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KNOWLEDGE OR BELIEF AS A PREREQUISITE TO  
CONDONATION IN THE LAW OF DIVORCE

By F. EUGENE READER\*

IN an earlier article<sup>1</sup> the writer considered the question of what constitutes the condonation of a marital offense. It was there concluded that though the courts consistently speak of condonation as being synonymous with "forgiveness," in fact the presence or absence of forgiveness, in the ordinary or lay sense of the word, is not at all determinative of whether a marital offense has been condoned. Rather, it was found, the doctrine of condonation is based upon the legal principle that once a spouse has committed an offense recognized as a ground for divorce the injured spouse may pursue either of two courses. He may treat the marriage as thereby terminated *de facto* and, by comporting himself conformably with its termination through refraining from marital cohabitation, may preserve the right to have it terminated *de jure* by a decree. Or, he may elect to treat the marriage as still existent, which he does by continuing marital intercourse, in which case he waives or foregoes his right to obtain a divorce. Voluntary sexual intercourse, subsequent to a marital offense, is then what condones that offense. The doctrine has its foundation in a precept, based on an ethical dictate and a sense of fair play, that society can not approve of the continuation of the basic incident of marriage coupled with the preservation of a power legally to terminate that relationship at will.

An obvious qualification of the doctrine is that there can be no such election unless the injured spouse is aware of the fact that the marital breach has been committed. One can not be said to have made a choice, or to have waived a right, when he was ignorant of the existence of the facts which gave him an alternative course of action. There is therefore an oft-stated rule, expressed in the statutes<sup>2</sup> and decisions alike, that a knowledge of the commission of adultery<sup>3</sup> is a condition precedent to the con-

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<sup>1</sup>Reader, *The Meaning of Condonation in the Law of Divorce* (1936) 40 Dickinson L. Rev. 92, (1936) 2 Cur. Leg. Th. 499.

<sup>2</sup>For example, the Pennsylvania statute provides that it shall be a defense to a suit for divorce if the libellant "has admitted the respondent

donation of it. Though there can be no question of the propriety of this rule in the abstract, its concrete application to particular factual situations is not so simple, and the language of the courts tends to confuse rather than clarify the real issue.

There can be no doubt that where one spouse is wholly ignorant of the commission of adultery by the other spouse, as where he has received no information relating thereto and has observed no circumstances indicative thereof, marital cohabitation can not constitute a condonation of the adultery.<sup>4</sup> It is where he has some information, of some sort, or is aware of incriminating circumstances, that the question arises as to whether he should be charged with having chosen to continue the marriage and to forego the remedy to which the adultery entitled him. Suppose the wife's absence on numerous occasions arouses the husband's suspicions, or an anonymous letter informs him that she is unfaithful, or he is told of her adultery by a claimed witness thereto, or she confesses her transgression? In any or all of these cases is the husband put in the position that his subsequent marital cohabitation will preclude the possibility of his thereafter divorcing her for an adultery which she in fact committed?

The test for the determination of this question is said to be that he must have had "knowledge,"<sup>5</sup> "full knowledge,"<sup>6</sup> "reasonable knowledge,"<sup>7</sup> "such knowledge as will satisfy a prudent man,"<sup>8</sup> "probable knowledge,"<sup>9</sup> etc., of the adulterous act. Is such

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into conjugal society or embraces after he or she knew of the criminal fact." Act of May 2, 1929, Pamphlet Laws (1929), p. 1237, sec. 52, 23 *Purd. St.*, sect. 52. See 2 Vernier, *American Family Laws* 79, for a resume of the statutes.

<sup>3</sup>Though the defense of condonation applies to various grounds for divorce, the requirement of knowledge of the offense will present a problem only in the case of such grounds as adultery, where the injured spouse may cohabit in ignorance of the fact of its commission; for in other grounds for divorce, such as cruelty or desertion, the offense operates or is inflicted directly upon the person of the injured spouse. *Burns v. Burns*, (1877) 60 *Ind.* 259, 260.

<sup>4</sup>*Clark v. Clark*, (1867) 97 *Mass.* 331; *Van Wickle v. Van Wickle*, (N.J. Ch. 1919) 108 *Atl.* 761; *Phillips v. Phillips*, (1878) 1 *Ill. App.* 245; cf. *Wilson v. Wilson*, (1888) 16 *R. I.* 122, 13 *Atl.* 102.

<sup>5</sup>See the cases quoted *infra*, text at footnotes 25 to 27, and the discussion thereof.

<sup>6</sup>*Bramwell v. Bramwell*, (1831) 3 *Hagg. Ecc.* 618, 630; *Johnson v. Johnson*, (1834) 4 *Paige (N.Y.)* 460; *Horne v. Horne*, (1922) 141 *Md.* 123, 118 *Atl.* 122, 123; *Beeler v. Beeler*, (1898) 19 *Ky. L. R.* 1936, 44 *S. W.* 136, 137; *Odom v. Odom*, (1867) 36 *Ga.* 286, 319.

<sup>7</sup>*Graham v. Graham*, (1892) 50 *N. J. Eq.* 701, 25 *Atl.* 358, 365; *Marsh v. Marsh*, (1861) 13 *N. J. Eq.* 281, 282.

<sup>8</sup>*Ellis v. Ellis*, (N.J. 1887) 9 *Atl.* 884, 887; *Diggs v. Diggs*, (1919) 187 *App. Div.* 859, 175 *N. Y. S.* 791, 792.

