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RANKIN v. SCOTT FELL & Co.

Order of the Supreme Court varied accordingly, by making the rule absolute for a nonsuit with costs. Appellant to pay the costs of the appeal.

Solicitors for appellant, *Robson & Cowlishaw.*

Solicitors for respondents, *Minter, Simpson & Co.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

DAVIS . . . . . APPELLANT;
PETITIONER,

AND

DAVIS
RESPONDENT,
. . . . . RESPONDENTS.
HUGHES
CO-RESPONDENT

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 8, 9.

Griffith C.J., Barton and O'Connor JJ.

Matrimonial Causes Act (*No.* 14 *of* 1899), *sec.* 18—*Connivance*—*Corrupt intention*—*Conduct conducing to adultery.*

A wife, without just cause, left her husband's house, and refused to return to it, or to allow him to live with her. Having reason to suspect her of adultery with a certain man, the husband, for the purpose of obtaining proof of her guilt, secretly watched the house in which she lived. On one occasion he saw the man whom he suspected enter the house in the evening and leave at an early hour of the following morning, and, on another occasion, saw the pair in the act of adultery. He did not interfere on either occasion.

Held, in a suit by the husband for dissolution of marriage on the ground of adultery, that these facts did not establish connivance.

Decision of the Supreme Court (1904) 4 S.R. (N.S.W.), 506, reversed.

APPEAL from a decision of the Supreme Court, (1904) 4 S.R. (N.S.W.), 506.

The following statement of the facts is taken from the judgment:—

The petitioner and his wife, respectively appellant and respondent in the appeal, lived for some years together at Bombala.

The petitioner's avocation necessitated his frequent absence from the town where he lived, and his custom was to return home at the end of every week for one or two days. On one occasion, when he came home, he found that his wife had left his house with the children, removed the furniture, and begun housekeeping somewhere else. She afterwards opened a small shop in a house adjoining that in which the co-respondent, a saddler, lived and carried on his business. The petitioner asked his wife to return to his house, or to allow him to live with her at the house which she had taken, but she refused to do so. He continued, nevertheless, to provide for her maintenance and that of the children. Some considerable time afterwards his suspicions were aroused as to improper conduct between his wife and the co-respondent, and for some time he personally watched the house in which she lived. At first he discovered nothing to confirm his suspicions, but on 8th February, 1903, he saw the co-respondent admitted into the respondent's house in the evening, and saw him leave it and return to his own house at 2 o'clock in the morning. On the next day he accused the co-respondent of misconduct with the respondent, and an angry altercation took place between them, resulting in cross charges of assault at the police court. On the same day he accused his wife of misconduct, and she did not deny it. A few days afterwards the petitioner offered to forgive his wife if she would come home with the children, but she refused to have anything to do with him. A week later he again watched the house with a witness, and detected his wife and the co-respondent in the act of adultery. Shortly afterwards she went away from Bombala with the co-respondent, and the petitioner did not discover their whereabouts for some months. When he did, he instituted proceedings for divorce.

The suit came on for hearing before *Walker* J., who dismissed the petition on the ground that the petitioner had been guilty of conduct conducing to the adultery. From this decision the petitioner appealed to the Full Court. That Court dismissed the appeal on the ground that, even if the petitioner had not been guilty of conduct conducing to the adultery, he had connived at it, and was therefore disentitled to relief.

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Windeyer, for the appellant. There is nothing in the evidence to show that the petitioner in any way connived at the adultery, or was guilty of such wilful neglect or misconduct as to conduce to it; secs. 17 (*b*) and 19 (*b*) (iii.) of Act No. 14 of 1899. The adultery had begun long before the acts of alleged connivance, and the wife had actually deserted the petitioner and refused to return to him, though the petitioner continued to support her and the children. The watching for evidence of adultery under such circumstances is not evidence of connivance. The petitioner had endeavoured in every way to heal the breach between his wife and himself, and having failed in that, set about obtaining strict proof for the purposes of establishing his title to relief in the Court. He was as much entitled to watch his wife himself, as to employ a detective to do so. He cannot be said to have brought about his wife's fall. Short of absolute physical compulsion, he had done everything that was possible to save her. It is not necessary that he should act with the nicest discrimination, wisdom or delicacy, so long as he acts with an honest intention, with a view to the assertion of his legal rights. The Court below relied on *Gipps* v. *Gipps* (1). The headnote to that case is misleading in suggesting that for a husband to merely abstain from interfering to prevent an adulterous intercourse, without any improper or corrupt intention on his part, is connivance. If taken literally, that is inconsistent with all the other leading cases on the subject. They all establish the necessity for the presence of a corrupt intention in the mind of the husband. Moreover, in that case, the adultery had not begun at the time when the acts of alleged connivance took place, and interference might have prevented or delayed it. But in the present case it had begun, and the husband was practically powerless to arrest it, his wife being out of his influence and control. *Pring* J., does not appear to have regarded the case as an authority for the proposition contended for, because he assumes the necessity of a corrupt intention, but says that it may be inferred. In *Linscott* v. *Linscott* (2) *Darley* C.J. pointed out that *Gipps* v. *Gipps* (1) was a case in which the most pronounced corrupt intention existed. The basis of the doctrine is

