[HIGH COURT OF AUSTRALIA.]

HAEVECKER . . . . . APPELLANT;
PLAINTIFF,

AND

HAEVECKER AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Oct.* 2, 5, 6.

SYDNEY, *Dec.* 15.

Latham C.J., Dixon and Evatt JJ.

Divorce—Adultery—Connivance—Conduct inducing or contributing to adultery—Wilful neglect or misconduct conducing to adultery—Matrimonial Causes Act 1929 (*S.A.*) (*No.* 1946), *secs.* 11 (*a*), 12 (1) (*d*), (*f*).*

Where a husband believes prematurely that a relationship between his wife and another man is adulterous, and, in the desire to obtain evidence in order to divorce her, abstains from taking steps which he would or might have taken if he had thought that she had not yet committed adultery, but on the other hand does nothing which leads the wife or the adulterer to suppose that he sanctions the commission of adultery, and they both understand that he objects to their association, he is not guilty of connivance at their subsequent adultery although, on the supposition that his wife had already fallen, his state of mind was one of willingness that adultery should go on so as to supply him with the proofs he needed.

So *held* by *Dixon* and *Evatt* JJ.

H. and his wife lived near a farm occupied by R. and his mother. In 1930 H.'s wife was engaged to work during the day at the farm. She returned to the matrimonial home at night, but in 1931 H. complained of the late hours

* The *Matrimonial Causes Act* 1929 (S.A.) provides :—Sec. 11 : "No order shall be made—(*a*) if the plaintiff has condoned, been accessory to, or connived at all the grounds proved." Sec. 12 (1) : "The court may refuse to make an order if the plaintiff has been guilty of . . . (*d*) habits or conduct inducing or contributing to the existence of the ground relied upon . . . (*f*) wilful neglect or misconduct conducing to the existence of the said ground."

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at which she returned. He told both his wife and R. that their relationship had been the subject of comment by neighbours and that he wanted his wife to stop working at the farm. The wife remained in her employment at the farm. H. began to occupy a separate room in the matrimonial home, and in 1932 he went to live at his father's house. The wife continued to occupy the matrimonial home until H. sold it in 1934. She then lived at the farm, where R. also lived. In an action by H. in the Supreme Court of South Australia for dissolution of the marriage he gave evidence that in 1931 he believed that his wife and R. had committed adultery, that he wanted a divorce and was anxious to obtain evidence for it. He said :—"From 1931 onwards I did not take steps to prevent familiarity being committed between my wife and co-defendant. I could not very well do it. I had to let it go at that. If they did commit adultery I would have been all the more pleased, that is, after I reached the decision to go for divorce. I wanted to make it easy for them to commit adultery so that I could get a divorce, that is, after I made up my mind I wanted a divorce." The trial judge found that the wife and R. had committed adultery, the first occasion found being in or about March 1933, but he dismissed the action on the grounds that H. had connived at the adultery and had been guilty of wilful neglect conducing to, and of conduct inducing and contributing to, the adultery.

Held, by *Dixon* and *Evatt* JJ. (*Latham* C.J. dissenting), that the evidence did not justify a finding of connivance, or, by *Dixon* and *Evatt* JJ., a finding that H. had been guilty of wilful neglect conducing to, or of conduct inducing or contributing to, the adultery within the meaning of sec. 12 (1) of the *Matrimonial Causes Act* 1929 (S.A.).

Decision of the Supreme Court of South Australia (*Reed* A.J.) reversed.

APPEAL from the Supreme Court of South Australia.

Oscar George Haevecker brought an action for divorce against his wife Bertha May Haevecker and Walter Benno Regnier. He alleged that the defendant wife since about October 1933 at Australian Plains had lived with and habitually committed adultery with the defendant Regnier and on divers occasions prior to October 1933 at divers places the defendants had committed adultery. The defendants, in addition to denying the alleged adultery, pleaded that, if adultery had been committed, it was connived at by the plaintiff. They also pleaded that the plaintiff had been guilty of habits or conduct, inducing or contributing to the commission of any such adultery and wilful neglect or misconduct conducing thereto.

The facts as found by *Reed* A.J., the trial judge, were substantially as follows :—The husband and wife, who were married in 1922,

lived in a very small township at Australian Plains. Their circumstances were not prosperous. About December 1930 the wife, with the husband's consent, went to work at a neighbouring farm occupied by the mother of the defendant Regnier. From time to time the husband expressed dissatisfaction, because his wife came home late from Regnier's premises and because he considered that she neglected her own household. On one occasion in 1931 the husband expected his wife to attend a euchre party, but she and Regnier were both absent. This aroused the husband's suspicions, and he complained to both Regnier and the latter's mother and alleged that Regnier was out with Mrs. Haevecker on that night. About this time the husband and wife began to occupy separate rooms. The trial judge took the view that this was due to gossip which the husband had heard about his wife and Regnier and to the wife's refusal to leave Regnier in accordance with wishes which the husband had expressed to her. In October 1932 the husband left the matrimonial home and went to live at his father's house. The wife continued to work at Regnier's, but slept at the matrimonial home. During the greater part of 1933 the only persons at Regnier's house were Regnier, Mrs. Haevecker and her child and, on occasions, farm labourers. It was found that the wife and Regnier committed adultery, the first occasion found being in or about March 1933. In February 1934 the husband sold his house, and from that time on the wife lived at the same house as Regnier.

The husband's evidence as to his state of mind was substantially to the following effect:—When his wife had been at Regnier's a year much gossip reached his ears. After his complaint to the Regniers on the occasion of the euchre party, he suspected his wife's relations with Regnier and knew in his own mind that she had been misconducting herself. He had little or nothing but gossip to go on. He decided he would not have her in the house, wished to obtain evidence for a divorce and was on the look out for it. He had his meals at his parents' residence and ultimately went to sleep there. He made it clear to his wife that he did not want her companionship and thought she must have seen that he was trying to get evidence to divorce her. He took no steps to prevent familiarity between the defendants, saying that he could not very

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well do it and he had to let it go at that. Once he decided to seek a divorce, he would have been better pleased if they did commit adultery and he wished to make it easy. He did not see how he could have stopped it. They knew he suspected them, and everyone was talking about it; it was unnecessary to tell her.

The formal findings of *Reed* A.J. were :—

1. That the defendant Bertha May Haevecker committed adultery with the defendant Walter Benno Regnier.

2. That the defendant Walter Benno Regnier committed adultery with the defendant Bertha May Haevecker.

3. That the plaintiff connived at the said adultery.

4. That the plaintiff had been guilty of wilful neglect conducing to the said adultery.

5. That the plaintiff had been guilty of conduct inducing and contributing to the said adultery.

He therefore dismissed the action.

From this decision the plaintiff appealed to the High Court.

Further facts appear from the judgments hereunder.