<sup>9</sup>*Connelly v. Connelly*, (1903) 98 *Mo. App.* 95, 71 *S. W.* 1111, 1113; see 2 *Bishop, Marriage and Divorce*, 6th ed., sec. 40, p. 33.

a test practicable? It is not necessary to consult a dictionary to realize that the noun "knowledge," or the verb "to know," has many senses and uses, and that little can be accomplished towards giving the word a definitive content by adding qualifying adjectives, which themselves have a broad content. This connotative aspect does not necessarily mean that the term "knowledge" must be dispensed with as an element of the rule, for though it has a variety of senses and uses, it has a sufficiently generally understood pivotal meaning to give some content to the underlying principle. We can safely assume that the word conveys to everyone, at the least, the idea that the person having knowledge of an act has some information or indication that the act occurred. In this narrow sense it merely negatives total ignorance of the act in question. To some the term may suggest much more. A danger is that there will be a mechanical application of the term, according to some particular suggestion of the word, without regard to the underlying policy of the doctrine of condonation. If the word "knowledge" is retained as descriptive of a mental state that is a prerequisite of condonation, extreme care must be used in each instance to give it a content and meaning that will assure its application producing a result in keeping with the underlying notion of fair play that gives breath to the doctrine. A particular case must be brought within or without the term, not because the case has some facts identical with another case which was held to be within the term, or because the facts fall within a particular connotation of the term, but because the immediate circumstances are such that the plaintiff's cohabitation could not meet with approval unless it were treated as a factual reinstatement of the marriage.

If the term "knowledge," when judicially employed, could be given some precise denotation, capable of accurate application to varying factual situations with a consistently just result, and that precise meaning were made clear in the cases; or, if the term were used merely as a starting point to an exhaustive examination of the equities of the particular case, it should perhaps be retained. But the former is scarcely capable of accomplishment and there is no particular advantage in the latter. Certainly if some other test could be employed that would accomplish the former it should be substituted for "knowledge."

In addition to this "knowledge" phraseology the courts frequently say that there can be no condonation unless the injured

spouse "believes"<sup>10</sup> in or "is convinced" of guilt.<sup>11</sup> It is submitted that the word "believe" has a quite definite content in its lay sense. To believe is to put faith or trust in a thing; it is the mental acceptance of a proposition, statement, or fact as true. Thus you may have knowledge, in the narrow or some other sense of that word, of the commission of an act of adultery, and yet either believe or not believe that the act was committed; depending upon whether you conclude from the information or circumstances that the act did take place, or refuse so to conclude because you do not trust the information or are not convinced from the suspicious circumstances.

With these observations as to terminology in mind the groundwork is laid for a critical examination of the problem of whether it is knowledge of adultery (in some broader sense of the word, as is suggested by the adjectives "full" or "probable") that is determinative of condonation, or whether it is belief that adultery has been committed (whether based on slight or much information—upon knowledge in its narrow or broader senses) which is determinative; or, possibly, whether there must be both knowledge and belief. This calls for an examination of the actual decisions.

It has been observed, on the one extreme, that where there is utter ignorance of the adultery there clearly can be no condonation. The opposite extreme is presented by those cases where the knowledge is so full and complete that belief in guilt is an inevitable conclusion and there, clearly, condonation does take place. Thus, where the injured spouse voluntarily has marital intercourse after he or she has filed the divorce petition alleging the prior acts of adultery relied upon,<sup>12</sup> or after obtaining a decree nisi,<sup>13</sup> or after personally surprising the other in the act of adultery,<sup>14</sup> or after the guilty spouse has been convicted in a criminal proceedings of the adultery subsequently charged in the suit,<sup>15</sup> this is a condonation of the adultery. Of the same nature are those cases where the plaintiff, at the time of the marital

<sup>10</sup>See *Ellis v. Ellis*, quoted *infra*, text at footnote 25, and the cases cited *infra*, note 32.

<sup>11</sup>*Polson v. Polson*, (1895) 140 Ind. 310, 39 N. E. 498, 499; *Rogers v. Rogers*, (1916) 67 N. J. Eq. 534, 58 Atl. 822, 824.

<sup>12</sup>*Owsley v. Owsley*, (1926) 121 Okla. 259, 249 Pac. 692.

<sup>13</sup>*Sneyd v. Sneyd*, [1926] P. 27, 95 L. J. P. 22.

<sup>14</sup>*Toulson v. Toulson*, (1901) 93 Md. 754, 50 Atl. 401.

<sup>15</sup>*Delliber v. Delliber*, (1832) 9 Conn. 233; *Johnson v. Johnson*, (1911) 78 N. J. Eq. 507, 80 Atl. 119. In both of these cases the plaintiff contended that she did not at that time believe in his guilt, which the court answered by pointing out that she acquired no further facts of guilt since his conviction, and must have believed he was guilty then if now.

cohabitation, was in possession of all the information and evidence subsequently relied upon at the trial to prove the adultery.

