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AN EXAMINATION OF CONNIVANCE, A DEFENSE TO DIVORCE

I. Introduction

"Connivance" has been defined as consent of the complainant, express or implied, to the misconduct now alleged as a ground for divorce.[1] The element of corrupt consent is considered to be an essential ingredient.[2] Once established, connivance represents a bar to a divorce.[3] The courts have reasoned that a spouse whose conduct facilitated to the other's adultery has no more right to complain of his mate's sexual unfaithfulness than does a husband whose wife has been raped.[4] The underlying principle is expressed by the latin aphorism, "Volenti non fit injuria," which means, "He who consents cannot receive an injury." [5]

Mere passive endurance or unrelated misconduct does not make the party giving such permission or engaging in such misconduct guilty of connivance, provided that he does nothing to encourage the other to commit the transgression, and does not directly or indirectly throw opportunities in the other's way.[6] Connivance will not be inferred from mere negligence, folly, dullness of apprehension, or simple indifference;[7] nor as a rule will desertion be regarded as connivance, although under some cir-

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[1] 27A C.J.S. *Divorce* § 64 (1959). The phrase "to connive at," when used in a legal context, means to feign ignorance of, to wink at, to pretend not to know, or to covertly approve by passive consent. 19 C.J. *Divorce* § 172 (1920).

Although there are a few scattered cases in which the defense of connivance has been used in suits involving other divorce grounds, such as habitual intoxication and desertion (see *Rosengren v. Rosengren,* 115 N. J. Eq. 283, 170 Atl. 660 (1934) and *Gillenwaters v. Gillenwaters,* 28 Mo. 60 (1859)), in practice connivance is employed only in actions grounded on adultery. Clark, *Cases and Problems on Domestic Relations* 582 (1965).

[2] 24 Am. Jur. 2d *Divorce and Separation* § 193 (1966). "Connivance in divorce law is a married party's corruptly consenting to evil conduct in the other whereof afterwards he complains." *Backenstoe v. Backenstoe,* 14 Ohio Dec. 348 (1904).

[3] Madden, *Handbook of the Law of Persons and Domestic Relations* § 88 (1931).

[4] See *Boulting v. Boulting,* 3 Swab. and T. 329, 164 Eng. Rep. 1302 (1864) and *Morrison v. Morrison,* 142 Mass. 361, 8 N.E. 59 (1886).

[5] *Forster v. Forster,* 1 Hagg. Con. 144, 161 Eng. Rep. 504 (1790).

[6] *McMillan v. McMillan,* 120 Fla. 209, 162 So. 524 (1935) and *Wade v. Wade,* 229 S.W. 432 (Mo. App. 1921).

[7] Madden, *op. cit. supra* note 3, at § 88.

cumstances it has been so construed.[8] In short, a divorce defendant cannot successfully use the defense of connivance unless he can show that the plaintiff manifested a desire, or at least a willingness, that the misconduct now complained of take place.[9]

II. Historical Background

The doctrine of connivance originated in the ecclesiastical courts and was eventually made a statutory defense to an action for divorce by the English Matrimonial Causes Act of 1857.[10] The canonists who occupied the bench in the ecclesiastical courts traditionally regarded a divorce application[11] as being attributable solely to a unilateral desire of the party seeking the divorce. The function of the court was seen as that of an intermediary between two parties with conflicting aims.[12] But as long ago as the Middle Ages the shortcomings of this position became apparent, for observation disclosed that in many cases there was a mutual desire to end the marriage.[13] Since the concept of divorce by mutual consent could not be reconciled with the Christian doctrine upon which the canon law was based, the ecclesiastical courts adopted measures to ensure that marriages were not dissolved except in those instances when the defendant actually committed an offense recognized by the canon law as being sufficiently grave to warrant termination of the marriage. Among the measures adopted was establishment of the defense of connivance.[14] This defense was recognized during the colonial legislative divorce period of American history, was honored by the state courts when they acquired divorce jurisdiction, and was incorporated into many state codes.[15]

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8 *Richardson v. Richardson,* 114 N. V. Supp. 912 (1906); *Heidrich v. Heidrich,* 22 Pa. Super. 72 (1910); and *Pike v. Pike,* 100 N.J. Eq. 486, 136 Atl. 421 (1927).

9 Clark, *op. cit. supra* note 1, at 582.

10 Annot., 17 A.L.R. 2d 347 (1951).

11 The only kind of divorce recognized by the ecclesiastical courts was a divorce a mensa et thoro, which amounted merely to a legal separation. Jacobs and Goebel, *Cases and Materials on Domestic Relations* 337-338 (4th ed. 1961).

