revival of an adultery that had been condoned, and that the principle accepted in the English law had no application in Ceylon. He also contended that the facts disclosed did not amount to a matrimonial offence, and that the question of revival did not arise in this case. I do not think it is necessary to consider these matters because, as counsel for the plaintiff argued, the fact of condonation has not been established in this case, and I do not agree with the finding of the Trial Judge that there had been condonation.

In dealing with the law in this connection the District Judge said—"Our law is codified, and what condonation in a case of adultery amounts to is to be found in section 602 of the Civil Procedure Code." He then proceeded to cite a portion of section 602, to wit—

"No adultery shall be deemed to have been condoned within the meaning of this Chapter unless where conjugal cohabitation has been resumed or continues."

The District Judge, thereafter speaks of this as a "definition" of condonation. He considered whether the words "conjugal cohabition" included sexual intercourse, and held that mere continuance

of residence in the same house amounted to " conjugal cohabitation " although there had been no sexual intercourse.

The District Judge ended as follows:—" Therefore on the facts, I am bound to hold that the plaintiff has in law condoned her husband's adultery ".

I am unable to agree with the District Judge's argument. The clause quoted by him can in no sense be regarded as a definition of condonation. On the contrary it sets out only one essential ingredient of condonation, viz., conjugal cohabitation. The clause does not profess to set out what the other ingredients are. The District Judge appears to have held that if conjugal cohabitation is established, then condonation must be assumed. That is not the law.

For the purposes of this appeal, I may cite the judgment of McCardie J. in *Cramp v. Cramp* [1] where the earlier authorities are reviewed. The learned Judge was considering the point whether sexual commerce by a husband with a wife known to be guilty of adultery is to be deemed conclusive evidence of condonation. He came to the conclusion that " a husband who has sexual relations with his wife after knowledge of her adultery must be conclusively presumed to have condoned her offence. That is the rule of righteousness and I am glad to think it is the rule of law. " But he made this very significant observation:

" I find that the authorities draw a clear distinction between a wife who permits intercouse after knowledge of her husband's adultery and a husband who has intercouse with his wife after he is aware of her infidelity. As to condonation by a wife, Sir Cresswell Cresswell in *Keats v. Keats* and *Montezuma* [2] says: ' With reference to a wife, to whom a knowledge of her husband's adultery has been brought home, and who has yet continued to share his bed, the rule has not been so strict. The wife is hardly her own mistress; she may not have the option of going away; she may have no place to go to; no person to receive her; no funds to support her; therefore her submission to the embraces of her husband is not considered by any means such strong proof condonation as the act of a husband in renewing his intercourse with his wife. ' This passage illustrates the view that the wife may be the passive rather than the active agent in the matter in question. It is in conformity with the older cases of *D'Aguliar v. D'Aguliar* [3], *Durant v. Durant* [4] and *Turner v. Turner* [5]. " The point was concisely put by Lord Stowell in *Beeby v. Turner* [6]: " It would be hard if condonation by implication was held a strict bar to the wife. It is not improper she should show a patient forbearance; she may find a difficulty either quitting his house or 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. When a woman therefore submits to her husband's embraces, it is only evidence, strong indeed at the present day, but not necessarily conclusive of condonation: see *per* Dr. Lushington in *Snow v. Snow* [7] and *per* Lord Penzance in *Newsome v. Newsome* [8].

[1] *(1920) Probate Division 158.*
[2] *1 Sw. and Tr. 334, 347.*
[3] *1 Hagg. Ec. 773.*
[4] *(1825, 1925) 1 Hagg. Ec. 733.*
[5] *(1854) 2 Spinks 201 m.*
[6] *1 Hagg. Ec. 789, 795.*
[7] *2 Notes of Cases, Supp. XIII.*
[8] *(1871) L. R. 2p and M. 306.*

Now if the fact that a wife, after knowledge of her husband's adultery, shares his bed is not strong or conclusive proof of condonation, the fact that she had merely resided in the same house with the husband must be weaker still. There should be in addition proof of forgiveness and of the reinstatement of the offending spouse. No doubt where the husband after knowledge of the wife's adultery shares her bed the law presumes condonation, but this is a special rule applicable to the husband, and not to the wife in similar circumstances.

The facts on which the allegation of condonation is based in this case are very meagre. Unfortunately no issue of condonation was raised. It was no doubt open to the District Judge to raise that question, but the framing of an issue was desirable though perhaps not imperative, so that the parties should be made aware of the point on which the District Judge intended to find. In the present case it is difficult to say whether the parties knew that condonation was really in issue, until the later stages of the case.

In one passage the plaintiff talked of the episode in May when the first defendant and Asilin were caught in the act of adultery, and added—" The next morning I sent her away. After that I continued to live with my husband and we lived as man and wife . . . . I did it for the sake of the children ". In cross-examination she said: " On the next day I sent Asilin out. I sent her out after first defendant went to work. He was very angry when he came in the evening . . . . . Thereafter I made up and we lived as husband and wife till August 12, when I left ".

It is significant that no question was put to plaintiff as to whether there had been intercourse after the adultery was known. The first defendant said that there was no such intercourse, but asserted it was because the plaintiff was sick. On the facts I think I must hold that there was no intercourse. There is no evidence that the first defendant was penitent and asked or was granted forgiveness. His letter written to Asilin within a few days shows that he was not penitent. No acts are spoken to from which forgiveness or reinstatement of the offending husband can be presumed. The District Judge has correctly put the position as follows :—" Plaintiff says that she decided to take no action for the sake of the children and also as she hoped to redeem her husband and start life afresh ".

The defendant in his evidence mentioned no facts from which condonation may be presumed.

The evidence certainly shows forbearance on the part of the wife, but in my opinion it falls far short of showing forgiveness or reinstatement of the husband. The only solid fact that emerges is that the husband and wife lived together in the same house for a few months. Some emphasis was laid by counsel for appellant on the phrase of plaintiff—" thereafter I made up ", but no attempt was made to obtain any details concerning the " making up ", and in considering what it consisted of we are left to sunrise.

In all the circumstances I do not think the District Judge was justified in finding that the plaintiff condoned the adultery of the first defendant.

In consequence it is unnecessary for me to consider the other interesting questions which were raised in the appeal.

The appeal is dismissed with costs.

JAYETILEKE J.—I agree.

Appeal dismissed.