

JAMES F. COOPER, Appellant, v. **GERTRUDE L. COOPER**, Appellee.

Action of Divorce. This case comes up on an appeal from the Court of Common Pleas and Quarter Sessions for Montserrado County, before which it was tried and determined at its September term, A. D. 1908.

The first count of the appellant's bill of exceptions refers to the court below overruling counts 1 and 2 of defendant's answer.

The court below did not err in overruling the counts referred to in defendant's answer, in the first instance. The first count alleges insufficiency of the cause of action, but fails to say what the insufficiency was, contrary to prescribed principles of law and pleadings which expressly assert that the fundamental principle upon which all complaints, or answers, or replies shall be construed, shall be that of giving notice to the other parties of all new facts which it is intended to prove. This court regrets to be driven to the necessity of reiterating this point of law to the learned counsellors who are well acquainted with it.

The second count of the defendant's answer, requesting the court to strike out the first count of plaintiff's complaint, on the grounds of the words "divers other days between the said 26th of February, A. D. 1906 and the filing of this complaint" being indefinite and uncertain. This court says that the term *divers* mentioned in the first count of plaintiff's complaint means several, sundry other days, more than one day, thus permitting plaintiff to introduce evidence on any other day between the 26th day of February, A. D. 1906 and the filing of the complaint.

The efforts made by counsel for the appellant to establish proof of condonation are not tenable and cannot be noticed by this court, as it was the appellant's imperative duty to set forth the same in his answer, thereby giving the appellee the notice required by law. The question of marital relation between the parties, referred to in the appellant's bill of exceptions and not mentioned in his written pleadings, has duly been considered.

The presumption of marriage between the parties, this court considers absolute and irrefutable. For it is clear according to the records, that, the parties have lived together as man and wife. The appellant having acknowledged same when he applied to witness Prout for his wife, and the fact being corroborated by other witnesses. The statute law declares that whatever a party says is evidence against him.

The court, therefore, adjudges that the judgment of the lower court is affirmed, and the appellant is ruled to cost.

The clerk of this court is commanded to issue a mandate to the court below as to the effect of this decree.

Given under our hands this 10th, day of February, A. D. 1909.

By the Court.