A simple factual situation typifying these cases is as follows. Two reputable persons come to the husband and tell him that they saw his wife commit adultery with another man. Despite this information the husband has intercourse with his wife. He then leaves her, starts divorce proceedings, and the sole evidence of her adultery offered by him is the testimony of the same two people, who simply testify to what they had told him. That such conduct is a condonation of the offense the decisions agree.<sup>16</sup> The cases of this general nature<sup>17</sup> however, do not add anything to the problem of whether knowledge or belief is the test, since there is present in them both knowledge, in almost any sense of the word, and incontrovertible proof of belief in guilt; for the husband can not be permitted to say that he disbelieved the very testimony of the same witnesses upon which he asks the court to pronounce the wife's guilt,<sup>18</sup> at least in the absence of a showing of collateral circumstances causing a change from doubt to conviction.<sup>19</sup> As was said in *Bordeaux v. Bordeaux*<sup>20</sup>

"The witnesses who testified to the adulterous act of Dec. 23, 1897, testified that within two or three days after the occurrence of this act they informed plaintiff, who admits that he received such information. That he must have believed it is sufficiently evidenced by the fact that he called the same persons, as his witnesses upon the trial, to make proof of the allegations of the complaint."

<sup>16</sup>*Bordeaux v. Bordeaux*, (1904) 30 Mont. 36, 75 Pac. 524, reversed on other grounds in (1905) 32 Mont. 159, 80 Pac. 6; *Marsh v. Marsh*, (1861) 13 N. J. Eq. 281; *Davis v. Davis*, (1857) 19 Ill. 334; *Stuart v. Stuart*, (1882) 47 Mich. 566, 11 N. W. 388; *Todd v. Todd*, (N.J. Ch. 1897) 37 Atl. 766; *Turnbull v. Turnbull*, (1861) 23 Ark. 615; cf. *Bridge v. Bridge*, (N.J. Ch. 1915) 93 Atl. 690; *Farmer v. Farmer*, (1889) 86 Ala. 322, 5 So. 434; *Rogers v. Rogers*, (1904) 67 N. J. Eq. 534, 58 Atl. 822; *Pepin v. Pepin*, (1924) 123 Misc. Rep. 888, 206 N. Y. S. 732.

<sup>17</sup>Cases where the guilty spouse has confessed his or her adultery to the other should be included in this class. However, a complicating question of proof has been raised in these cases and they will hence be discussed later.

<sup>18</sup>*Turnbull v. Turnbull* (1861) 23 Ark. 615, and *Todd v. Todd*, (N.J. Ch. 1897) 37 Atl. 766, are even stronger cases in that in them the husband, after obtaining the evidentiary information, but before the marital intercourse, acted upon the information in such a way as to leave no doubt that he believed it and was convinced of her guilt.

<sup>19</sup>See *Stuart v. Stuart*, (1882) 47 Mich. 566, 11 N. W. 388, saying, "Except that plaintiff has now the testimony of Baum to his own infamy, there does not appear to be any greater reason for believing in his wife's guilt now than he had in 1865. . . . In short there is nothing in the evidence which impresses us in the least as a new discovery, and probably we should never have heard of it but for other quarrels." And see *Bordeaux v. Bordeaux*, (1905) 32 Mont. 159, 80 Pac. 6, 9.

<sup>20</sup>(1904) 30 Mont. 36, 75 Pac. 524, 527.

To find an answer to the question of what is the real test, it is necessary to turn to those intermediate cases where the husband or wife has some knowledge of the other's infidelity, but it is not so complete as to compel a finding of belief in guilt. In an English case, *Ellis v. Ellis*,<sup>21</sup> a husband had been told by a woman of his wife's adultery. He set up this adultery as a defense to the wife's suit for maintenance, but did not succeed in proving it. After the trial he told his wife that he did not believe that she was guilty, and believed his informant had accused her out of spite. They then lived together for several weeks, when she left him. He obtained further evidence of her adultery, and started divorce proceedings. It was held that her adultery had not been condoned. In *Merrill v. Merrill*,<sup>22</sup> the defendant had committed adultery with A's wife. A came to him and accused him in the presence of the plaintiff. The defendant protested his innocence, and convinced A that another man was impersonating him. The plaintiff was satisfied with this explanation too, and believed him to be innocent. She continued to live with him for three years and then left him, because her son-in-law showed her a newspaper clipping referring to his improper relations with Mrs. A and she then discovered other evidence showing that A's accusations were well founded when made. It was held that the adultery was not condoned. In *Mischler v. Duchman*,<sup>23</sup> the husband confronted his wife with the report of detectives, showing she had committed adultery. She denied it and convinced him that the charges were false. It was held that since he accepted her denial as true there could be no condonation. Many cases involve fact situations of this same nature and all reach the same conclusion.<sup>24</sup>

How do the courts explain these uniformly consistent decisions? In *Ellis v. Ellis* it was said,<sup>25</sup>

"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, after certain intelligence had been communicated

<sup>21</sup>(1865) 4 Sw. & Tr. 154.

<sup>22</sup>(1899) 41 App. Div. 347, 58 N. Y. S. 503.

<sup>23</sup>(1925) 159 La. 478, 105 So. 559.

