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Brown v. Walker in 1896.²² Such a statute, however, is unnecessary to force testimony from a witness,²³ and it would preclude states from enforcing their own criminal laws upon certain witnesses. While the statute in the principal case was rightly supported as a necessary and proper incident to the legislative powers of Congress,²⁴ it is questionable whether a complete immunity statute directly affecting the states could be validated on the same basis.

DOMESTIC RELATIONS—DIVORCE—
CONDONATION BY A SINGLE ACT OF INTERCOURSE
Daniels v. Daniels, 99 A.2d 717 (Sup. Ct. Del. 1953)

A preliminary decree was entered on a wife's petition for divorce on grounds of her husband's adultery. Before the final decree the husband induced his wife to have sexual intercourse with him in the belief that he could thus defeat the divorce and thereby deprive the wife of a property settlement. The husband then petitioned to vacate the preliminary decree. The appellate court held as a matter of law that, because of the husband's bad faith, this single act of intercourse was not condonation.¹

Condonation is the voluntary forgiveness by one spouse of a marital offense committed by the other and bars a divorce action for that offense.² Condonation requires actual knowledge of the guilty act and may be accomplished by express words or by conduct.³ Since a finding of condonation may be based on conduct, a subjective lack of forgiveness may be immaterial.⁴ By implication of law, the condonation

22. 161 U.S. 591, 606-608 (1896). But see Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 191, 197 (1930).

23. See note 19 *supra*.

24. See note 6 *supra*.

1. *Daniels v. Daniels*, 99 A.2d 717 (Sup. Ct. Del. 1953). This was a common law determination of the case. The husband contended, as a second ground of appeal, that a statute, DEL. CODE ANN. tit. 13, § 1528 (1953), governed the case. The statute provides in part:

On a petition for divorce for the cause of adultery, if the defendant . . . proves that the plaintiff . . . has admitted the defendant into conjugal society or embrace after knowledge of the adultery . . . the petition shall be dismissed. [Italics added.]

The issue under the statute was basically the same as that under the common law. The court held the husband's act was fraud, which vitiated the wife's consent, and there was no voluntary "embrace" within the meaning of the statute.

2. MADDEN, DOMESTIC RELATIONS §§ 90-91 (1931), gives the elements of condonation. 2 VERNIER, AMERICAN FAMILY LAWS § 77 (1932), treats the statutory coverage of the subject in the several states.

3. MADDEN, *op. cit. supra* note 2.

4. MADDEN, DOMESTIC RELATIONS §§ 90-91, p. 303 (1931). See *Phinizy v. Phinizy*, 154 Ga. 199, 114 S.E. 185 (1922).

is on condition that the offender will not repeat the particular act and will thereafter treat the spouse with conjugal kindness.⁵

While the cases are in conflict as to whether a single act of intercourse is condonation as a matter of law, a majority of the jurisdictions deciding the question still appear to rule that it is.⁶ Of course, it follows from the definition of condonation that the rule does not apply where the intercourse was not voluntary because induced by fraud or duress,⁷ or was done without knowledge of the guilty act.⁸ Also, it is often stated that the rule is applied less strictly against the wife than against the husband.⁹ Some of the cases are difficult to explain except by this latter consideration.¹⁰

In a recent Ohio case,¹¹ where the matter was one of first impres-

5. This is in the nature of a condition subsequent. *Brodsky v. Brodsky*, 233 S.W. 2d 829, 833 (Mo. App. 1950). Its breach entirely nullifies the condonation so that the divorce action is based upon the offense originally condoned. This is significant because the act sufficient to defeat condonation can be less than that which gives ground for divorce. *Mason v. Mason*, 46 R.I. 43, 124 Atl. 730 (1924); *MADDEN, DOMESTIC RELATIONS* §§ 90-91 (1931). For an interesting historical discussion of this point see 2 *BISHOP, MARRIAGE, DIVORCE AND SEPARATION* § 312 (1891).

6. *Buck v. Buck*, 205 Ark. 918, 171 S.W.2d 939 (1943); *Phinizy v. Phinizy*, 154 Ga. 199, 114 S.E. 185 (1922); *Harnett v. Harnett*, 55 Iowa 45, 7 N.W. 394 (1880) (apparently sufficient were it not for compulsion); *Collins v. Collins*, 194 La. 446, 193 So. 702 (1940); *Toulson v. Toulson*, 93 Md. 754, 50 Atl. 401 (1901); *Huffine v. Huffine*, 48 Ohio L. Abs. 430, 74 N.E.2d 764 (1947); *Tarr v. Tarr*, 184 Va. 443, 35 S.E.2d 401 (1945). Cases holding it is not necessarily condonation are: *Dion v. Dion*, 128 Conn. 416, 23 A.2d 314 (1941); *Drew v. Drew*, 250 Mass. 41, 144 N.E. 763 (1924); *Koffman v. Koffman*, 193 Mass. 593, 79 N.E. 780 (1907); *Rushmore v. Rushmore*, 12 N.J. Misc. 575, 174 Atl. 469 (Ch. 1934); *Panther v. Panther*, 147 Okla. 131, 295 Pac. 219 (1931).

