TENNEKOON

v.

SOMAWATHIE PERERA *alias* TENNEKOON

SUPREME COURT.
SHARVANANDA, C.J., COLIN-THOMÉ, J., RANASINGHE, J., TAMBIAH, J. AND DE ALWIS, J.
S.C. APPEAL No. 51/84.
C.A. No. 287/79 (F).
D.C. COLOMBO No. 10740/D.
SEPTEMBER 18 AND 19, 1985.

Divorce – Seven-year separation – Summary Procedure – Section 608 (1) and (2) of the Civil Procedure Code – Has matrimonial fault to be proved even where there has been a seven-year separation? Marriage Registration Ordinance.

Held – (*Tambiah, J. dissenting*) :

The words "either spouse" in section 608(2) of the Civil Procedure Code must be understood as referring only to the innocent spouse for the purpose of the relief of divorce under section 608(2) (*a*) or section 608(2) (*b*) of the Civil Procedure Code.

It is incumbent on a spouse seeking a divorce under section 608(2) of the Civil Procedure Code on the ground of separation for a period of seven years to establish matrimonial fault. Only a procedural change enabling summary procedure to be used instead of a regular action was effected by section 608(2) of the Civil Procedure Code.

Muthuranee v. Thuraisingham (1984) 1 SRI L.R. 381 overruled.

Cases referred to:

1. *Muthuranee v. Thuraisingham [1984] 1 Sri L.R. 381.*
2. *Keerthiratne v. Karunawathie (1938) 39 NLR 514, 575, 516.*
3. *Joseph v. Joseph (1940) 42 NLR 119.*
4. *National Assistance Board v. Wilkinson [1952] 2 Q.B. 648.*
5. *R. v. Sheen 28 L.J.M. 9.*
6. *Kish v. Taylor [1911] 1 K.B. 625, 634.*
7. *Plumstead Board of Works v. Spackman [1884] 13 Q.B.D. 878.*

8. *Re Brocklebank [1889] 23 Q.B.D.461.*
9. *Quebec Railway v. Vandry AIR 1920 P.C. 181, 186.*
10. *Orr v. Orr (1920) 22 NLR 57, 61.*
11. *Frugtneit v. Frugtneit (1941) 42 NLR 547.*
12. *Chapman v. Chapman [1972] 2 All E.R. 1089.*
13. *Kruger v. Kruger [1980] 3 S.A.L.R. 283.*
14. *Ebert v. Ebert (1939) 40 NLR 388.*

APPEAL from judgment of Court of Appeal ([1984] 2 SLR 217).

Eric Amerasinghe, P.C., with *D. R. P. Goonetileke* for the plaintiff-appellant.

E. R. S. R. Cumaraswamy, P.C. with *Prins Gunasekera* and *R. K. Suresh Chandra* for the defendant-respondent.

Cur. adv. vult.

January 31, 1986.

SHARVANANDA, C. J.

The plaintiff-appellant instituted this action by way of matrimonii procedure against his wife praying for a divorce a mensa et thoro for a period of 7 years prior to the institution of the action, in terms of section 608(2) of the Civil Procedure Code. The defendant-respondent filed answer denying that they lived in separation. After trial the trial Judge rejected the evidence of the defendant and entered judgment for the plaintiff as prayed for in his action. From the said judgment the defendant appealed to the Court of Appeal and that court by its judgment dated 5.9.84 set aside the judgment of the trial court and dismissed the application of the plaintiff with costs in both courts. The Court of Appeal granted leave to the plaintiff to appeal to this court on the following questions of law:–

(i) whether separation a mensa et thoro for a period of 7 years constitutes a valid ground for divorce under section 608(2) of the Civil Procedure Code, and

(ii) if not, whether it is incumbent on the petitioner seeking a divorce under that subsection on such ground to establish a matrimonial fault on the part of the respondent to such separation.

Since the judgment appealed from is in conflict with the judgment of another Bench of that court in *Muthuranee v. Eliyatamby Thuraisingham* (1) this appeal was referred to a Bench of five judges for a final decision of the conflict in the interpretation of section 608(2) of the Civil Procedure Code.