<sup>24</sup>*Abbott v. Abbott*, (1928) 132 Misc. Rep. 11, 228 N. Y. S. 611; *Harris v. Harris*, (1901) 83 App. Div. 123, 82 N. Y. S. 568; *Deisler v. Deisler*, (1901) 59 App. Div. 207, 69 N. Y. S. 326; *Phillips v. Phillips*, (1930) 221 Ala. 455, 129 So. 3; *Greims v. Greims*, (1912) 80 N. J. L. 233, 83 Atl. 1001, reversing, (N.J. Ch. 1911) 79 Atl. 1048; *Gosser v. Gosser*, (1898) 183 Pa. St. 499, 38 Atl. 1014; *Andros v. Andros*, (1905) 1 Cal. App. 309, 82 Pac. 90; *Laycock v. Laycock*, (1908) 52 Or. 610, 98 Pac. 487; see: *Reading v. Reading*, (N.J. Ch. 1887) 8 Atl. 809; *Conklin v. Conklin*, (1921) 196 App. Div. 607, 188 N. Y. S. 141, 143.

<sup>25</sup>(1865) 4 Sw. & Tr. 154.

to him 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."

In *Merrill v. Merrill* the court said:<sup>26</sup>

"The uniform rule is that some knowledge must exist, sufficiently substantial upon which to base a belief, and usually there must also be some means of making legal proof of the commission of the offense, before condonation will be implied from cohabitation. . . . The wife instead of being suspicious of the husband when the charge of infidelity was made against him by Johnson, was justified in relying upon the denial of her husband. . . . She had no belief in its existence, had no knowledge of the fact, and had not the slightest proof upon which she might then act."

And in *Mischler v. Duchman* the opinion states,<sup>27</sup>

"Without knowledge on the part of plaintiff of the wrong conduct of his wife we fail to see in what manner her concealed faults can be legally condoned. If a husband does not believe that his wife is guilty when he is so informed, but yields to the deception practiced upon him by his wife, there can be no legal basis for reconciliation in such a case."

From these statements it can be seen that although the *Ellis* case quite definitely adopts belief as the test, the others speak of knowledge, or of both belief and knowledge, as being the factor rendering the cohabitation a condonation. This latter language is typical of the cases of this factual type, and about all that can be said for these judicial pronouncements is that they tend to confuse, rather than clarify, the issue as to whether it is belief in guilt that is determinative, or the possession of some quantum of information.

Can these cases in fact be explained on any other ground than that belief in guilt is the test? It is true that in them the information possessed is not as full and complete as in the cases heretofore discussed. From that it may be argued that the explanation of the decisions is that there was not "full knowledge," or that "knowledge" is not present when information pointing to guilt is counteracted by the denial of the accused spouse. However, the principle implicit in all of the cases is that if the injured

<sup>26</sup>(1899) 41 App. Div. 347, 58 N. Y. S. 503, 505-506. Compare the language in *Greims v. Greims*, (1912) 80 N. J. L. 233, 83 Atl. 1001, 1003 that "It must be remembered that the petitioner had faith in his wife and gave full credit to her continued assertions of innocence, and as *Malins, V. C.*, said in *Brown v. Brown*, L. R. 7 Eq. 185, 193, 'husbands are apt to believe what their wives tell them.'"

<sup>27</sup>(1925) 159 La. 478, 105 So. 559, 560.

spouse had not been so credulous as to accept the explanations and in fact had accepted the information as true there would have been a condonation. In such case the quantum of information or the "knowledge" would have been the same. It is the acceptance of that information as true, or the discarding of it as unworthy of belief, in other words the belief in guilt or innocence, that is controlling. That this is the true ratio decidendi of the decisions is illustrated by the case of *Day v. Day*.<sup>28</sup> There the husband received information of his wife's adultery with one Craft. The wife admitted a number of adulterous acts, but claimed that they were not voluntary, but the result of force. He continued to live with her, but left because of a belief in her guilt, and then returned because of the persuasions of a relative. The court pointed out that

"If he believed that the numerous acts of adultery brought to his attention were without her consent, his continuance of the marital relation might not amount to an effective forgiveness or condonation. . . . Much of his own testimony, however, was wholly inconsistent with this theory."<sup>29</sup>

In other words the case turned upon whether he believed she was guilty (which his leaving her and his explanation thereof confirmed) and not upon the state of his knowledge. The same is true of all the other cases of this type, but in them it appeared that he in good faith accepted her explanation and believed her to be innocent.

From an analytical standpoint it is clear that, despite the judicial language, the motivating principle of all the cases so far discussed is that belief in guilt is a condition precedent to the condonation of a marital offense. The term "knowledge" is incapable of being given a precise connotation, whereas "belief," as applied to these circumstances, does have a definite denotation; and it was the lack of such belief in guilt that rendered the continued intercourse ineffectual as a bar. It might be well to see whether that principle is in harmony with the social and moral precepts which evoked the doctrine of condonation as a defense to divorce. The doctrine is based upon the principle that society can not approve of a spouse continuing to enjoy that particular attribute of married life which alone is condemned unless the marital status is present, unless this act of itself acts as a factual and legally conclusive reinstatement of the marital ties. Suppose,

<sup>28</sup>(1905) 71 Kan. 385, 80 Pac. 974, 6 Ann. Cas. 169.

