1957 *Present :* H. N. G. Fernando, J., and T. S. Fernando, J.

P. E. BAPTISTE, Appellant, *and* P. SELVARAJAH and another, Respondents .

S. C. 622—D. C. Colombo, 3,123

Divorce—Adultery—Condonation—Proof.

The mere fact that the spouses continue to live under the same roof does not necessarily show condonation of adultery, for the parties may do so by force of circumstances and not as the result of a true reconciliation.

Semble : Since reconciliation involves a mutual intention on the part of both spouses to restore what was sundered, an invitation by the innocent spouse to have intercourse which is rejected by the guilty spouse does not constitute condonation of adultery.

APPEAL from a judgment of the District Court, Colombo.

S. Sharvananda, with *K. Rajaratnam*, for the 2nd defendant-appellant.

V. Ratnasabapathy, for the plaintiff-respondent.

Cur. adv. vult.

April 12, 1957. T. S. FERNANDO, J.—

The plaintiff (husband) instituted an action on 19th October, 1953, claiming a dissolution of his marriage with the 1st defendant (wife) on the grounds of

(*a*) her adultery with the 2nd defendant on several occasions between November, 1952, and 17th September, 1953,

(*b*) her malicious desertion on the said 17th September, 1953.

He further claimed (1) damages from the 2nd defendant in a sum of Rs. 15,000, and (2) the custody of the child of the marriage between his wife and himself.

At the trial the acts of adultery on which the plaintiff relied to establish his case were confined to three, and in the course of a careful analysis of the evidence led before him the learned district judge has found only the second of these three acts, viz., the act of adultery alleged to have taken place in the plaintiff's house in December, 1952, proved to his satisfaction. He has held that the plaintiff is entitled to a decree for divorce on the ground of such adultery as well as by reason of the malicious desertion on the part of the 1st defendant proved to have taken place on 17th September, 1953. The 1st defendant filed no answer, but was present at the trial, at first unassisted but later represented by a proctor. She neither gave nor called any evidence on her behalf and in fact has not appealed against the judgment of the District Court.

In regard to the claim against the 2nd defendant which was one for damages only, the learned district judge has, in view of his finding that the 2nd defendant was guilty of adultery with the 1st defendant in December, 1952, awarded to the plaintiff a sum of Rs. 5,000 as damages. It may be noted that the 2nd defendant himself neither gave nor called any evidence at the trial. While it is not contended on appeal that the finding of the learned judge in regard to adultery in December, 1952, is unsustainable, it is argued on behalf of the 2nd defendant that such adultery was condoned by the plaintiff's subsequent conduct in relation to his wife and that condonation of the adultery has the effect under our law of wiping out the offence altogether and rendering it incapable of

revival. It is accordingly contended that in terms of section 601 of the Civil Procedure Code the plaintiff's action should have been dismissed and such dismissal would include a dismissal of the claim against the co-defendant.

While the Civil Procedure Code casts a duty upon the trial judge to satisfy himself upon a trial in a divorce action whether the plaintiff in such action has condoned the act or conduct which constitutes the ground upon which the dissolution of the marriage is prayed for, it is noteworthy that the 2nd defendant did not himself raise the question of condonation either in his answer or in the issues accepted at the trial. However that may be, the question of condonation was specifically considered by the learned district judge and he has reached a finding that the evidence of the plaintiff did not establish that he had condoned the act of adultery in December, 1952. In contesting this finding, learned counsel for the 2nd defendant places reliance on the evidence that the plaintiff notwithstanding the adultery in December, 1952, lived with the 1st defendant until her desertion in September, 1953. It is necessary to examine the evidence on the point in view of its importance to the argument raised on behalf of the 2nd defendant. I reproduce below the relevant evidence as it appears in the cross-examination of the plaintiff :—

Q : When you took her back on those two occasions you lived the same life as husband and wife ?

A : Yes. I merely lived in the same house but I had nothing to do with her. We were under the same roof, but not in the same room. We ate at the same table and went about together.

Q : Didn't you want to resume marital relations ?

A : She did not consent to it.

Q : Otherwise you were willing ?

A : Not that I was willing. She also complained of womb trouble and I took her to Dr. Thiagarajah because he attended on her at her first confinement. I did not ask her for marital relations. She refused in the sense that she did not like to live with me as husband and wife in the same room. I was also not willing. Her normal behaviour was different to what it was earlier.

Q : Why didn't you resume marital relations ?

A : Because I did not want.

Q : Your answer was that because she was not willing ?

A : I did not want and she was not willing. Because she acted in a different manner to what she was before she went a second time.

Certain evidence elicited in the course of the cross-examination of one of the plaintiff's witnesses, viz., Excise Inspector Webber, in regard to apparent reconciliation was also referred to by counsel, but it is clear upon a close analysis of that evidence that Webber was there referring to a reconciliation after an earlier allegation of adultery and not a reconciliation after the incident of December, 1952. In fact it was Webber's position that after the later incident he himself made no effort to bring husband and wife together. The learned district judge was therefore correct in considering the question as he did upon the evidence of the plaintiff alone. It is apparent from his evidence that no sexual intercourse took place between his wife and himself after the incident of December, 1952, but it is stressed that the parties refrained from sexual intercourse merely because the wife did not consent to it on account of her "womb trouble" and that so far as the plaintiff was concerned he was quite willing to forgive his wife and was prepared to resume all marital relations. I do not consider that it is a fair inference from the evidence that the plaintiff was willing to resume married life as before; on the other hand, it seems to me that the evidence bears out the reasonableness of the conclusion reached by the trial judge that there was no condonation. Apart from the passage from Latey on Divorce relating to the circumstances in which marital offences are condoned cited by the learned district judge in the course of his judgment, I may usefully refer in this context to the following observations contained at page 309 of Hahlo on *The South African Law of Husband and Wife* :—

> "Since reconciliation involves a mutual intention on the part of both spouses to restore what was sundered, an invitation by the innocent spouse to have intercourse which is rejected by the guilty spouse does not constitute condonation . . . . The mere fact that the spouses continue to live under the same roof does not necessarily show condonation, for the parties may do so by force of circumstances. But if it can be shown that the parties continued or resumed life in common, because they became reconciled, and that the guilty spouse has been restored to his or her former position, there is condonation even though no sexual intercourse has taken place."

The fair inference from the evidence, in my opinion, is that the living together in one house of husband and wife with their child from December 1952 till the wife's desertion in September, 1953, was the result of the force of circumstances rather than of a true reconciliation. Apart from that, the verdict of the trial judge being supportable on the evidence before him should, in my opinion, be affirmed.

It is true that the learned district judge has proceeded to consider the question of the liability of the 2nd defendant even on the assumption that the plaintiff had condoned the adultery; but that question, in my opinion, is only of academic interest in view of the finding already reached on the facts. It is therefore unnecessary to consider the able and interesting argument advanced by learned counsel for the 2nd defendant that the effect of the condonation of the matrimonial offence must be considered according to the rules of the Roman-Dutch law which

is the law by which we are governed in this country in matters of divorce and not of the English law which the learned district judge has purported to follow and apply in his judgment.

In view of the conclusion we have reached on the facts I would dismiss the appeal with costs.

H. N. G. FERNANDO, J.—I agree.

Appeal dismissed.