Admittedly the marriage between the parties was one that was contracted under the provisions of the Marriage Registration Ordinance (Cap. 112) which is commonly referred to as Marriage (General) Ordinance. The preamble of this Ordinance states:

"that it is an ordinance to consolidate and amend the law relating to marriages other than the marriage of Muslims and to provide for the better registration thereof."

Section 19 of the Ordinance provides as follows –

(i) No marriage shall be dissolved during the lifetime of the parties except by judgment of divorce a vinculo matrimonii pronounced in some competent court.

(ii) ... subsequent shall be founded either *on the ground of adultery incurable impotency at the ... or of malicious desertion,* or *of ... of such marriage.*

(iii) Every court in Ceylon having matrimonial jurisdiction is hereby declared competent to dissolve a marriage on *any such ground.*

Section 597 of the Civil Procedure Code provides that.

"Any husband or wife may present a plaint to a District Court within the local limits of the jurisdiction of which he or she, as the case may be, resides, praying that his or her marriage may be dissolved on any ground for which marriage may, by the law applicable in Ceylon to his or her case, be dissolved."

"Our common law of divorce is based on the 'guilt' and not on the marriage breakdown' principle ..... Adultery and malicious desertion are breaches of the fundamental obligations flowing from the marriage contract, for it is of the essence of the marriage relationship that the spouses should adhere to each other, being physically and spiritually 'one flesh' ....." – *The South African Law of Husband and Wife* – Hahlo – pp. 349-350.

Section 596 of the Civil Procedure Code specifies the procedure in matrimonial actions. It provides–

> "In all actions for divorce a vinculo matrimonii, or for separation a mensa et thoro, or for declaration of nullity of marriage, the pleadings shall be by way of plaint and answer, and such plaint and answer shall be subject to the rules and practice by this Ordinance provided with respect to plaints and answers in ordinary civil actions, so far as the same can be made applicable, and the procedure generally in such matrimonial cases shall (subject to the provisions contained in this, Cap. XLII) follow the procedure herein before set out with respect to ordinary civil actions."

The pleadings in matrimonial actions are by way of plaint and answer and the procedure in such action is regular procedure and not summary procedure.

The grounds for a divorce are a matter of substantive law and are as specified in the aforesaid section 19 of the Marriage (General) Ordinance.

The grounds for judicial separation are:–

(*a*) that further cohabitation with the defendant has become dangerous or intolerable for the plaintiff,

(*b*) that the state of affairs was brought about by the unlawful conduct of the defendant.

To be unlawful the conduct need not amount to a breach of the criminal law. It is sufficient that the defendant has committed some matrimonial offence or breach of the conditions underlying the status of marriage. "Adultery and malicious desertion, being grounds for divorce are also grounds for the lesser remedy of judicial separation." *Keerthiratne v. Karunawathie* (2).

A judicial separation may be prayed for by the plaintiff even where grounds for a divorce a vinculo matrimonii exist. The court cannot, in such a case, give more than a judicial separation. Judicial separation may therefore be decreed even where there is evidence of adultery subsequent to marriage, or of malicious desertion and also when for other reasons the continuance of the cohabitation would become dangerous or unsupportable. So that judicial separation may be decreed on account of cruelty or protracted differences or for gross dangerous and unsupportable conduct on the part of the defendant.– Vide *Keerthiratne v. Karunawathie (supra)*.

Judicial separation in the words of Professor Hahlo:

"Is a half-way house between marriage and divorce. A decree of judicial separation does not dissolve the marriage tie, but puts, for the time being, an end to the personal consequences of marriage by suspending the reciprocal duty of the spouses to live together."

Section 608 (1) of the Civil Procedure Code provides as follows:

"Application for a separation a mensa et thoro on any ground on which by law applicable to Ceylon such separation may be granted, may be made by either husband or wife by plaint to the District Court, within the local limits of the jurisdiction of which he or she, as the case may be, resides, and the court, on being satisfied on due trial of the truth of the statement made in such plaint, and that there is no legal ground why the application should not be granted, may decree separation accordingly."