<sup>29</sup>(1905) 71 Kan. 385, 80 Pac. 974, 975.

then, a spouse has some knowledge of the other's infidelity, either slight or fairly complete, but not so full and incontrovertible as to compel belief in guilt, but refuses to believe the other guilty, either because of the other's denial, or, in the absence of protestations of innocence, because of an implicit faith in the other. If this spouse, in this state of mind, continues marital cohabitation, must this conduct meet with disapproval? Can it be said, fairly, that this man or wife has factually reinstated the marriage and rendered its judicial termination impossible, when he or she honestly believed that nothing had ever occurred to terminate that relationship of mutual trust and faithfulness, or to make its legal dissolution possible or desirable? Here is not one who intentionally chooses to continue the marital relation despite its breach by the other, but one who innocently continues it because he honestly thinks there is no reason to do otherwise. If a spouse has such faith in the integrity of the other, we can not condemn him or her for that, nor later say, "now that it is certain that your faith was unwarranted you can not put away your unfaithful partner, because you had 'knowledge' of the adultery and continued to live with her."

Now suppose that another spouse, with the same knowledge, slight or extensive, is of a distrustful nature, and therefore accepts the information or incriminating circumstances as true and believes the other to be guilty. So believing, he continues marital cohabitation. Is this conduct to be approved? Here is one who intentionally continues the marriage though he is convinced that it has been breached and factually terminated. Can it be said to him, "True enough, you believed your wife was an adulteress and despite that you were willing to share her charms, but you can still divorce her because your 'knowledge' of the act was not full enough at the time to permit of a condonation?" Looking at the equities of the cases there can be no question that they must weigh heavily in favor of the former. Yet, if knowledge and not belief is the test, granting that knowledge must then include something more than mere lack of ignorance and must be somewhat full (i.e. probable, or reasonable, etc.), the former must be denied a divorce because he was trusting enough to disbelieve the somewhat full information which he had, while the latter may legally cast his wife aside, though he was so lacking in faith that he believed her an adulteress, and so callous that he continued to enjoy her charms, because, while doing so, he did not have sufficient knowledge of her guilt.

It seems clear that, in addition to the practical difficulty of trying to apply the indefinite term "knowledge" as the test, both the logical and the sociological approach compel the conclusion that it is belief and not knowledge that must be the sole test of condonation. It might be contended that belief is not the sole test in that knowledge, in its narrow sense, must be present also, for a spouse who is wholly ignorant of the other's adultery could not have believed the other to be unfaithful. If the term "knowledge" is so understood and so confined, it might be proper to say that knowledge plus belief is necessary. However, it would be much more satisfactory, as an aid to clarity and as a preventative of unfair decisions, if the courts would make a clear avowal that belief in guilt is the sole condition precedent to condonation. The question of knowledge would then be relegated to a mere rule of evidence—that there must have been some information concerning or circumstances pointing to guilt in the possession of the plaintiff in order to justify a finding that he believed the defendant to be guilty.<sup>30</sup> All of the cases so far discussed have reached a decision in keeping with the principle that belief is the test. The criticism is directed not at the actual decisions, but at the method of approach, which renders obscure a definite underlying principle, and paves the way for an unjust decision in a particular case, through a reliance upon the terminology rather than an appreciation of the motivating precept.

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<sup>30</sup>It may be said that there is no real difference between a rule to the effect that there must be knowledge of plus belief in guilt to support a condonation, and a rule to the effect that belief in guilt is the sole prerequisite, but that, as a matter of evidence, there must have been some knowledge of the offense to support a finding of belief in guilt. Yet these two different rules are very apt to produce contrary results when applied, unless the court is extremely careful to construe knowledge in the proper light. Under the former rule the court is apt to construe knowledge as meaning that the plaintiff must have been possessed of a certain quantum of information, and hence hold, in a particular case, that though the plaintiff in fact believed his wife to be guilty there was no condonation because he did not have a sufficient quantum of information to constitute knowledge—the very result above condemned as being contrary to the motivating social and moral considerations. On the other hand, if the second rule is applied, the court, it having been found as a fact that he believed in her guilt, would hold that there was a condonation, and would not concern itself with the sufficiency or quantity of the information in his possession, other than to see whether there was evidence showing that he was not wholly ignorant of the offense.

Even where the statute expressly specifies "knowledge" (see note 2 supra) no particular difficulty is presented. The courts can properly construe the statute as merely being declaratory of the Canon Law (as in *Johnson v. Johnson*, (1835) 14 Wend. (N.Y.) 636, 643; *Jeans v. Jeans*, (1835) 2 Harr. (Del.) 38; or construe "knowledge" merely as a rule of evidence, or as being used in a particular sense that is synonymous with belief (which is what the courts have done in fact in numerous cases).

Strangely, only one case seems squarely to have raised the issue and expressly discussed whether belief or knowledge is the real test; and in that one the court said it was inclined to accept the latter, though it proceeded upon the basis that belief was the test and found a condonation, since the plaintiff's information was so complete and irrefutable that lack of belief in guilt was inconceivable.<sup>81</sup> However, a few cases, without mentioning knowledge as a possible test, have clearly adopted belief as the sole test in condonation cases.<sup>82</sup>

It is evident that in using belief in guilt as the test we must use the term in the subjective and not in the objective sense. It is not whether some other person, or the proverbial "reasonable man," would or would not have believed in guilt, having the same information that the plaintiff had, but whether in fact this plaintiff did so believe. For whether the law should approve the particular spouse's conduct depends, not upon what someone else would have done under the same circumstances, but upon whether this spouse's action was prompted by honest and proper motives, or by a disregard of the decencies of human behavior. This qualification is implicit in the decisions just discussed, though it is seldom given articulate expression.<sup>83</sup>

This much, therefore, seems evident. To rely upon knowledge as the test, and hence to determine a particular case according to whether its facts fit into or without a particular contracted or

<sup>81</sup>*Sneyd v. Sneyd*, [1926] P. 27, 95 L. J. P. 22.