7. *Harnett v. Harnett*, 55 Iowa 45, 7 N.W. 394 (1880); *Rex v. Rex*, 39 Ohio App. 295, 177 N.E. 527 (1930).

8. *Laycock v. Laycock*, 52 Ore. 610, 98 Pac. 487 (1908).

9. *Harnett v. Harnett*, 55 Iowa 45, 7 N.W. 394 (1880); *Gardner v. Gardner*, 68 Mass. 434 (1854); *Shackelton v. Shackelton*, 48 N.J. Eq. 364, 21 Atl. 935 (Ch. 1891). The policy behind this view is that the wife, being dependent on the husband, may actually find it difficult to leave him, and may have to submit of necessity. 2 *BISHOP, MARRIAGE, DIVORCE AND SEPARATION* § 284 (1891); *MADDEN, DOMESTIC RELATIONS* §§ 90-91, p. 304 (1931).

Furthermore, if the husband sues successfully for divorce, the strong probability is that the wife will be without support, to the detriment of society. However, if the wife is successful against the husband, she will receive alimony. Thus, the social value of maintaining the family is greater in the first case than in the second.

There is also a disposition by the courts to favor the suffering wife. See *Fekany v. Fekany*, 118 Fla. 699, 702, 160 So. 192, 193 (1935).

Some authorities further complicate the law on condonation by distinguishing between condonation of adultery and condonation of other offenses (usually cruelty). See *McClanahan v. McClanahan*, 104 Tenn. 217, 227, 56 S.W. 858, 861 (1900); 17 *AM. JUR., DIVORCE AND SEPARATION* §§ 209, 210 (1938). They say a single act of intercourse will condone adultery, whereas it will not condone cruelty. As shown by a reading of the *McClanahan* case, the distinction apparently results from the failure properly to analyze the fact situations. These authorities do not take cognizance of the fact that continuing cruelty after intercourse breaches the condition that the offending party treat the condoning spouse with conjugal kindness, and therefore divests the condonation. They also fail to realize that there is no basic reason why intercourse should condone adultery and not cruelty.

10. *E.g.*, *Shackelton v. Shackelton*, 48 N.J. Eq. 364, 21 Atl. 935 (Ch. 1891).

11. *Huffine v. Huffine*, 48 Ohio L. Abs. 430, 74 N.E.2d 764 (1947).

sion, the court reviewed the cases and held purely as a moral proposition¹² that a single act of intercourse is condonation. The court pointed out that the injured party is still protected, since the forgiveness is conditioned on future conjugal kindness. However, it seems the trend is to hold that a single act of intercourse is not condonation as a matter of law.¹³ The jurisdictions which hold this have done so on the grounds that the injured party must subjectively intend to condone.¹⁴

The court in the principal case held that a single act of sexual intercourse alone is not condonation as a matter of law.¹⁵ It did not do so, however, on the ground that the intent to condone was lacking, for it specifically found that the wife did intend to condone. It seems difficult, moreover, considering the facts of the case and the language of the court, to fit the result within any of the other rationales¹⁶ holding that a single act of sexual intercourse is not condonation. It is true the court treated the husband's conduct as a fraud on the wife, which removed the voluntary nature of her consent. The mere intent to defeat the divorce action without misrepresentations or false promises, however, seems to fall short of what the cases in this area consider to be fraud.¹⁷ Absent active fraud, the condition of conjugal kindness is deemed sufficient to protect the injured spouse.¹⁸

Regardless of whether the husband's conduct is characterized as a fraud, the decision was based on the ground that the husband's motive and intent at the time of the act, positive bad faith, as a matter of law *prevented any condonation ab initio*,¹⁹ even though the injured

12. As a Virginia court succinctly stated, "[i]t would be shocking . . . to grant a divorce to parties who . . . litigated by day and copulated by night." Tarr v. Tarr, 184 Va. 443, 449, 35 S.E.2d 401, 404 (1945).