Ligertwood K.C. (with him *Blackburn*), for the appellant. The important time is when the appellant first made up his mind that his wife had committed adultery. Connivance is a state of mind, a corrupt intention. If he had a real belief in his wife's misconduct, it was not connivance merely to hope, or even to seek, evidence to obtain a divorce. Acquiescence is sufficient only if there is a duty on the husband to warn the wife, and this must be before any adultery has taken place. As to connivance, see *Davis* v. *Davis and Hughes* (1) and *Thomson* v. *Thomson* (2). There must be something of an active character, such as giving facilities or creating opportunities (*Marris* v. *Marris* (3)). The question is whether the husband intended his own dishonour. The judge's findings as to his conduct are inconsistent with connivance. There cannot be conduct conducing where there is a wife determined against her husband's wishes to associate with another man. In any event the bar is only discretionary. As to conduct conducing, see *Dering* v. *Dering and Blakeley* (4).

(1) (1904) 2 C.L.R. 178.
(2) (1908) S.C. 179.
(3) (1862) 2 Sw. & Tr. 530; 164 E.R.1102.
(4) (1868) L.R. 1 P. & D. 531.

Stanley, for the respondent Haevecker. The husband had no reasonable suspicion before the acts complained of as connivance. His duty was to warn his wife (*Moorsom* v. *Moorsom* (1); *Gilpin* v. *Gilpin* (2); *Boulting* v. *Boulting* (3)). He cannot abstain from acting because he has a reasonable suspicion (*Gipps* v. *Gipps* (4); *Halsbury's Laws of England*, 2nd ed., vol. 10, p. 675, note *p*; *Bevern* v. *Bevern and Dobson* (5); *Lankester* v. *Lankester and Cooper* (6)). *Thomson* v. *Thomson* (7) depends on the Scotch doctrine, which is different from the English (*Wemyss* v. *Wemyss* (8)). Even if there were no connivance there was conduct conducing (*Jeffreys* v. *Jeffreys* (9)).

Travers, for the respondent Regnier. Negligence is sufficient to constitute connivance (*Halsbury's Laws of England*, 2nd ed., vol. 10, p. 674; *Gipps* v. *Gipps* (4); *Lankester* v. *Lankester* (6)). The Scotch doctrine is different and there the party conniving is more like an accessory. A mental state with failure to exercise steps of which the husband is capable is connivance. Suspicion is not enough to excuse him. In *Davis* v. *Davis and Hughes* (10), where the contrary was held, adultery was said to be an existing fact. The question is simply one of fact and there is no complaint of misdirection (*Powell* v. *Streatham Manor Nursing Home* (11)). Sec. 11 of the *Matrimonial Causes Act* 1929 (S.A.) distinguishes between a person being accessory to or conniving at the grounds proved (See *Wharton's Law Lexicon*, 12th ed. (1916), p. 10). If a husband takes an active step he is an accessory. Connivance is merely state of mind coupled with inactivity (*Boulting* v. *Boulting* (3); *Glennie* v. *Glennie and Bowles* (12); *Marris* v. *Marris* (13); *Phillips* v. *Phillips* (14); *Rogers* v. *Rogers* (15);

(1) (1792) 3 Hag. Ecc. 87, at pp. 94, 106; 162 E.R. 1090, at pp. 1092, 1096.
(2) (1804) 3 Hag. Ecc. 150; 162 E.R. 1112.
(3) (1864) 3 Sw. & Tr. 329; 164 E.R. 1302.
(4) (1864) 11 H.L.C. 1; 11 E.R. 1230.
(5) (1920) V.L.R. 26; 41 A.L.T. 100.
(6) (1925) P. 114.
(7) (1908) S.C. 179.
(8) (1866) 4 Macph. 660; 4 Sc. R.R. 674.
(9) (1864) 3 Sw. & Tr. 493; 164 E.R. 1366.
(10) (1904) 2 C.L.R. 178.
(11) (1935) A.C. 243.
(12) (1862) 32 L.J. P.M. & A. 17, at p. 20.
(13) (1862) 2 Sw. & Tr. 530; 164 E.R. 1102.
(14) (1847) 5 N.C. 435.
(15) (1830) 3 Hag. Ecc. 57; 162 E.R. 1079.

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Moorsom v. *Moorsom* (1)). As to the discretionary bars, see *Lankester* v. *Lankester* (2). Conduct conducing has been found in fact, and the trial judge exercised his discretion on it. It is not suggested that he did so on wrong principles (*Ives* v. *Ives* (3)). In conduct conducing the effect on the wife must be considered. If the husband has no suspicion on which a reasonable man might act, he gets no protection. Conduct conducing need not be wilful (*Stubbs* v. *Stubbs and Kemp* (4)).

Ligertwood K.C., in reply. Connivance is not mere acquiescence; it is acquiescence with the intention that as a result adultery will take place. In this case not even acquiescence has been proved. Connivance must be clearly proved, and if the facts are equivocal, the presumption is against it. If connivance cannot be found, neither can conduct conducing.

Cur. adv. vult.

Dec. 15. The following written judgments were delivered :—

LATHAM C.J. The appellant Oscar George Haevecker claimed a divorce on the ground of his wife's alleged adultery with one Regnier. The defendants, Bertha May Haevecker and Walter Benno Regnier, in addition to denying the adultery, raised the defences that the plaintiff connived at the adultery and that he was guilty of habits or conduct inducing or contributing to the commission of adultery and of wilful neglect or conduct conducive thereto.

Reed A.J. found that the adultery was proved, the first occasion of adultery being in or about the month of March 1933. He also held that the other defences mentioned were established and accordingly refused the decree.

The *Matrimonial Causes Act* 1928 of South Australia provides in sec. 8 that sec. 31 of the *Matrimonial Causes Act* 1867 shall be amended so as to include the following provision :

" Upon any petition for dissolution of marriage charging adultery, if the court finds that the petitioner has during the marriage been

(1) (1792) 3 Hag. Ecc. 87 ; 162 E.R. 1090.
(2) (1925) P. 114.
(3) (1929) 3 A.L.J. 201.
(4) (1931) S.A.S.R. 196, at p. 199.

accessory to or conniving at the adultery of the other party to the marriage the court shall dismiss the petition unless on some ground not involving adultery the petitioner is entitled to relief."

The hearing of the petition was lengthy and much conflicting evidence was heard, but it is possible to state quite shortly the facts which are relevant to this appeal.