<sup>82</sup>As in *Ellis v. Ellis*, quoted above, text at footnote 25. And see: *Anonymous*, (1809) 6 Mass. 147, 148, (saying, "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. For he can not be considered as having impliedly forgiven a crime, which he does not believe to have been committed."); *Reading v. Reading*, (N.J. Ch. 1887) 8 Atl. 809; *Day v. Day* (1905) 71 Kan. 385, 80 Pac. 974, 6 Ann. Cas. 169.

<sup>83</sup>For example, would the average person or a "reasonable man" have believed the husband's story in *Merrill v. Merrill*, (1899) 41 App. Div. 347, 58 N. Y. S. 503? And see *Gosser v. Gosser*, (1895) 183 Pa. St. 499, 503, 38 Atl. 1014, 1015 (saying, "Much less might have been sufficient to have convinced others. That he resisted belief, and was slow to act, is to his credit."); *Quincy v. Quincy*, (1839) 10 N. H. 272, 279; *Keats v. Keats*, (1858) 1 Sw. & Tr. 335, 347. This of course presents a somewhat more difficult problem of proof than if the objective test were used, but no more so than in the many other instances in the law where it is necessary to prove the actual mental state of a person involved, such as the presence of a specific criminal intent accompanying an act, or the subjective intent to contract, etc. Of course, in all such matters of proof, the words and acts of the party and the surrounding circumstances will be of probative value in determining the actual mental state and, in reality, the fact finding tribunal will, to some extent, determine what this person in fact intended or believed by considering what they, or a normal person, would have believed under the same circumstances.

expanded penumbra of connotations of the term, is to substitute an intellectual exercise in etymology for an honest effort to see that justice is done as a basis for decision. In the cases thus far discussed a proper decision is likely to be reached despite the apparent use of this test. The danger is that this test, being employed in these cases, will be carried over into other situations and there produce an unjust result. And just this has occurred. A number of cases have arisen which are like these last considered, in that one spouse has some information or indication of the other's adultery, but unlike them, in that there was no accusation of and denial of guilt by the suspected spouse. In them the injured spouse may or may not have believed in the other's guilt, depending upon his or her faith in the other. In a number of such cases the court has proceeded by making knowledge the test and then endeavoring to give that term a particular content for the purpose of application. For example, in *Graham v. Graham*,<sup>34</sup> marital cohabitation continued after the husband was told of floating rumors of an affair between his wife and another man, and after detectives had reported to him that she had gone to a certain boarding house. In holding there was no condonation, the court did not mention the presence or absence of belief in her guilt, simply saying it appeared "that 'reasonable knowledge' of the infidelity of the defendant, as defined by the authorities, was not in the possession of the petitioner," and quoting from an earlier New Jersey case<sup>35</sup> to the effect that

"Reasonable knowledge may be said to have been had when information of a fact is given by credible persons, speaking of their own knowledge, particularly if the same facts be afterwards proved, and they become instrumental in the proof."

A like approach was taken in a case where the husband had received an anonymous letter telling of his wife's infidelity<sup>36</sup> and in a few other cases of a similar nature.<sup>37</sup> For all that appears

<sup>34</sup>(1892) 50 N. J. Eq. 701, 25 Atl. 358.

<sup>35</sup>*Marsh v. Marsh*, (1861) 13 N. J. Eq. 281, 282 (a case where the plaintiff at the time of the intercourse was in possession of all the information and evidence subsequently relied upon at the trial to prove the adultery).

<sup>36</sup>*Beeler v. Beeler*, (1898) 19 Ky. L. Rep. 1936, 44 S. W. 136, 137, saying, "It must be proven that the injured party, having full knowledge of the offense, forgave the offending party."

<sup>37</sup>*Frost v. Frost*, (1916) 85 N. J. Eq. 571, 96 Atl. 1010; see *Smith v. Smith*, (1924) 155 La. 647, 99 So. 492, 493; *Pain v. Pain*, (1889) 37 Mo. App. 110, 115; cf. *Redding v. Redding*, (N.J. Ch. 1912) 85 Atl. 712. In *Maglathin v. Maglathin*, (1884) 138 Mass. 299, though the language is rather ambiguous, the court seems to have taken the proper approach; i. e., that it was a question of fact for the trial judge as to whether plaintiff believed the information he had of her guilt. And see: *Pepin v. Pepin*,

in these decisions the husband may have believed his wife to be guilty and yet continued marital cohabitation, but he is not held accountable because the information which served as a basis for his belief did not constitute "knowledge" as the court chose to define that term. This runs counter to the dictates of the pertinent social and ethical considerations. The cases ignore the underlying principle of the doctrine of condonation, and illustrate an unfortunate result of the continued use of "knowledge" terminology in the cases. These decisions and this terminology, therefore, are to be deprecated.