A court cannot enter a decree for separation a mensa et thoro based entirely on the consent of parties – *Joseph v. Joseph* (3).

Act No. 20 of 1977 amended the section 608 as it originally stood in the Civil Procedure Code by the renumbering of the above provision as section 608 (1) and by inserting the following new subsection as section 608 (2)–

"Either spouse may –

(*a*) after the expiry of a period of two years from the entering of a decree of separation under subsection (1) by a District Court, whether entered before or after the relevant date, or

(*b*) notwithstanding that no application has been made under subsection (1) but where there has been a separation a mensa et thoro for a period of seven years,

apply to the District Court by way of summary procedure for a decree of dissolution of marriage, and the court may, upon being satisfied that the spouses have not resumed cohabitation in any case referred to in paragraph (*a*) or upon the proof of the matters stated in an application made under the circumstances referred to in paragraph (*b*) enter judgment accordingly...."

It is on the construction of section 608 (2) that rival submissions have been made by counsel for the appellant and counsel for the respondent.

Counsel for the plaintiff-appellant submitted that the words "either spouse" connoted either spouse irrespective of whether the spouse was the guilty spouse or the innocent one and that section 608 (2) (*b*) stipulated that where there has been a separation a mensa et thoro for a period of 7 years either husband or wife will be entitled to a decree for divorce, regardless of the existence or not of grounds for a dissolution of marriage for which section 19 of the Marriage (General) Ordinance mandated a court competent to dissolve a marriage. According to counsel, the fact of separation for 7 years will be sufficient ground by itself, under section 608(2)(*b*) of the Civil Procedure Code, to found a decree for dissolution of marriage and it will be irrelevant for the court to inquire into who is responsible for the separation. He urged that the seven-year period of separation is a new statutory ground for divorce. He admitted that a more fitting place for this new ground of dissolution is section 19 of the Marriage (General) Ordinance, which contains the substantive law relating to dissolution of marriage, but he submitted that though this new ground of divorce is out of place in a code relating to procedure of actions, nothing prevents the legislature from enacting substantive law in a code of procedure.

The preamble to the Civil Procedure Code states that it is an ordinance to consolidate and amend the law relating to the procedure of the civil courts. The code is primarily a procedural enactment; it prescribes the procedure that has to be followed in a civil court in the adjudication and enforcement of substantive rights between parties to a civil suit. Section 7 provides that the procedure of an action may be either "regular" or "summary". Section 8 enjoins that every action shall commence and proceed by a course of regular procedure save and except actions in which it is specially provided that proceedings may be taken by way of summary procedure. It is to be noted that as a general rule the procedure in matrimonial actions is regular procedure (section 596). Section 608(1) re-affirms this rule with respect to applications for a separation a mensa et thoro.

But the amended section 608(2) departs from the general rule and stipulates summary procedure for obtaining a decree of divorce founded on separation a mensa et thoro. The submission of counsel for the respondent is that the amended section 608(2) seeks only to alter the procedure for obtaining a dissolution of marriage founded on a decree of separation a mensa et thoro, under section 608(1) or on the fact of separation a mensa et thoro for a period of seven years. He

discounted the suggestion that section 608(2) enacts substantive law. He contended that the mere fact of separation a mensa et thoro for a period of seven years has not been constituted a ground of divorce by section 608(2)(*b*). He argued that in the scheme of sections 608(1) and (2), the applicant for divorce should prove (*a*) that he/she had obtained a decree for judicial separation under section 608(1) or (2) that there are grounds on which by the law applicable to separation a mensa et thoro a decree for such separation may be granted to him/her and that there had been such separation for a period of seven years. He submitted that this new provision for divorce under section 608(2) is in conformity with the common law and harmonises with the 'guilt' principle which pervades our law of divorce. He said that the construction contended for by counsel for the appellant introduced a new element in our law of divorce which is alien and opposed to the 'guilt' doctrine; in that, it enables a guilty spouse to sue for divorce on the ground of separation for seven years which separation he/she had brought about by his/her unlawful conduct. He said that that new ground enables the guilty spouse to take advantage of his/her own wrong.