Haevecker and his wife, who were married in 1922, lived in a very small township at Australian Plains. They were not in prosperous circumstances. At a time which the learned judge fixed at about December 1930 the wife went to work at a neighbouring farm occupied by Regnier's mother. She undertook this work with her husband's consent. She was engaged in household duties and to some extent, in accordance with what appears to be a custom in this district, in outdoor farm work. The actual management of the farm was in the hands of Mrs. Regnier's son, who is joined as a defendant in the case. The husband expressed dissatisfaction from time to time because his wife came home late from Regniers' and because, according to him, she neglected her household. In December 1931, or, according to other evidence, in June 1932 (the precise date is really immaterial), the wife was expected by her husband to be present at a euchre party, but she did not attend and Regnier also was absent. This, as the learned judge finds, aroused the husband's suspicions and he complained to Regnier's mother and to Regnier himself, alleging that Regnier was out with his wife on that night.

About this time the husband began to occupy a separate room, and the learned judge ascribed this change in the relations of the parties to gossip about his wife and Regnier which the husband had heard, and to the wife's refusal to leave Regniers' in accordance with the wishes which her husband had expressed to her. In October 1932 the husband left the matrimonial home and went to live at his father's house. His wife continued to work at Regniers', but still used the matrimonial home for sleeping purposes. Between February and September 1933 and after October 1933, Mrs. Regnier (the co-defendant's mother) was not living at the farm. The only persons who were regularly at Regnier's house were then the co-defendant, the defendant and her child, and, on occasions, farm

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labourers. The husband sold his house in February 1934 and thereafter the wife not only worked but also lived in the same house as Regnier. As I have already stated, the learned judge found that the first occasion upon which adultery was committed was in March 1933. This finding is not challenged, though it is contended that the husband was entitled to suspect (as he did in fact suspect) adultery before the date established by this finding. It is upon this basis that the appeal must be considered.

The finding against the husband on the defence of connivance is based in part upon the husband allowing his wife to continue to work at Regniers' notwithstanding suspicions which he entertained as to her relations with Regnier. The learned judge held that the husband was only too ready to leave the wife where she was so as to expose her to the temptation "which he thought then existed" and that "his subsequent conduct was such as to leave her to that temptation and was designed to increase it." The learned judge in part bases his finding upon facts such as the sale of the matrimonial home in 1934, which happened after the first act of adultery proved. But connivance must precede the adultery found and subsequent facts are therefore irrelevant. Facts which I have already mentioned afford a basis for a finding of connivance, but the strongest evidence in support of the plea is provided by the plaintiff himself in evidence given under cross-examination. He said :—"From 1931 I was on the look out to obtain evidence to obtain a divorce, I was anxious to obtain whatever evidence I could to obtain the divorce. In 1931 I had Regnier in my mind's eye as the co-defendant." He further said :—"From 1931 onwards I did not take steps to prevent familiarity being committed between my wife and co-defendant. I could not very well do it. I had to let it go at that. If they did commit adultery I would have been all the more pleased, i.e., after I reached the decision to go for divorce. I wanted to make it easy for them to commit adultery so that I could get a divorce, i.e., after I made up my mind I wanted a divorce."

The learned judge believed the evidence of the husband that in and after 1931 he suspected his wife of adultery, holding that his conduct indicated plainly that he was suspicious of his wife and dissatisfied with her conduct. Thus the position as established by

evidence which the learned judge was at liberty to accept was that the husband believed that his wife had committed adultery, though he could not prove it, that he was anxious to obtain evidence of adultery, and in this state of mind would have been pleased if she committed adultery. On the findings of the learned judge, in fact the wife had not committed adultery in 1931 or 1932 or the early part of 1933 when the husband was in the state of mind which he described. The adultery in fact did not take place until March 1933. Accordingly the husband actively desired that the adultery which did take place should take place, and his conduct in permitting his wife to continue her daily association with Regnier, in ceasing intercourse with her, and in leaving the matrimonial home was consistent with this mental attitude. It is urged that the evidence to which I have referred was given in replies to questions asked in cross-examination and that, the evidence not having been taken in question and answer form, it is reasonably obvious that the husband only assented to questions which were put to him in cross-examination instead of using his own words, and that the particular statements which I have quoted should not be regarded as really expressing the husband's mind. Comments of this nature are obviously such as could properly be made (and doubtless were made) when the case was being argued before the Supreme Court. These criticisms were doubtless present to the mind of the learned trial judge when he made the findings with respect to connivance to which I have already referred. A court of appeal is not, in my opinion, in a position to reverse such findings where so much depends upon the character and intelligence and demeanour of the witness. Thus the position is that the findings of the learned judge show that the husband in fact consented to and acquiesced in the adultery which the court found to be proved, and, indeed, actually desired that it should take place. If these were all the facts there would be no doubt as to connivance having been established.

But it is strongly urged that the acquiescence and consent of the husband was based upon the mistaken belief that adultery had already taken place and that acquiescence or consent based upon such a belief should not be regarded as that willing consent to an act of adultery which the law requires in order to establish connivance.

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In *Davis* v. *Davis and Hughes* (1) this court considered the leading authorities on the subject of connivance, stating that the principle upon which the rule with respect to which connivance is founded is *volenti non fit injuria*. The case of *Allen* v. *Allen and D'Arcy* (2) is there referred to with approval and the following quotation is made from Mr. Justice *Hill's* direction to the jury in that case :— "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 dullness 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."

Apart from the reference to an accessory before the fact, this statement appears to me to be an accurate statement of the law. In order to establish connivance it is not necessary to prove that a husband against whom it is charged was an accessory before the fact, i.e., that he intentionally helped to bring about the adultery, nor is it necessary to prove that, without intention, the alleged connivance caused or contributed to the guilty conduct of the other spouse or her associate. See *Marris* v. *Marris* (3) and the cases cited in *Sharpe* v. *Sharpe and Otto* (4). (The judgment in this case was set aside in this court in November 1936. I refer to the report cited because it conveniently collects a number of authorities.) Thus, in considering this case, I leave out of account any consideration of the question whether the alleged connivance of the husband caused or contributed to bring about the adultery which in fact took place. Such a question would be very relevant in determining whether or not the conduct of the husband induced or contributed

(1) (1904) 2 C.L.R., at pp. 182 et seq.
(2) (1859) 30 L.J. P.M. & A. 2.
(3) (1862) 2 Sw. & Tr. 530 ; 164 E.R. 1102.
(4) (1936) Q.S.R. 227, at pp. 234, 235.

to the commission of adultery. In my opinion it is not relevant upon the issue of connivance.

In *Glennie* v. *Glennie and Bowles* (1) the principle upon which the law of connivance is based is stated very shortly in the proposition that a person cannot complain of any act passively assented to. In *Boulting* v. *Boulting* (2) it is said :—" Now, connivance is an act of the mind ; it implies knowledge and acquiescence. I prefer the word 'acquiescence' to 'consent,' because the latter in some respects carries with it an idea of leave or licence conveyed or signified to the erring party. As a legal doctrine, connivance has its source and its limits in this principle, *volenti non fit injuria* : a willing mind, this is all that is necessary." In *Gipps* v. *Gipps* (3) Lord *Westbury* L.C. said :—" The word 'conniving' is not to be limited to the literal meaning of wilfully refusing to see, or affecting not to see or become acquainted with, that which you know or believe is happening, or about to happen. It must include the case of a husband acquiescing in, by wilfully abstaining from taking any steps to prevent, that adulterous intercourse which, from what passes before his eyes, he cannot but believe or reasonably suspect is likely to occur."