Contrary to the principle that belief in guilt is the test for condonation, is the statement made in some of the cases to the effect that there may be no condonation until the innocent spouse is in possession of sufficient evidence to prove the other's adultery in court, and, as a subsidiary rule, that even a confession of guilt by one spouse to the other is not alone a sufficient basis for a condonation.<sup>38</sup> Thus it is said that

"It is an established rule of law that the husband may not be held to have condoned an offense of the wife, even though he be informed by her that she has committed an offense; and this rule proceeds upon the ground that he may not make use of such confession as evidence, and, in consequence, he may continue to cohabit with the wife until possessed of knowledge which will enable him to legally establish the offense."<sup>39</sup>

If such is the rule it is obvious that belief in guilt forms no basis for a condonation, for no spouse could continue to believe in the other's innocence after the latter, upon accusation, admitted the adulterous conduct. The cases say that such a rule

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(1924) 123 Misc. Rep. 888, 206 N. Y. S. 732; *Welch v. Welch*, (1892) 50 Mo. App. 395.

<sup>38</sup>See *Davis v. Davis*, (1857) 19 Ill. 334, 336; *Von Funk v. Von Funk*, (1935) 120 Fla. 103, 162 So. 145; *Shackleton v. Shackleton*, (1891) 48 N. J. Eq. 364, 366, 21 Atl. 935; *Turnbull v. Turnbull*, (1861) 23 Ark. 615, 619; *Hofmire v. Hofmire*, (1838) 7 Paige Ch. (N.Y.) 60, 32 Am. Dec. 611, 612; *Uhlmann v. Uhlmann*, (1885) 17 Abb. N. C. (N.Y.) 236; *Deisler v. Deisler*, (1901) 59 App. Div. 207, 69 N. Y. S. 326, 332-333; but cf. *Pepin v. Pepin*, (1924) 123 Misc. Rep. 888, 206 N. Y. S. 732.

<sup>39</sup>*Merrill v. Merrill*, (1899) 41 App. Div. 347, 58 N. Y. S. 503, 505. The statement that he can not make use of such confession as evidence is incorrect. With the exception of three jurisdictions, where unusual statutory provisions are controlling (*Richardson v. Richardson*, (1837) 4 Port. (Ala.) 467, 30 Am. Dec. 538; *Hampton v. Hampton*, (1890) 87 Va. 148, 12 S. E. 340; *Trough v. Trough*, (1906) 59 W. Va. 464, 53 S. E. 630, 115 Am. St. Rep. 940, 4 L. R. A. (N.S.) 1185, 8 Ann. Cas. 837) it is consistently held that the admissions or confessions of a spouse are admissible in evidence to prove the commission of a marital offense. See 4 Wigmore, *Treatise on Evidence*, 2nd ed., sec. 2069. A question arises only as to whether the confession is sufficient proof if uncorroborated by other evidence. See note 45, *infra*.

is necessary, in that if a husband left his wife because he was convinced that she had committed adultery, but he did not have sufficient evidence to prove the charge in court, he would be guilty of desertion<sup>40</sup> and, further, that if he did not continue cohabitation it would frustrate the means of discovery;<sup>41</sup> or, that it is advisable because the husband should not expose his wife and family to disgrace, by leaving her and applying for a divorce, until he is certain that he can prove the adultery.<sup>42</sup> It is submitted that these cases are based upon a misconception of what constitutes condonation. It may well be that a husband should not leave his wife and commence divorce proceedings until he is satisfied that he can prove his case, but it is not the failure to start proceedings, nor the continuing to live under the same roof, which constitutes condonation, but marital intercourse.<sup>43</sup> Where the husband, because of information obtained or because of her own confession, believes his wife to be guilty, he may hesitate to leave her or to file his petition until he is certain he can prove it, but he can not justifiably continue marital intercourse and then cast her aside when sufficient proof is forthcoming.<sup>44</sup> This alleged general rule and its subsidiary rule as to confession of guilt<sup>45</sup> is hence without any valid foundation, either in law or for reasons of policy. In fact no case has actually held that marital intercourse subsequent to either a confession of guilt, or to a belief in guilt otherwise

<sup>40</sup>See *Hofmire v. Hofmire*, (1838) 7 Paige Ch. (N.Y.) 60, 32 Am. Dec. 611; 2 Bishop, *Marriage and Divorce*, 6th ed., 1881, sec. 43, n. 9.

<sup>41</sup>See *Elves v. Elves*, (1796) 1 Hagg. Con. 269, 292; but see *Dillon v. Dillon*, (1842) 3 Curt. 86, 91, 6 Jur. 422.

<sup>42</sup>See *Ellis v. Ellis*, (N.J. 1887) 9 Atl. 884, 886.

<sup>43</sup>Though husband and wife continue to live in the same house, and even share the same room, there is no condonation unless they had sexual intercourse. *Marshall v. Marshall*, (1925) 55 App. D. C. 173, 3 Fed. (2d) 344, 40 A. L. R. 624; *Greenwell v. Greenwell*, (R.I. 1916) 98 Atl. 53; *Harnett v. Harnett*, (1882) 59 Iowa 401, 13 N. W. 408; *Koch v. Koch*, (1916) 62 Pa. Super. 607.

<sup>44</sup>"Where a husband has received information respecting his wife's guilt, and can place such reliance on the truth of it as to act on it, although he is not bound to remove his wife out of his house, he ought to cease marital cohabitation with her." *Dillon v. Dillon*, (1842) 3 Curt. 86, 91, 6 Jur. 422.