Counsel for the respondent added that the breakdown principle, on which the English Matrimonial Causes Act 1973 is based does not make irrelevant the conduct of the guilty spouse in granting a divorce. The English Act enables the court to grant a divorce on the ground that the marriage has broken down irretrievably as evidenced by the fact that the parties have lived apart for a continuous period of five years immediately preceding the presentation of a petition for divorce. It however provides that –

> "the respondent to a petition for divorce in which the petitioner alleges five years separation may oppose the grant of a decree on the ground that the dissolution of the marriage will result in grave financial or other hardship to him and that it *would in all the circumstances be wrong to dissolve the marriage*", and it mandates the court "to consider all the circumstances, *including the conduct of the parties to the marriage*, all the interests of those parties and of any children or other persons concerned, and that if it is of opinion that the dissolution of the marriage will result in grave financial or other hardship to the respondent and that it would in all the circumstances be wrong to dissolve the marriage it shall dismiss the petition."

Counsel for the respondent pointed out that section 608(2) does not direct the court to take account of the considerations obligated by the English provisions before dissolving the marriage.

In my view, though the submission of counsel for the appellant is not without force, on the whole I would prefer to accept the construction of counsel for the respondent, even though it would involve writing into section 608(2) words qualifying the spouse who could make the application under that section.

Section 608(1) specifically requires that the party applying for a judicial separation must establish a ground on which by the law applicable thereto, such a separation may be granted. The onus is on the plaintiff to show that the cohabitation has become dangerous or intolerable owing to the unlawful conduct of the defendant. A decree for judicial separation will not be granted where the plaintiff refuses to cohabit for reasons other than the defendant's alleged unlawful conduct.

Section 608(2) has to be read with section 608(1), and not in isolation as an independent section. It derives its colour from the earlier section 608(1). Both sections seek to give relief to the spouse who is entitled to sue for a decree of separation a mensa et thoro or who has sued and obtained such a decree.

Taken out of context section 608(2) may appear to entitle either spouse, whether guilty or innocent, to make the application under section 602(*a*) or (*b*) but the section has got to be read in the context of the concept of judicial separation and of section 608(1). Taken in that context it is only the innocent spouse who can be identified as the "either spouse" referred to in section 608(2) for the purpose of the relief of divorce under section 608(2) (*a*) or section 608(2) (*b*).

It is to be noted that the grounds for the grant of a decree for judicial separation are not the same as for the grant of a decree for divorce. The ground for grant of judicial separation is that the cohabitation has become dangerous or intolerable to the plaintiff as a result of the defendant's unlawful conduct. On the other hand, the grounds for divorce are, as stated earlier, adultery, malicious desertion and incurable impotency at the time of the marriage. There is sense and justice in entitling the innocent spouse who has obtained a decree for judicial separation to enlarge that decree into a decree for dissolution

of marriage, after expiry of a period of two years from the entering of a decree of separation; or in granting decree for divorce to an innocent spouse who had lived in separation a mensa et thoro for seven years, but had not made an application for a decree for judicial separation under section 608(1) even though entitled to do so.

In resolving the question what is a proper construction of section 608(2) the following relevant principles of construction have to be borne in mind:–

(*a*) There is a presumption that Parliament does not intend to make a radical change in the existing law by a side wind.

As Lord Delvin said:

"It is a well established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion"–*National Assistance Board v. Wilkinson*(4).

The principle that the innocent spouse alone is entitled to a divorce or judicial separation is deep-seated in our jurisprudence. I think if it is to be superseded it should be overtaken by a clear definite and positive enactment, not by an ambiguous one such as section 608(2) relied upon by the appellant.