Statements in some of the cases (for example, *Hoar* v. *Hoar* (4)) that, in order to constitute connivance there must be a corrupt intention, do not, in my opinion, add anything to the proposition that intentional concurrence in a wife's adultery in fact amounts to connivance. " The question on this part of the case is not whether the petitioner was blameworthy from some conceivable ethical or popular point of view, nor whether in the strict sense of the words in their common law meaning he was party to a crime. It is whether he concurred in the series of acts on his wife's part of which he now complains " (per Lord *Merrivale* in *Lankester* v. *Lankester and Cooper* (5)). A " corrupt intention " is sufficiently established when it is shown that a husband willingly consented to what was in fact the first act of adultery on the part of his wife. If the husband bona fide believed that sexual intercourse of his wife with another person would not be adulterous the case is different (*Clayton* v. *Clayton and*

(1) (1862) 32 L.J. P.M. & A., at p. 20.
(2) (1864) 3 Sw. & Tr., at p. 335 ; 164 E.R., at p. 1304.
(3) (1864) 11 H.L.C., at p. 14 ; 11 E.R., at p. 1235.
(4) (1801) 3 Hag. Ecc. 137 ; 162 E.R. 1108.
(5) (1925) P., at p. 121.

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Sharman (1), where the husband honestly, though mistakenly, believed that an English marriage had been effectually dissolved by the decree of a foreign court). Such a case appears to me to have no analogy to a case, such as the present case, where it is beyond question that any intercourse between the wife and a stranger would necessarily be adulterous.

In the present case it is established that for about two years before the adultery actually took place the husband assumed that it had taken place and afforded facilities for the commission, or, as he thought, the continuation, of the matrimonial offence. I cannot see that the result in law is affected by the fact that he believed, but wrongly believed, that his wife had already been guilty of adultery. I have been unable to discover any authority which supports the view that if a husband thinks and acts under a mistaken belief of this character he is not to be held guilty of (to use the phrase of some of the older cases) "consenting to his own disgrace." He in fact does so consent though he mistakenly believes that the disgrace has already occurred. The case is different from that of *Davis* v. *Davis* (2), where it was held that watching a wife in order to obtain evidence of adultery did not amount to connivance. In the present case there is a finding, with ample evidence to support it in the husband's clear admissions, that the husband actively desired that adultery should take place so that he would be in a position to get a divorce, and that he not only allowed a position of affairs to continue which might lead to adultery, but helped to bring about the continuance of this position.

A husband might readily form a mistaken idea as to his wife's conduct by reason of some communication made to him by some untruthful or unduly suspicious but plausible person, and, in the erroneous belief that his wife had already been guilty of misconduct (which, however, he was not able to prove), leave her alone or place her in such surroundings that she would be subject to temptation, in the hope that she would thereafter be guilty of acts of misconduct so that, upon proving them, he could obtain a divorce. Such conduct in such circumstances would, in my opinion, amount to connivance. The contrary view would be unjust to a wife, who, though in fact

(1) (1932) P. 45.

(2) (1904) 2 C.L.R. 178.

innocent, was wrongly thought by her husband to be guilty. She should not, in my opinion, be prejudiced by his mistake.

Thus, in my opinion, the appeal should be dismissed.

DIXON AND EVATT JJ. The questions for decision in this appeal are whether a husband connived at his wife's adultery and, if not, whether he was guilty of wilful neglect conducing to the adultery, or of conduct inducing or contributing thereto.

Under the law of South Australia connivance is an absolute bar and such wilful neglect or misconduct as conduces to adultery is a discretionary bar (*Matrimonial Causes Act* 1929 (No. 1946), sec. 11 (*a*) and sec. 12 (1) (*f*)). But in South Australia in a suit for dissolution of marriage it is also a discretionary bar if the party suing has been guilty of habits or conduct inducing or contributing to the existence of the ground relied upon (*ibid.*, sec. 12 (1) (*d*)).

When the ground relied upon is adultery this new bar must, it would seem, comprehend all conduct covered by the old bar of wilful neglect or misconduct conducing to the offence.

The case presents the peculiarity that the connivance and conduct conducing or contributing imputed to the husband consists much less in overt acts than in state of mind. To some extent our decision must depend upon inferences of fact, but it cannot but be affected by our conception of what constitutes connivance and conduct amounting to the discretionary bar.

Connivance was, of course, an answer in the ecclesiastical courts to a suit for divorce *a mensa et thoro*, and it is upon the decisions of those courts that the definitions now current rest. Although knowledge of, and consent to, or acquiescence in, the behaviour of the guilty spouse were always regarded as necessary elements in connivance, the earlier tendency was, as might be expected, to regard reckless, careless, or culpable conduct of the spouse complaining as a sufficient bar without further inquiry into intention or motive. The course of development was against this tendency. The common law courts, in actions of crim. con., and the ecclesiastical courts alike emphasized the difference between consent to a wife's adultery and negligence, however gross, or inattention to her

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conduct (See *Duberley* v. *Gunning* (1), per Lord *Kenyon* and *Buller* J.). In the year following this case Lord *Stowell* said :—" The first general and simple rule is, if a man sees what a reasonable man could not see without alarm ; if he sees what a reasonable man could not permit, he must be supposed to see and mean the consequences ; but this is not to be too rigorously applied without making allowance for defective capacity : dullness of perception, or the like, which exclude intention, is not connivance ; there must be intention. The presumption of law is against connivance ; and if the facts can be accounted for without supposition of intention, the court will incline to that construction. Undoubtedly there have been some persons who have conspired against the virtue of their wives to gain a separation, and (experience has proved) have even connived without such an object : but either of them is contrary to the usual conduct and disposition of mankind ; and the court is to presume according to general rules of conduct. However, though to bar the husband there must be intention on his part, I have no difficulty in saying that mere passive connivance is as much a bar as active conspiracy ; he would be *particeps criminis*. The expression of the books, of a man prostituting his wife, is too strong, but the rule is *volenti non fit injuria* ; that is the true principle : active or passive, the husband is not the object of legal relief " (*Moorsom* v. *Moorsom* (2)). In this passage Lord *Stowell's* purpose was not to put a state of mind in place of external conduct as the standard of connivance, but to insist that external conduct unaccompanied by a corrupt intention is not enough. This is well brought out in the concluding sentences of his judgment : " If the question were," he says, " whether Moorsom acted as a prudent, a wise, or an attentive man, the result would be unfavourable : if it were a question whether in fact he contributed to the disgrace of his family, the answer would again be unfavourable ; but the question is whether he contributed with a corrupt intention : and, on a consideration of the evidence, I do not think myself judicially warranted to pronounce that he did so ; I am bound to pronounce judicially, and I accordingly do pronounce that he is entitled

(1) (1792) 4 T.R. 651 ; 100 E.R. 1226.