(1) 33 L.J., P.M. & A., 161.

(2) 18 N.S.W. L.R., Div. 12.

volenti non fit injuria. It is necessary to show concurrence, consent, pleasure or satisfaction. As regards conducing to the adultery, in *Cunnington* v. *Cunnington* (1), it was held that, although in that case the adultery would never have taken place but for the absence of the husband, it was not such wilful neglect or misconduct as to conduce to the adultery, and raise a case for the exercise of the discretion of the Court; it was not a *causa causans*; there must be a breach of some marital duty, some contribution by the husband towards his own dishonour. See also *Phillips* v. *Phillips* (2). *Neich* v. *Neich* (3) was based on a misapprehension of the law. The conduct conducing to the adultery must be anterior to the adultery, but in that case it was assumed that acts done by the husband after it had begun might deprive him of relief. Apart from that, in that case the Court was of the opinion that certain words addressed by the husband to the wife indicated a desire on his part that she should commit adultery. *Phillips* v. *Phillips* (4) decided that there must be corrupt intention, that culpable neglect or supine inertness is not in itself sufficient, and that, as connivance involves criminality, if the facts are equivocal, the presumption is in favour of an absence of intention. See also *Moorsom* v. *Moorsom* (5). The mind of the husband must be concurrent, must view the wife's course of conduct with pleasure: *Rogers* v. *Rogers* (6). A husband must not actively provide facilities for wrong-doing, but may abstain from interference for the purpose of obtaining evidence; *Bishop on Divorce*; *Sanchez de Matrimonio*, lib. 10, disp. 12, No. 52, cited in *Timmings* v. *Timmings* (7). In *Marris* v. *Marris* (8), which is directly opposed to the decision in *Neich* v. *Neich* (3), it was held that a husband who assented to his wife's going away to live with the co-respondent, but with great reluctance and sorrow, had not disentitled himself to relief.

There was no appearance for the respondents.

The judgment of the Court was delivered by

GRIFFITH C.J. This is an appeal from a decision of the Supreme

(1) 1 Sw. & Tr., 475.
(2) 1 Rob. E., 144.
(3) (1901), 1 S.R. (N.S.W.), Div. 67.
(4) 10 Jur., 829.
(5) 3 Hagg. Ecc., 87, at p. 107.
(6) 3 Hagg. Ecc., 57.
(7) 3 Hagg. Ecc., 76, at p. 82.
(8) 31 L.J. P.M. & A., 69.

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Court affirming a judgment of Mr. Justice *Walker* dismissing the appellant's petition for a divorce from his wife on the ground of adultery. The facts of the case are not in dispute, and are in a very small compass. [His Honor stated the facts as above, and proceeded.]