12 Marshall and May, *The Divorce Court* 19 (1932).

13 *Ibid.*

14 Tiffany, *Handbook on the Law of Persons and Domestic Relations* § 105 (3rd ed. 1921).

15 Twenty-three states now have statutes stating that a divorce is to be denied upon a showing of connivance. Ala. Code tit. 34, § 26 (1959); Alaska

(Continued on next page)

III. Contemporary Application of Connivance

A. Active Connivance

The most obvious, clear-cut example of connivance is the case where a spouse takes affirmative steps calculated to induce his mate to violate the marriage contract. Thus a petitioner who induces a relative, or hires a detective, to promote an act of adultery with the defendant-spouse is unquestionably guilty of connivance.[16] An illustrative case is *Fonger v. Fonger,* 160 Maryland 610, 154 Atl. 443 (1931). There the evidence revealed that plaintiff, a successful businessman who had tired of his unsophisticated farm-reared wife, had persuaded an acquaintance to seduce defendant in order to obtain grounds enabling plaintiff to procure a divorce. The Maryland Court of Appeals affirmed a decree dismissing the suit, saying:

> "These facts are . . . wholly inconsistent with any theory other than that Fonger (plaintiff) engaged Roseberry to furnish evidence upon which he could secure a divorce. . . . But if he baited and set a trap to take her in the offense, and . . . deliberately planned to . . . make her fall more certain, he will not be permitted to complain of her wrong . . . (I)t is certain that a court of equity will not lend its aid to one who has knowingly connived at his wife's adultery." [17]

(Continued from preceding page)

Comp. Laws Ann. § 56-5-1 (1962); Ariz. Rev. Stat. Ann. § 25-313 (1956); Cal. Civ. Code §§ 111 and 112; Del. Code Ann. tit. 13, §§ 1524 and 1528 (1953); Hawaii Rev. Laws § 324-26 (1961); Ill. Ann. Stat. ch. 40, § 11 (1956); Ind. Stat. Ann. § 3-1202 (1965); Kan. Gen. Stat. Ann. § 60-1508 (1964); Mich. Stat. Ann. § 552.41 (1957); Minn. Stat. Ann. § 518.08 (1947); Mo. Ann. Stat. § 452.030 (1952); Mont. Rev. Codes Ann. §§ 21-118 and 21-119 (1961); N. Y. Dom. Rel. Law § 171; N. D. Cent. Code §§ 14-05-10 and 14-05-11 (1960); Ore. Rev. Stat. § 107.070 (1965); Penn. Stat. Ann. tit. 23, § 52 (1955); S. D. Code §§ 14.0713 and 14.0714 (1939); Tenn. Code Ann. § 36-811 (1955); Tex. Rev. Civ. Stat. art. 4630 (1960); W. Va. Code Ann. § 4714 (1961); Wis. Stat. § 247.10 (1959); and Wyo. Stat. § 20-54 (1959).

Illustrative provisions are those of California and New York, which read, respectively, as follows:

"Divorces must be denied upon showing:

1. Connivance . . .

Connivance is the corrupt consent of one party to the commission of the acts of the other, constituting the cause of divorce."

"In either of the following cases the plaintiff is not entitled to a divorce, although the adultery is established:

1. Where the offense was committed by the procurement or with the connivance of the plaintiff. . . ."

[16] *McAllister v. McAllister,* 137 N. Y. Supp. 833 (1912) and *Rademacher v. Rademacher,* 74 N. J. Eq. 570, 70 Atl. 687 (1908).

[17] Pages 448-449 of 154 Atl.

Other acts which have been deemed to constitute connivance are: verbally encouraging familiarity between defendant and the corespondent;[18] inviting or permitting the corespondent to live in the parties' home;[19] deliberately exposing the defendant to lewd company;[20] and "wife swapping." [21]

B. Passive Connivance

Although conduct of a passive nature may not so clearly manifest consent to the defendant's marital transgressions as does conduct of the kind discussed above, it is nevertheless well established that a mere failure to act can, in some situations, amount to connivance. Whether such non-action will be regarded as connivance in a given case depends upon whether or not plaintiff's conduct suggests acquiescence.[22] Mere negligence or indifference on the part of the complainant is not enough.[23] In *Rogers v. Rogers*[24] the court declared:

> "Passive acquiescence would be sufficient to bar the husband, providing it appeared to be done with the intention and in the expectation that she (wife) would be guilty of the crime (adultery); but, on the other hand, it has always been held that there must be a consent . . .; it must be something more than mere inattention, than overconfidence, than mere indifference."

Thus a husband who permitted his wife to accept a male friend's invitation to go home with him and "be my wife tonight" was denied a divorce on the basis of connivance;[25] but a wife who on several mornings suffered her husband to leave the marital bed and get into bed with the housemaid was not deemed

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[18] *Viertel v. Viertel,* 86 Mo. App. 494 (1901).

[19] *Harmon v. Harmon,* 111 Kan. 786, 208 Pac. 647 (1922) and *Morrison v. Morrison,* 136 Mass. 310 (1884).

[20] "If a husband introduces his wife to society which is so abandoned, and exposes her to risks which are so great, that marital unchastity is the probable result, the courts may hold him to the consequences of his own conduct and deny a divorce. . . ." 24 Am. Jur. 2d *Divorce and Separation* § 199 (1966); *Harris v. Harris,* 2 Hagg. Ecc. 376, 162 Eng. Rep. 894 (1829).