(2) (1792) 3 Hag. Ecc., at pp. 106, 107 ; 162 E.R., at p. 1097.

to his separation" (1). But he does make it clear that active conduct is not necessary. Conduct may consist in passivity. Inaction where action is called for may have as much importance as the adoption of positive measures not only in manifesting purpose and intention but also in affecting the course pursued by the guilty parties. What is meant by passive consent appears from the later summary of Sir *John Nicholl* in *Rogers* v. *Rogers* (2). He said:— "In these cases 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; but on the other hand it has always been held that there must be a consent. The injury must be *volenti*, it must be something more than mere negligence; than mere inattention; than over-confidence; than dullness of apprehension; than mere indifference; it must be intentional concurrence in order to amount to a bar." In *Stone* v. *Stone* (3) Dr. *Lushington* went further and said: "Facts, to constitute connivance, must have a direct and necessary tendency to cause adultery to be committed."

The elements which go to make up connivance at adultery include willingness that adultery should be committed, action or inaction based upon or manifesting that willingness, and a corrupt intention or expectation that adultery will or may follow (Cp. *Phillips* v. *Phillips* (4), per Dr. *Lushington*; *Phillips* v. *Phillips* (5), per Sir *Herbert Jenner Fust*; *Marris* v. *Marris* (6); *Glennie* v. *Glennie* (7)). Connivance must be proved with clearness but, of course, the proofs will usually be circumstantial only. In applying the tests of connivance to facts, it is necessary to remember that while every act of adultery is a matrimonial offence, the important question is whether the establishment of a guilty relationship was connived at. When an adulterous relation has been established the injured spouse is placed in an entirely different position. In point of time connivance

(1) (1792) 3 Hag. Ecc., at p. 117; 162 E.R., at p. 1100.
(2) (1830) 3 Hag. Ecc., at p. 59; 162 E.R., at p. 1080.
(3) (1844) 1 Rob. Ecc. 99, at p. 101; 163 E.R. 978, at p. 979.
(4) (1844) 1 Rob. Ecc. 144, at pp. 157-164; 163 E.R. 993, at pp. 997-1000.
(5) (1846) 10 Jur. 829, at p. 830.
(6) (1862) 31 L.J. P.M. & A. 69.
(7) (1862) 32 L.J. P.M. & A. 17.

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precedes or coincides with the commission of an offence. When the adulterous connection is formed the offence is complete and the other spouse is not expected to take measures to prevent its continuance. He is at liberty to repudiate the guilty party although he knows the consequence must be to put repentance out of the question. He may use the continuance of the relation as a means of gaining evidence, notwithstanding that, in doing so, he refrains from taking steps readily open to him for preventing a specific act of adultery and so refrains intending that it should be committed (*Davis* v. *Davis* (1); *Bewes* v. *Bewes* (2)). Indeed, Dr. *Lushington* went further. In discussing Lord *Stowell's* overstatement in *Timmings* v. *Timmings* (3) that a husband is at liberty to let the licentiousness of his wife take its full scope, he refers to the passage in *Sanchez* which is translated in *Davis* v. *Davis* (4), and says :—" I understand these words thus : a husband suspecting his wife of having committed adultery, is at liberty to remain quiet and watch her for the purpose of detecting her adultery, and he is permitted this as being the *majus bonum*. This is the sense in which Lord *Stowell* is to be understood " (5). This statement goes further because it demands only suspicion on the part of the husband and does not require that adultery should have already occurred. If the guilty step has been taken and an adulterous course of conduct embarked upon, the other spouse has no corrupt intention in seeking, in acts which he does not actively instigate, counsel or direct, evidence of a conjugal offence he did not originally connive at. The significance of the element of corrupt intention is well illustrated by the cases which deal with adultery arising out of a void marriage after a *de facto* decree of dissolution pronounced by a foreign court at the instance or with the concurrence of the petitioner but without jurisdiction. In *Lankester* v. *Lankester* (6) the husband and wife, British subjects domiciled in England, repaired to South Dakota for the purpose of obtaining a divorce, so as to enable the wife, at least, to remarry. The husband said that he had been advised that it was probable that the American decree would be recognized in England. His

(1) (1904) 2 C.L.R. 178.
(2) (1903) 22 N.Z.L.R. 665.
(3) (1792) 3 Hag. Ecc. 76, at p. 81 ; 162 E.R. 1086, at p. 1088.
(4) (1904) 2 C.L.R., at p. 184.
(5) (1844) 1 Rob. Ecc., at p. 160 ; 163 E.R., at p. 998.
(6) (1925) P. 114.

wife remarried and he petitioned in England for a dissolution on the ground of adultery. Lord *Merrivale* remarked that if he really entertained a hope or belief that a marriage between people of English domicil can be dissolved by the means taken, his Lordship could only suppose he was misled by his wishes. As " he concurred in the series of acts on his wife's part of which he now complained " his petition was dismissed on the ground of connivance. With this must be contrasted the same learned judge's decision in *Clayton* v. *Clayton* (1). There the wife had gone through the marriage ceremony immediately before emigrating alone to America, where she lived for some years. She repented of her marriage and was advised that under the law of Michigan, the State of her residence, it would be annulled. On the advice of her attorney, she petitioned in the court of Michigan and sent her husband a copy of the petition endorsed with an acceptance of service and a consent to a decree. These she requested him to sign and he did so. The Michigan court pronounced a decree of nullity and after a little time she remarried. Her husband then petitioned in England for dissolution on the ground of her adultery. It appeared that all parties believed the decree in Michigan would validly dissolve the marriage in both jurisdictions. Lord *Merrivale* held that the husband had not been guilty of connivance. He said :—" In my judgment connivance does involve what in its essence is a guilty act ; it does involve what in its essence is a wrongful intention contrary to the law of the land. These people intended to observe the law ; they were not aware, and they were honestly and by accident not aware, of the true position ; and it would be wrong to say, I think, that the petitioner connived at the cohabitation of the respondent with the co-respondent " (2).

In the present case connivance raises a more difficult question than conduct conducing or contributing to adultery. In the view we take it is necessary to make one or two observations only in relation to the two discretionary bars now relied upon. In the first place, it is well established that conduct does not conduce to the adultery unless there is a real causal relation. In the next place, if the first act of adultery is not the consequence of any conduct of the spouse complaining, her subsequent conduct will be no bar although

(1) (1932) P. 45.

(2) (1932) P., at p. 51.