<sup>45</sup>This subsidiary rule has a further fundamental weakness in that the better, though minority, rule is that a confession of guilt, alone and uncorroborated, is sufficient evidence to prove adultery in divorce proceedings, provided the confession was free from collusion. *Robinson v. Robinson*, (1859) 1 Sw. & Tr. 767; *Getty v. Getty*, [1907] P. 334; *Billings v. Billings*, (1831) 11 Pick. (Mass.) 461; *Stewart v. Stewart*, (1921) 93 N. J. Eq. 1, 114 Atl. 851; see 4 Wigmore, *Evidence* 2d. ed., secs. 2067, 2068. And, of course, in the cases before us, it must be assumed that the confession was real and non-collusive; for, otherwise, it could have formed no basis for a belief in guilt.

induced, did not constitute a condonation<sup>46</sup> and there is considerable judicial language contrary to that of these cases.<sup>47</sup>

One further problem, falling within our general topic, deserves comment. A situation of the following nature is occasionally presented for decision. A husband receives information of, or his wife confesses to, a specific act or specific acts of adultery. The husband believes that such adultery took place and, being ignorant of any other transgressions by her, believes that her infidelity was confined to this one act, or these particular acts. So believing, he continues marital cohabitation. Thereafter he learns that in addition to this act or these adulteries, his wife has been guilty of other adulterous conduct. He thereupon leaves her. The question then is presented as to whether his continued cohabitation acted as a condonation of all her past adultery, or only of such acts as he was then aware of and believed in. Here the underlying policy and the equities of the case would seem to support the latter conclusion. A spouse who is aware only of the fact that the other has strayed from the straight and narrow path on one occasion, or with but one man, may be willing to forego his remedy and continue the marriage, or may not be so injured thereby that further marital intercourse would be unthinkable; but it would oppugn human nature to assume that this spouse would have felt the same way had he been aware of and convinced that she had been guilty of these other infidelities. To choose between a divorce from and a continuation of the marriage with a wife who has been guilty of a single misstep and to choose between a divorce from or a continuation of the marriage with a wife who has been a promiscuous offender, are two entirely different things; and, in fairness, the injured spouse is entitled to know the exact nature of the choice which he must make before it can be made binding upon him. The cases in which a situation of this nature has arisen have followed this line of reasoning, and hold that the condonation is confined to the acts which the injured spouse believed to have been committed, and that a divorce

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<sup>46</sup>Except, possibly, *Von Funk v. Von Funk*, (1935) 120 Fla. 103, 162 So. 145; although the language used to the effect that "a husband can't be said to have condoned the offense . . . where he continues to give her the benefit of the doubt," indicates that the reason for the decision was that he did not believe her to be guilty.

<sup>47</sup>*Timmings v. Timmings*, (1792) 3 Hagg. Ecc. 76, 77; *Dillon v. Dillon*, (1842) 3 Curt. 86; *Quincy v. Quincy*, (1839) 10 N. H. 272, 275, 277; *Farmer v. Farmer*, (1889) 86 Ala. 322, 5 So. 434, 435; *Spence v. Spence*, (1926) 162 La. 1, 110 So. 68.

will be granted for the adultery of which he or she remained ignorant at the time of the cohabitation.<sup>48</sup>

It should be observed, however, that the information and consequent belief may be such, in a particular case, that the intercourse should be construed as a condonation of all offenses, including those of which the plaintiff was not even aware. In the above cases the plaintiff was aware of but one act of adultery and subsequently learned of another act; or was aware of adultery with one person and later learned that the husband or wife had been living a life of profligacy or prostitution. A different situation would be presented where the spouse had reason to and did believe that the other had committed numerous, indiscriminate transgressions and yet continued cohabitation. There, it could not be contended reasonably that the plaintiff's conduct would have been different had he or she been aware of a few additional acts, and it follows that such conduct should preclude the granting of a divorce. This principle has been applied in cases where, upon accusation of adultery, the guilty spouse makes a general confession of guilt, no specific acts being charged or admitted. There, subsequent cohabitation condones all adultery, though the injured spouse may later learn of specific instances of adultery of which he or she was not aware at the time of the marital cohabitation.<sup>49</sup> The applicable principle is well stated in *Moorhouse v. Moorhouse*:<sup>50</sup>

"It is doubtless true that the act of condonation only operates to forgive the specific acts condoned, when the forgiveness is applied to specific acts. . . . But where no specific acts or offense are known or disclosed, and where no inquiry is made as to specific acts and there is no concealment or denial upon inquiry, but the confession is of general infidelity, without specification, then a condonation, also general, applies as well to one precedent offense as to another, and includes them all."

Somewhere between these two situations the line must be drawn and the determinative test will be whether the plaintiff's conduct would have been any different had he been aware of and believed that all of the acts of adultery took place which in fact did occur.

<sup>48</sup>*Alexandre v. Alexandre*, (1870) L. R. 2 Prob. & Div. 164; *Frank v. Frank*, (1930) 99 Pa. Super. 183; *Shackleton v. Shackleton*, (1891) 48 N. J. Eq. 364, 21 Atl. 935, 27 Am. St. Rep. 478; see *Durant v. Durant*, (1825) 1 Hagg. Ecc. 733, 752; but see *Fowler v. Fowler*, (1926) 119 Okl. 95, 248 Pac. 629, 632.

<sup>49</sup>*Rogers v. Rogers*, (1877) 122 Mass. 423; *Moorhouse v. Moorhouse*, (1899) 90 Ill. App. 401.

<sup>50</sup>(1899) 90 Ill. App. 401, 403.