On these facts the learned Judge of first instance apparently held that the petitioner had been guilty of conduct conducing to his wife's adultery. The petitioner appealed to the Full Court, who held that the petitioner had been guilty of connivance, the connivance relied on being watching to obtain evidence of the suspected adultery. Of course, in one sense, he might possibly have prevented the adultery as soon as he saw the co-respondent approaching the house, by taking steps to prevent him from entering it. There is a passage in the judgment of Lord *Chelmsford* in the case of *Gipps* v. *Gipps* (1), relied on in the Supreme Court, which is very material on this point: "It must be borne in mind that the offence of adultery is complete in a single instance of guilty connection with a married woman. It is the first act which constitutes the crime, and though the adulterous intercourse between the parties should continue for years, there is not a fresh adultery upon every repetition of the guilty acts, although all and each of them may furnish proof of the adultery itself." Now in this case the husband suspected the fact of adultery, and watched to obtain evidence for the purpose of proving it. The learned Judges of the Supreme Court thought that this amounted to connivance. I will state what we conceive to be the law as to connivance. As far as we know, there is no conflict of opinion on this point to be found in the books. The matrimonial law is derived from the Canon Law. The first case cited to us was *Phillips* v. *Phillips* (2), in which Dr. Lushington stated the principles of law governing the power of the Divorce Court as to connivance. The same case was relied on by the Supreme Court of New South Wales in the case of *Linscott* v. *Linscott* (3). In that case delay in instituting the suit was held not to be evidence of connivance, and the learned Chief Justice in his judgment referred to the

(1) 33 L.J. P.M. & A., 161, at p. 169. (2) 1 Rob. E., 144.
(3) 18 N.S.W. L.R., Div. 12.

case of *Phillips* v. *Phillips* (1), and quoted some passages, which I will also read as applying to the facts of this case, though the application is not quite the same. Dr. Lushington says (2): "The first case to which I refer is that of *Rogers* v. *Rogers* (3), in which *Sir John Nicholl* says: 'Without doubt, connivance on the part of the husband will, in point of law, bar him from obtaining relief, on account of the adultery which he has allowed to take place. *Volenti non fit injuria* is the principle on which the rule has been founded.' I apprehend that the meaning of this maxim is, that there must be *consent* —the party must be acquiescing in (it matters not whether actively or passively), and cognizant of the adulterous intercourse of his wife. That consent must be proved, either by direct evidence or by necessary consequence from his conduct. *Sir John Nicholl* refers to several cases. 'In these cases,' he says, 'it was held not to be necessary that any active steps should be taken on the part of the husband to corrupt the wife—to induce and encourage her to commit the criminal act. Passive acquiescence would be sufficient to bar the husband, provided it appeared to be done with the intention, and in the expectation that she would be guilty of the crime'—(*with the intention*)—'but, on the other hand, it has always been held that there must be a consent. The injury must be *volenti*'—(nothing can be stronger than these words; and the learned Judge having stated what connivance is, proceeds to show what it is not). 'It must be something more than mere negligence—than mere inattention—than over-confidence—than dulness of apprehension—than mere indifference—it must be intentional connivance, in order to amount to a bar.' . . . 'If the facts are equivocal, the presumption is in favour of the absence of intention.'" Dr. Lushington then referred to the case of *Timmings* v. *Timmings* (4), which was also referred to by the Supreme Court, as having been disapproved of in *Gipps* v. *Gipps* (5). An examination of the latter case, however, shows that the supposed disapproval was due to a misapprehension of the language of Lord *Stowell*. In the case of *Timmings* v. *Timmings* (6), Lord *Stowell* is reported to have said: "True it is, that a hus-

(1) 1 Rob. E., 144.
(2) 1 Rob. E., at p. 157.
(3) 3 Hagg. Ecc., 57.
(4) 3 Hagg Ecc., 76.
(5) 33 L.J. P.M. & A., 161.
(6) 3 Hagg. Ecc., 76, at p. 81.

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band is not barred by a mere permission of opportunity for adultery; nor is it every degree of inattention on his part which will deprive him of relief; but it is one thing to permit and another to invite; he is perfectly at liberty to let the licentiousness of the wife have its full scope; but that he is to contrive the meeting, that he is to invite the adulterer, then to decamp and give him the opportunity, I do think amounts to legal prostitution. The analogy, as to theft, in the passage cited from *Sanchez* shows this doctrine." The words misapprehended are "he is perfectly at liberty to let the licentiousness of his wife take its full scope." Immediately after the passage just quoted Lord *Stowell* referred to *Sanchez*. It will be convenient here to read the passage on which he relied. *Sanchez* was a great writer on the Canon Law, and probably the generally acccepted view taken of connivance is derived from his work "*De Matrimonio*." The passage is in lib. 10 disp. 12, No. 52,—I shall read it in English—"It is lawful for a man who suspects his wife of adultery to watch her with proper witnesses so as to be able to convict her of adultery, first because that is not conniving at the offence but taking advantage of her wickedness for his own advantage; secondly, because it is one thing to invite, advise, or enjoin the commission of a wrong thing, which is never lawful, and another to allow, or abstain from removing the opportunity for wrong-doing, which is sometimes permissible for the sake of some greater good . . . . . For instance, parents or masters of a household do no wrong in abstaining from removing some opportunity for theft from their children or dependants, when they know that they are addicted to it, in order that they may by such means be caught in the theft and recalled to rectitude." The analogy put by *Sanchez* shows that he did not think it connivance to watch for the purpose of discovering the existence of a suspected fact, and it is manifestly in that sense that Lord *Stowell* used the words that a man may let the licentiousness of his wife take its full scope, that is to say, if he suspects her, for the purpose of convicting her. The learned Chief Justice in the case of *Linscott* v. *Linscott* (1), after quoting from *Phillips* v. *Phillips*, which was decided in 1844, refers to the