13. Compare *Delliber v. Delliber*, 9 Conn. 233 (1832) with *Dion v. Dion*, 128 Conn. 416, 23 A.2d 314 (1941); Anonymous, 6 Mass. 197 (1809) with *Koffman v. Koffman*, 193 Mass. 593, 79 N.E. 780 (1907); *Shackelton v. Shackelton*, 48 N.J. Eq. 364, 21 Atl. 935 (Ch. 1891) with *Rushmore v. Rushmore*, 12 N.J. Misc. 575, 174 Atl. 469 (Ch. 1934).

14. *Quigley v. Quigley*, 310 Mass. 415, 38 N.E.2d 624 (1941); *Drew v. Drew*, 250 Mass. 41, 144 N.E. 763 (1924); *Rushmore v. Rushmore*, 12 N.J. Misc. 575, 587, 174 Atl. 469, 476 (Ch. 1934). See *Panther v. Panther*, 147 Okla. 131, 133, 295 Pac. 219, 221 (1931).

15. In fact, the court held as a matter of law that there was no condonation. Under the circumstances the act of intercourse did not even present an issue of fact as to whether the wife had condoned. *Daniels v. Daniels*, 99 A.2d 717, 719 (Sup. Ct. Del. 1953).

16. See text at notes 7-10 *supra*. The court did not consider whether the husband's coldness after the intercourse breached the condition of subsequent conjugal kindness.

17. See *Hash v. Hash*, 115 Ind. App. 437, 59 N.E.2d 735 (1945); *Rex v. Rex*, 39 Ohio App. 295, 177 N.E. 527 (1930). And compare the principal case with *Phinizy v. Phinizy*, 154 Ga. 199, 114 S.E. 185 (1922) and *Farley v. Farley*, 278 Mich. 361, 270 N.W. 711 (1936).

18. Perhaps an underlying factor in this case was that there was an attempted perversion of a judicial decree. The husband was attempting *mala fide* to defeat a decree of the court.

19. *Daniels v. Daniels*, 99 A.2d 717, 719 (Sup. Ct. Del. 1953).

party intended to condone. This decision goes far in holding that the offending party's bad faith, though apparently short of active fraud, is conclusive proof that there is no condonation. The injured party is not forced to rely on the condition subsequent for protection. The court goes even further, suggesting that the offending party must affirmatively intend a reconciliation before there is condonation.²⁰ The court, however, did not consider the situation where there is a mere neutrality of intent, as where intercourse was had just as a satisfaction of desire. Thus, the language suggesting that the offender must affirmatively intend to be reconciled leaves open the question whether a mere neutrality of intent would result in a finding of no condonation as a matter of law.

The principal case is in line with the trend holding that a single act of intercourse is not conclusive on the issue of condonation, but merely an evidentiary factor. It goes further than any of the other cases in indicating that the offending party's intent may often be determinative. If the language of the court were taken at face value, condonation would be made to depend on the mutual intent and good faith of the parties. This seems a salutary result. The policy behind condonation is the maintenance of the home, and this would appear desirable only when both parties are in good faith in wanting to continue the marriage.

EVIDENCE—PARTY NOT BOUND BY TESTIMONY OF OWN WITNESS

Johnson v. Baltimore & Ohio R.R., 208 F.2d 633 (3d Cir. 1953)

A railroad detective shot and killed a man whose administratrix sued the railroad under a wrongful death statute. Plaintiff called to the stand the detective who was the sole witness to the shooting.¹ His uncontradicted testimony was that decedent attacked him with a knife when the detective attempted to arrest decedent for the commission of a felony. Corroborating testimony established that the detective showed the effects of knife wounds. A verdict and judgment for the plaintiff was affirmed by the appellate court which held that plaintiff was not bound by the uncontradicted testimony of the detec-

20. *Daniels v. Daniels*, 99 A.2d 717, 719 (Sup. Ct. Del. 1953). This seems to be the idea accepted in New Jersey. See *Rushmore v. Rushmore*, 12 N.J. Misc. 575, 588, 174 Atl. 469, 476 (Ch. 1934); *Totten v. Totten*, 60 Atl. 1095, 1096 (N.J. Ch. 1905).

1. The court pointed out that plaintiff did not try to invoke Fed. R. Civ. P. 43 (b) which provides:

A party may call an adverse party or an officer, director, or managing agent of a public or private corporation . . . and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party. . . .

Since the detective was not an "adverse party or an officer, director, or managing agent" of the railroad corporation, it appears that plaintiff was not entitled to the benefits of this rule. See *Dowell, Inc. v. Jowers*, 182 F.2d 576 (5th Cir. 1950).