[21] *Emerson v. Emerson,* 12 Cal. App. 2d 648, 55 P.2d 1265 (1936).

[22] Madden, *op. cit. supra* note 3, at § 88 and Harper and Skolnick, *Problems of the Family,* 466-467 (Rev. ed. 1962).

[23] 27A C.J.S. *Divorce* § 64 (1959).

[24] 3 Hagg. Ecc. 57, 162 Eng. Rep. 1079, 1080 (1830).

[25] *Gutzwiller v. Gutzwiller,* 8 N. J. Super. 254, 74 A2d 325 (1950).

guilty of connivance, since she did nothing to encourage defendant's misbehavior and exhibited, at most, indifference rather than acquiescence.[26]

C. Connivance to Obtain Evidence for Divorce

The defense of connivance is often employed in cases where plaintiff, suspecting his spouse of an adulterous affair, has allowed matters to continue as before, in order to obtain evidence enabling him to secure a divorce. The courts have usually refused to accept a defense of connivance in this situation,[27] although contrary results have been reached where the complainant helped to create opportunities for his mate to pursue the affair.[28] An illustrative case is *Wilson v. Wilson.*[29] There the complainant, suspecting that his wife had been meeting a paramour in Boston, followed her to Boston one day, observed her meet a man and accompany him to a hotel, waited (with a detective) outside the couple's hotel room for a few minutes, and then broke into the room, catching the couple in bed. The Massachusetts Supreme Court ruled that plaintiff was not guilty of connivance, saying:

> "Merely suffering . . . a wife, whom he already suspects of having been guilty of adultery, to avail herself to the full extent of an opportunity to indulge her adulterous disposition, which she has arranged without his knowledge, does not constitute connivance on the part of the husband, even though he hopes he may obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason. . . . The law does not compel a husband to remain always bound to a wife whom he suspects, and it allows him, as it does other parties who think they are being wronged, reasonable scope in their efforts to discover whether the suspected party is or is not guilty, without themselves being adjudged guilty of conniving at the crime which they are seeking to detect." [30]

The court ruled similarly in the English case of *Douglas v. Douglas,*[31] even though the plaintiff had deliberately absented himself from home for a couple of days in the hope that his wife and her paramour would act less cautiously and give plaintiff's

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[26] *Ratcliff v. Ratcliff,* 221 Mo. App. 944, 288 S.W. 794 (1926).

[27] Harper and Skolnick, *op. cit. supra* note 22, at 465.

[28] *Farwell v. Farwell,* 47 Mont. 574, 133 Pac. 958 (1913).

[29] 154 Mass. 194, 28 N.E. 167 (1891).

[30] Page 167 of 28 N.E.

[31] (1951) P. 85.

detectives an opportunity to obtain unequivocal evidence of adultery.

D. The Double Standard Employed in the Courts' Application of Connivance

An examination of the cases discloses that the courts are slower to invoke the connivance doctrine against the wife than they are against the husband.[32] For example, in *Lambert v. Lambert,*[33] the court decided that the plaintiff-wife was not guilty of connivance even though she had permitted the corespondent to continue visiting in the parties' home for several days after learning of the adultery; and in *Cochran v. Cochran,*[34] the court ruled that there was no connivance even though the complainant-wife, who knew of the illicit relationship, sometimes purposely made it convenient for defendant and the corespondent to be alone with one another. One authority speculates that the courts' tendency to invoke connivance more readily against the husband than against the wife may be ascribable to an awareness that the wife has traditionally been economically dependent upon the husband and has commonly had but a limited opportunity to discover his familiarity with other women.[35] In view of the recent legal and economic liberation of women, it would appear that there is no longer any justification for such favoritism.

IV. Conclusion

In summary, a showing of connivance requires evidence that plaintiff has somehow—either through affirmative acts or wilful failure to act—manifested a corrupt consent to defendant's misdeeds. Proof of simple negligence, obtuseness, or indifference will not, in most jurisdictions, suffice. One who, suspecting his mate of unfaithfulness, permits the existing situation to continue unaltered in order to gather evidence enabling him to obtain a divorce is usually deemed innocent of connivance. Finally, the courts exhibit a tendency to invoke connivance more reluctantly against the wife than against the husband. The defense of connivance is so limited in its application that the average attorney

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[32] See Harper and Skolnick, *op. cit. supra* note 22, at 468.

[33] 165 Iowa 367, 145 N.W. 920 (1914).

[34] 35 Iowa 477 (1872).

[35] Harper and Skolnick, *op. cit. supra* note 22, at 468.

is unlikely to use it or encounter it more than once or twice in his career;[36] but he should be aware of the doctrine, for in those instances when connivance is pleaded (and established) it nearly always defeats the application for a divorce.

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[36] "(C)onnivance only has potential application to the least significant ground for divorce (adultery), and is itself a relatively insignificant defense." Clark, *op. cit. supra* note 1, at 582.