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further acts of adultery are attributed to it (*St. Paul* v. *St. Paul* (1); *Millard* v. *Millard and Bastow* (2)). In the third place, the new discretionary bar introduced by sec. 12 (1) (*d*) of the *Matrimonial Causes Act* 1929, although similar to the old, is in some respects wider. It may be that the "habits or conduct" relied upon need involve no great conjugal impropriety of behaviour. The word "contributing" appears to require a weaker and less direct causal relation between the conduct of the petitioner and the act complained of than that which the courts seem to demand under the old discretionary bar. With this preliminary discussion of the principles upon which the appeal depends we now turn to the facts of the case.

There is more than one feature in the evidence for which it is not easy to find a satisfactory explanation. It sometimes happens, particularly in cases between husband and wife, that by common consent the parties withhold the key by which the true interpretation of their conduct may be obtained. Possibly something of the sort has taken place in the present case. However, the greater part of the difficulties raised by the evidence has been removed by findings made by the trial judge. The appeal is against his conclusion that the husband had connived at his wife's adultery, that he had been guilty of wilful neglect conducing to, and of conduct inducing and contributing to, the adultery. But there is no cross-appeal against the finding of adultery, and most of his Honour's findings upon subsidiary questions of fact are not impugned.

The facts upon which the appeal depends are comparatively few. The parties dwelt in a very small country township. Haevecker managed the store, which belonged to his father, did saddlery work, drove the mail and acted as postmaster. His wife kept poultry and a few cows, which she tended. She had been the local school mistress. They were married in 1922, she then being 26 years of age and he 31. They have one child, a boy born in the following year. They lived in a house near the store and near the dwelling of Haevecker's father and mother. About a mile away a Mrs. Regnier and her son carried on a small farm. Young Regnier was about seven years younger than Mrs. Haevecker. As Mrs. Regnier got older she found she needed assistance. An arrangement was made with Mrs. Haevecker

(1) (1869) L.R. 1 P. & D. 739. (2) (1898) 78 L.T. 471.

that she should come every day to the Regniers' house and help there. In return she was to graze her cows on the farm and to receive feed for her fowls. The date at which she took up her duties was the subject of dispute. She fixed it as 22nd June 1931. Her husband put it in October 1930. The trial judge considered that it was at the end of 1930. From the association which thus began a relationship developed between Mrs. Haevecker and Regnier which has been found to be adulterous. Mrs. Regnier was away on a visit from some time in February 1933 until October and in that month she finally left the farm. The finding is that adultery was first committed in or about March 1933.

It is unnecessary to state the evidence upon which the conclusion was reached that an adulterous connection existed between them. It consisted in many circumstances, only one of which is material to the questions of connivance and of conduct conducing to adultery. Those questions depend on the part played by Haevecker. The circumstance material to his part is that Mrs. Haevecker and Regnier continued their association notwithstanding that they both knew that Haevecker objected to it. It was found that they must also have known from July 1933, if not earlier, that Haevecker accused them of adultery, and that there was much gossip about their relationship.

The following is the effect of the findings made with respect to the actions of Haevecker when considered in relation to the evidence on which the findings are based. When his wife entered into the arrangement with the Regniers she had his concurrence. But after it had gone on about a year he raised objections to it. He did so partly because he thought his wife was neglecting her own home and partly because he had grown suspicious of her relations with young Regnier. His wife ignored his objections and told him to mind his own business. Indeed on some occasions she went so far as to lock him out of the house and she concealed his bedding. At the end of 1931 as a result of the unexplained failure both of his wife and of Regnier to attend an entertainment in the township, he went to see the Regniers. What he said to the mother does not appear. To the son he said that there was much talk about his wife being at the Regniers' and he would rather her be at home;

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that he was hearing all sorts of unpleasant things and wished to know how much truth there was in it. Haevecker asked for an explanation of Regnier's absence from the entertainment and, on Regnier's giving some innocent reason for it, said that he believed he knew where he was, that he was out with his wife. Regnier answered that it was not so and said that there was nothing wrong at all. Both men said that they would speak to Mrs. Haevecker. The latter, however, did not leave it for her husband to open the subject to her. In effect she reproached him with going up to Regniers' to get her back to her home and with upsetting Mrs. Regnier. After this incident Haevecker occupied a separate room in his own house. The learned judge said in his judgment that he could ascribe the break by Haevecker with his wife only to the conversation and to her failure to leave the Regniers and to the gossip. His Honour added :—" His conduct indicated plainly that he was suspicious of his wife and dissatisfied with her conduct." A great deal of gossip had been caused in the neighbourhood and Haevecker, the learned judge says, " had come to the conclusion his wife was not behaving properly." If the findings are right in respect of time this took place a year before adultery was in fact first committed. About the middle of the year 1932 Haevecker gave up living at his own house and began to sleep at his father's, where, since his wife took up her duties with the Regniers, he had often had his midday meal and many others. His father's health had failed. What, if anything, he said to his wife about his change of abode, is left in doubt. But the finding is that at least she was not in ignorance of his attitude. From this time the difficulty grows of obtaining a satisfactory picture of the mutual behaviour and attitude of husband and wife. They met frequently. She came to her house of course, and she also visited the store. Both of them constantly saw their child, who was sometimes at Regniers' and sometimes at his grandparents'. But while the learned judge has no doubt that Mrs. Haevecker quite understood that her husband objected to her presence at the Regniers' and suspected her fidelity, he does not appear to have taken any overt step until the following year, 1933. According to Regnier, Haevecker then made a more or less ineffectual effort to get him to see him and discuss the situation.

Then, in May 1933, that is, two months after adultery had commenced according to the finding, Haevecker found a letter in his wife's drawer from a woman supplying contraceptives and also, it would seem, means for abortion. This confirmed a belief, which, he says, he already entertained, that as a result of her relations with Regnier his wife had become pregnant. In July she visited Adelaide and went to the house of the same woman. Haevecker informed the police of what he thought she was doing and they found her there. An innocent explanation was given of her presence at the house and on the facts there is no reason to think that abortion was actually practised. The learned judge thought that the object of her visit was to find out if she were pregnant. In August 1933 Haevecker consulted a solicitor with a view to obtaining a divorce. The solicitor interviewed Mrs. Haevecker and plainly told her that her husband thought she was pregnant and asked her to submit to examination, a thing she refused to do. She then stated the monetary provision she required as a condition of her returning to her domestic duties. The solicitor informed her that her husband contemplated divorce proceedings. Some further evidence of adultery was collected, but, in the result, Haevecker was advised that until further proof was forthcoming he could not safely proceed.