(1) 18 N.S.W. L.R., Div. 12.

case of *Allen* v. *Allen* (1) which was a case before a jury, in which Mr. Justice *Hill* directed the jury as to the question of connivance in these words:—"To find a verdict of connivance, you must be satisfied from the facts established in evidence that the husband so connived at the wife's adultery as to give a willing consent to it. Was he, or was he not, an accessory before the fact? Mere negligence, mere inattention, mere dulness of apprehension, mere indifference, will not suffice; there must be an intention on his part that she should commit adultery. If such a state of things existed as would, in the apprehension of reasonable men, result in the wife's adultery—whether that state of things was produced by the connivance of the husband or independent of it—and if the husband, intending that the result of adultery should take place, did not interfere, when he might have done so, to protect his own honour, he was guilty of connivance."

I will refer to one other later case, *Marris* v. *Marris* (2), decided by *Sir C. Creswell* in 1862. In that case the husband had in a sense consented to his wife leaving him and going to live with the co-respondent. An improper intimacy had gone on for a long time between the wife and co-respondent, and the husband knew of it, but was unable to prevent its continuance. The wife expressed her intention of going away from him, and he said, in effect, "Very well, if you have definitely made up your mind, I can do no more, you had better go;" and she went. The learned *Judge Ordinary* said: "I cannot construe that into a willing consent that the adultery should be committed. It is an unwilling consent, given because she would not comply with the condition that he insisted upon of giving up the improper intimacy. I had a good deal of difficulty in my own mind as to the meaning of the word 'connivance' as used in the Ecclesiastical Courts. By connivance I understand the willing consent of the husband; that the husband gives a willing consent to the act, although he may not be an accessory before the fact; that, although he does not take an actual step towards procuring it to be done, he gives a willing consent and desires it to be done." These observations, as well as all the others quoted, are entirely inapplicable to mere

(1) 30 L.J., P.M. & A., 2, at p. 4. (2) 31 L.J., P.M. & A., 69, at p. 72.

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watching to detect a wife in the commission of the offence, the adultery of which the appellant complains having, as pointed out by Lord *Chelmsford*, begun long before. What the appellant was doing was merely seeking evidence of an existing fact. How then can it be suggested that he connived at or willingly assented to the commencement of the adulterous intercourse? All the evidence is to the contrary. The facts in this case do not, in our opinion, afford any evidence of connivance on the part of the petitioner in the sense in which that word is used in the *Matrimonial Causes Act*.

The appellant was therefore entitled to succeed.

Appeal allowed, with costs against the co-respondent. Decree nisi for dissolution of the marriage, with costs, to be made absolute in three months. Costs of suit to be paid by co-respondent.

Proctors for appellant, *Shipway & Berne*.

C. A. W.

[HIGH COURT OF AUSTRALIA.]

JOHANSEN . . . . . PLAINTIFF;

AND

CITY MUTUAL LIFE ASSURANCE SOCIETY, LIMITED . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1904.

SYDNEY, *Dec.* 13.

GRIFFITH C.J., BARTON AND O'CONNOR JJ.

Practice—Special leave to appeal—Grounds for granting—Matter of public interest—Not granted on mere questions of fact—Judgment appealed from unattended with sufficient doubt.

Special leave to appeal to the High Court from a judgment of the Supreme Court of a State, in a case involving less than the appealable amount, will not be granted by the High Court where the questions involved are mere questions of fact, nor, even in a case involving an important question of law, if the judgment from which leave to appeal is sought appears to the Court to be unattended with sufficient doubt to justify the granting of leave.