

A

PETER GRAHAM LEVESTAM

v.

CIWA PHILBERT LEVESTAM

[COURT OF APPEAL, 1974 (Gould V. P., Marsack J.A., Haslam J.A.),
13th March]

B

Civil Jurisdiction

*Husband and Wife—separation agreement—whether such agreement void as
contrary to public policy—connivance.*

*Husband and wife—evidence and proof—connivance—what must be established
to prove connivance—presumption against connivance having occurred.*

C

In order to prove connivance, it is necessary to establish that the adultery
has been sanctioned or corruptly licensed. There is a presumption against
connivance having occurred.

Cases referred to : *Fearon v. Earl of Aylesford* (1884) 14 Q.B. 792.

D

Appeal against a decision in the Supreme Court refusing to set aside a
separation agreement.

H. A. L. Marquardt-Gray for the appellant.

R. G. Q. Kermode for the respondent.

E

Judgment of the Court (read by HASLAM J. A.) : [13th March 1974]—

This is an appeal against a decision in the Supreme Court refusing to set
aside a separation agreement upon grounds set out in para. 3 of the statement
of claim, namely, that :—

“ At the time that the defendant entered into the said agreement she did
so with the full knowledge of the plaintiff’s intention to continue illicit
intercourse with one Alice Jhansen, a married woman, and the plaintiff
says, therefore that the said separation agreement is void as being against
public policy.”

F

In effect, it was submitted that the agreement should have been set aside
because the respondent connived at the adultery of her husband, the plaintiff.

G

I now turn to the express findings of the fact on page 33 where the learned
Judge said in his reasons for judgment :—

“ I find that the wife was aware of the adulterous association when she
became a party to the separation agreement and that she had no reason
to think that it would soon cease, although it would be endowing her with
prophetic foresight to say that she knew the plaintiff intended to continue
living with Alice Jhansen.”

H

Then further on, His Lordship's reasons continue with this finding :—

- A " The husband was and still is determined to live with Alice Jhansen and it is clear that the wife can do nothing about it. Her signing the agreement does not license the husband's adultery or permit its continuation. The adultery would continue whether or not the agreement was made. The impression I gathered was that up to the signing of the agreement and probably for some time thereafter, the wife was at all times ready and willing to be reconciled to a husband who clearly did not and still does want her. I find that this agreement was not contrary to public policy. "
- B

Once again, the Judge found on the facts that connivance had not been established, and this Court agrees with his conclusion. This is sufficient to dispose of the matter.

- C But before parting with the case, a few words should be said perhaps about the argument that was addressed to us. It may be that in the light of modern usage and phraseology, the passage in 8 Hals. Laws of England (3 Ed.), para. 230, p. 134, could with advantage be re-written, for there the author of the topic ' Contract ' says :—

" Where an agreement for separation is made in the contemplation of a renewal or continuance of illicit intercourse by both parties, or by one of the parties to the knowledge of the other, it is void ; "

- D The word ' contemplation ' requires explanation and for that purpose it is sufficient to quote a sentence which in itself summarises its context, in *Fearon v. Earl of Aylesford*, (1884), 14 Q.B. at 792, Cotton L.J. said on the facts before him about the document that he was construing :—

" It is not to my mind *an inducement* to her to commit adultery. "

- E Connivance in derivation connotes winking at a course of misconduct, and, even if phrases of the more rigorous Victorian age be extracted from judgment, what must be established to prove connivance is sanctioning adultery or corruptly licensing it. There is a presumption against connivance having occurred.

Such being our conclusion therefore, the appeal must fail and is dismissed with costs.

Appeal dismissed.