Towards the end of September 1933 Mrs. Haevecker appears on several occasions to have slept all night at Regniers'. She did this too after Mrs. Regnier finally left the farm in October. Up to that time Haevecker had paid his wife £1 a week. But he then took the step of stopping the allowance and paying her only 10s. on account of his son. In February 1934 he decided to sell their house. His reason was in part financial but the main purpose, in the opinion of the learned judge, was to force the issue with his wife. The sale made the break between them complete and left her with no means of concealing the fact that she was living at Regniers', as in reality she then was. When she learned of the sale and was required to remove her furniture, she made and repeated a request that her husband should arrange to take her to his mother's house where he was living. He told her, in effect, that he neither could nor would have her there. Her furniture was taken up to Regniers'. But she prepared a peculiar document relating to her residence there. It

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expressed an agreement on the part of Regnier to let her have a room at 2s. 6d. a week as a living room, the contents thereof being stored at her risk or insured by her. This document Mrs. Haevecker executed before her husband, who witnessed it. There is a dispute as to the exact circumstances in which, and the date when, he signed the document as a witness. But whatever may be the correct account of its genesis, it seems plain enough that the purpose of the document was to put a better colour on Mrs. Haevecker's residing in Regnier's house. A document bearing her husband's signature as witness might be produced by Mrs. Haevecker as proof that he was cognisant of, and acquiesced in, the arrangement. Not long after she thus took up her residence at the farm, Regnier seems to have encountered criticism or remonstrance on the score of his relations with her from the pastor or elders of his church. Mrs. Haevecker at once accused her husband of procuring their interference. He told her that he had nothing to do with it, but added: "If I wanted you away from there I would come and get you myself." It is unnecessary to pursue the subsequent course of the parties' relations. It does not affect the issues upon which the appeal depends. In July 1934 Mrs. Haevecker unsuccessfully applied for a maintenance order. She then invoked the aid of the South Australian Children's Welfare and Public Relief Department, and, at length, in October 1934, he instituted the present suit for dissolution.

The foregoing statement contains, we believe, all the facts material to the pleas of connivance and of conduct conducing or contributing to the adultery. Except for the direct testimony given by the husband as to his own state of mind, those facts would decide the pleas. The husband's direct testimony as to his own mental processes forms the most important evidence against him; but, before stating its effect, it is, we think, desirable to consider the bearing of his actions, whatever may have been his secret thoughts, as his actions appear from the facts set out. Until February 1934, when he sold his house and witnessed the paper prepared by his wife, nothing he did or said to his wife or Regnier would lead either of them to suppose that he was willing that his wife should commit adultery. On the contrary, the earliest steps he took, those at the end of 1930, clearly

intimated to both of them, not only that he suspected their relationship but that he desired his wife to dissociate herself from the Regniers. From that time until March 1933 when, according to the finding, the relationship first became adulterous, his conduct was that of disapproval and protest. Part of the foundation of the finding of adultery is the persistence of Mrs. Haevecker and Regnier in their association, notwithstanding their complete grasp of the significance of Haevecker's actions, particularly in maintaining his objection to her staying at the Regniers', in accusing her of infidelity, in withdrawing first to another room and next to his parents' home. They understood that he suspected adultery at the end of 1930. He said or did nothing to suggest that his suspicions afterwards diminished. Their knowledge of his "accusation" of adultery is put by the learned judge at July 1933, "if not earlier." Doubtless they did not study the gradations of his strengthening belief that their relations were adulterous. Whether his conduct intimated that he suspected, believed, or charged adultery, they at least were made completely aware that the question of his wife's infidelity occupied his mind and actuated him in his treatment of both of them, and that he sought a termination of their association. Even in August 1933, Mrs. Haevecker, in answering the allegations of her husband's solicitor, proceeded to state the conditions on which she would leave the Regniers'. The strange part of the case is the economy of explicit statement practised by the parties. Neither the evidence which has been believed nor that which has been disbelieved contains an account true or false of any occasion when the husband, or either of the other two persons concerned, insisted on stating his or her position in unmistakable terms. From this, perhaps, no more should be drawn than a lesson that people are seldom found in fact conducting themselves as, according to general reasoning, they are expected to do. But, in any case, we can see in the husband's overt acts before February 1934, nearly a year after the assumed beginning of adultery, nothing that would in the least support the plea of connivance, still less of conduct conducing or contributing. Whatever he did in February 1934 short of condonation would not appear to us to matter. But it seems that he wished at that stage to deprive his wife of what had

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been her ostensible dwelling. Yet that, at the same time, he would not refuse to sign the paper she prepared and thus to afford the evidence she wanted of his knowledge that she went to Regniers' under cover of a lodger's agreement. This does not necessarily imply a willing consent to the continuance of the adulterous relationship.

It is convenient to examine the effect of the husband's outward actions as we have done apart from his evidence of his mental state, because it makes easier the task of attributing to the proper period in the progress of events the thoughts and intentions which he claimed or admitted that he had entertained. But, at the same time, it is a course open to the criticism that it separates acts and intentions in a way liable to cause the error of treating purpose otherwise than as an essential part of conduct, an error that would be fatal in such a question as connivance. That error we have tried to avoid. In stating the effect of the evidence given by the husband of his motives and intentions, it is necessary to reduce many answers given in cross-examination to a brief statement containing the result they fairly convey and to correct the times and dates he gave to accord with those fixed by the learned judge's findings.

In effect Haevecker said that when his wife had been at Regniers' a year much gossip arose, and it reached his ears; that after he complained to the Regniers, that is, at the end of 1931, he suspected his wife's relations with Regnier; that he knew in his own mind that she had been misconducting herself; that he had little or nothing but gossip to go upon; that he decided he would not have her in the house and wished to obtain evidence for a divorce and was on the look out for it. He said he made it clear to her that he did not wish her companionship; he had his meals at his parents' and ultimately went to sleep there: he thought his wife must have seen that he was trying to get evidence to divorce her. He said he took no steps to prevent familiarity between them: he could not very well do it: he had to let it go at that: after he decided to seek a divorce, he would have been better pleased if they did commit adultery and wished to make it easy. He added something to the effect that he did not see how he could have stopped it. He said they knew he suspected them and everyone was talking about it; it was unnecessary to tell her. He seemed uncertain whether he should date his conclusion that he would get a divorce from May 1933, when he took possession of the incriminating letter to his

wife, or from his complaint to the Regniers, which the learned judge fixed as at the end of 1931 ; but Haevecker finally settled upon the latter period.

It is on this evidence, considered, of course, in relation to the facts of the case, that the learned judge bases his conclusion that Haevecker connived at his wife's adultery. His Honour took the view that he had at the time insufficient grounds for his suspicions, that his protest was anything but vigorous, that he did no more and intended that his wife should commit adultery. His Honour's reasons do not appear to us to draw the very necessary distinction between Haevecker's position during the earlier period and his later actions in February 1934. But, apart from this consideration, we are unable to agree that the husband connived at his wife's adultery. Except because of her association with Regnier, no justification exists for imputing to him a desire to divorce his wife or a willingness that she should provide the ground for the dissolution of their marriage, and no one makes such an imputation. Her persistence in remaining at the Regniers' in face of his objection and of the gossip as to her relations with Regnier was the beginning from which her husband's decision to divorce her developed. It would, we think, be quite wrong to infer against him that he formed the intention of divorcing her before he was convinced that she had formed an adulterous connection with Regnier. His own evidence is to the contrary, the circumstances do not suggest it, and the learned judge has not drawn that inference, as we read his judgment. Haevecker may have been premature in his conclusion. That he had no sufficient ground for it we would hesitate to say. The number of explanations of his wife's conduct open was not great. The right one seems to have been infatuation with Regnier. A husband when he finds his wife pursuing an infatuation with another man which in fact leads to adultery can scarcely be said to act unreasonably because he draws an unfavourable conclusion too early. But we do not know that in the peculiar circumstances of this case the sufficiency of the grounds for Haevecker's belief matters. It is not a case where, because of an erroneous belief in his wife's infidelity, a husband adopts a course of action which indicates to her or to her lover that he sanctions adultery between them. The very opposite is found. They knew he objected to their relationship and, before or shortly after committing adultery, knew that he levelled an accusation at them of actual misconduct.

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The worst that has been, or, in our opinion, can be, said against him on the findings is that he desired that a relationship which he considered adulterous should continue so that he could obtain a divorce and, therefore, abstained from taking steps which he would or might have taken if he thought adultery had not yet taken place. For ourselves we think that this is an extreme view of his conduct and intention before July 1933. But, if it be tenable in point of fact, it does not mean connivance. For it involves no corrupt intention. Its whole basis is the belief that an adulterous connection has been established and exists. It does not involve any willing consent that his wife shall fall: it does not involve inaction with the expectation or intention that she will or may fall. It is, in our opinion, an illogical and inadmissible process to treat the state of mind ascribed to the husband as consisting in two independent elements, namely, first, an intention or willingness that she should commit an act or acts of adultery, and, secondly, a mistaken and therefore irrelevant belief that they would not be the first. The state of mind he is supposed to have possessed is single and amounts to a willingness that an established adulterous relation should continue so as to furnish irrefutable proof of its existence. Such an intention applies only to the assumption upon which it is based. In itself it cannot amount to connivance. When it accompanies no external act which leads the wife or the adulterer to suppose that the husband sanctions the commission of adultery and they both understand that the husband objects to their association, the essential elements of connivance appear to us to be lacking. We think the plea of connivance should fail.

It follows almost as of course from the views of the facts which we have already expressed that the pleas of neglect conducing and conduct contributing to the adultery are not established. It is not a case of what has been called voluntary blindness on the part of the husband. His objections were known. He might, it is true, have taken a more vigorous course of action, but what the result would have been it is hard to say. The view of the facts accepted upon the issue of adultery appears to us to leave little or no room for the conclusion that the course taken by the husband conduced or contributed to the adultery. Except expostulation and argument, there was no effectual step allowed by law that Haevecker could take after his suspicions were aroused. His wife and Regnier understood his attitude well enough and further oral protest would not

have made it clearer. It must be remembered that Mrs. Haevecker had got to the stage of locking her husband out of the house, concealing his bedding and repudiating his advice and behests. No doubt Haevecker's mode of dealing with the situation is not that which *a priori* reasoning would suggest. But the explanation of the way people approach problems of the kind confronting Haevecker can be discovered only in all the incalculable factors arising from the disposition of the parties, their knowledge of one another, and the history of their relationship, to say nothing of the influence of others. Before a court holds the spouse complaining barred, it must find some clear and definite act or omission which ought not to have occurred conducing or contributing to the establishment of the adulterous connection. Accepting the detailed findings of fact, we think such a conclusion will not follow from them. Other views of the evidence, no doubt, were open than those adopted by the learned judge, but he had an opportunity denied to us of estimating the credibility of witnesses. As to the events which occurred, his findings and view of the case could not be disturbed. We think that, consistently with them, no sufficient foundation exists for the inference or conclusion of mixed law and fact that Haevecker was guilty of connivance or of neglect conducing to his wife's adultery, or of conduct inducing or contributing thereto.

We think the appeal should be allowed: the third, fourth and fifth findings in the judgment or order appealed against should be set aside and the cause remitted to the Supreme Court to be further dealt with according to law.

As to costs, the wife is entitled to receive her costs of the appeal from her husband (*Fremlin* v. *Fremlin* (1)). But the co-defendant is prima facie liable for the costs of the entire suit including the costs which the husband pays the wife (*Townson* v. *Townson and Bucknall* (2); *Soler* v. *Soler* (3); *Clark* v. *Clark* (4)). The appeal arises out of the suit and from the husband's point of view becomes a necessary incident of it. The co-defendant must, therefore, pay the appellant's costs of the appeal, including those payable by him to the respondent, his wife.

(1) (1913) 16 C.L.R. 212.
(2) (1898) 78 L.T. 54.
(3) (1897) 16 N.Z.L.R. 4.
(4) (1865) 4 Sw. & Tr. 111; 164 E.R. 1458.

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Appeal allowed. Third, fourth and fifth findings contained in the judgment appealed against set aside. In lieu thereof enter findings for the plaintiff upon each of such issues. Set aside so much of the order as dismissed the action. Remit cause to the Supreme Court to be further dealt with according to law. Plaintiff-appellant to pay the defendant-respondent's costs of the appeal. Co-defendant to pay the plaintiff-appellant's costs of the appeal including those payable by the plaintiff-appellant to the the defendant-respondent.

Solicitors for the appellant, *Blackburn & McCann.*

Solicitors for the respondent Haevecker, *W. J. Denny & Stanley.*

Solicitors for the respondent Regnier, *Villeneuve Smith, Kelly, Hague & Travers.*

C. C. B.

[HIGH COURT OF AUSTRALIA.]

BIRMINGHAM AND OTHERS . . . . APPELLANTS; DEFENDANTS,

AND

RENFREW AND OTHERS . . . . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1937.

MELBOURNE, *June* 8-11.

SYDNEY, *Sept.* 2.

Latham C.J., Dixon and Evatt JJ.

Will—Mutual wills—Husband and wife—Agreement to benefit wife's relatives—Wills made by husband and wife accordingly—Death of wife—Fresh will by husband after accepting benefit—Death of husband—Action by original beneficiaries to enforce agreement—Constructive trust.

Contract—Statute of Frauds—"Contract or sale of lands"—Agreement to leave property by will—Parol agreement—Land owned at date of agreement and at date of death—Instruments Act 1928 (*Vict.*) (*No.* 3706), *sec.* 128—*Property Law Act* 1928 (*Vict.*) (*No.* 3754), *sec.* 53.

It was orally agreed between a husband and his wife that the wife should leave her property by will to the husband, and that, in consideration thereof,