(*b*) The golden rule of interpretation is that the words of a statute must prima facie be given their ordinary meaning. The court must not shrink from interpretation, which will reverse the previous law. Judges are not called upon to apply their notions of good policy so as to modify the plain meaning of statutory words; but, where, in construing general words the meaning of which is not entirely plain there is good reason for doubting whether legislature could have been intending so wide an interpretation as would disregard fundamental principles, then a court may be justified in adopting a narrower construction. It is to be taken as a fundamental principle, standing as it were on the threshold of the whole subject of interpretation, that the plain intention of the legislature as expressed by the language employed is invariably to be accepted and implemented, whatever may be the opinion of the Judge of its wisdom or justice. A sense of possible injustice of an interpretation ought not to induce a judge to do violence to well settled rules of construction but it may lead to the selection of one rather than the other of two reasonable interpretations. A statute must be given effect to whether the Judge likes it or not

"Whenever the language of a legislature admits of two constructions and, if construed in one way, would lead to obvious injustice, the courts act upon the view that such a result could not have been intended, unless the intention had been manifested in express words. It is a cardinal rule, governing the interpretation of statutes that when the language of the legislature admits of two constructions, the court should not adopt a construction which would lead to an absurdity or obvious injustice." *R. v. Sheen* (5) (per Lord Campbell).

(*c*) On the general principle of avoiding injustice any construction will, if possible be rejected (unless the policy of the Act required it) if it would enable a person by his own act to impair an obligation which he had undertaken or otherwise to profit by his own wrong – Maxwell on Interpretation of Statutes, 12th Ed. at page 212 –

"A man may not take advantage of his own wrong. He may not plead in his own interest, a self-created necessity." Per Fletcher Moulton, L. J., *Kish v. Taylor* (6).

Bearing in mind the above principles of construction of a statute I cannot persuade myself to accept the construction contended for by counsel for the appellant that the basic words "either spouse may" in section 608(2) includes the spouse whose unlawful conduct brought about the separation. This construction will enable the guilty spouse to take advantage of his own wrong (which brought about this separation) to achieve what he wanted, namely dissolution of the marriage.

It is to be noted in this case the plaintiff-appellant bases his action for dissolution of marriage only on the ground of seven years separation. In the issues raised by the counsel for the plaintiff the conduct of the defendant is not put in issue. The parties have four children by this marriage. For no fault of the defendant, the plaintiff is seeking to divorce her. In *Muthuranee v. Thuraisingham (supra)* in which Tambiah, J., held that seven years of separation simpliciter was sufficient to ground an action for divorce, the defendant's wife resisted an earlier action of the plaintiff-husband for divorce, on the ground that it was the plaintiff who maliciously deserted her and her daughter and was living in open adultery with one Cecilia, by whom he was having two children. Then the plaintiff withdrew that action and filed the present action praying for a decree of dissolution of marriage on the ground that they have been separated for a period of 7 years.

Here was a case where the husband was unquestionably the guilty party who deserted his wife and lived in adultery with another woman for 7 years and yet he was held entitled to divorce his innocent wife. The injustice inflicted on the innocent spouse is manifest. This consequence is the inevitable result of the interpretation of section 608(2) contended for by counsel for the appellant. To adopt the words of Brett, M. R., in *Plumstead Board of Works v. Spackman*(7):

> "If that is the true interpretation of the statute – if there are no means of avoiding such an interpretation of the statute – a Judge must come to the conclusion that the legislature by inadvertence has committed an act of legislative injustice ; but to my mind a Judge ought to struggle with all the intellect he has and with all vigour of mind that he has, against such an interpretation of an Act of Parliament and unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended."

> "Where the legislature has used words in an Act which, if generally construed, must lead to palpable injustice and consequences revolting to the mind of any reasonable man, the court will always endeavour to place on such words a reasonable limitation on the ground that the legislature could not have intended such consequence to ensue unless express language in the Act or binding authority prevents such limitation being interpolated in the Act – *Re Brocklebank* (8).

It is shocking to judicial conscience that a party who defies the moral laws can obtain a divorce on the ground of his own matrimonial offence of malicious desertion. It is inconceivable that a responsible legislature would have intended, by enacting section 608(2), to lend its sanction to such proceeding. Even English law which recognises the breakdown of marriage as a ground for granting divorce mandates the taking into account, inter alia, the conduct of parties to the marriage in exercising its discretion to grant a decree for divorce On the interpretation of counsel for the plaintiff-appellant the conduct of a delinquent petitioner is irrelevant in the matter of granting a decree for divorce even though the separation for seven years has been brought about by such conduct. The consequences of this interpretation is revolting to the mind of any reasonable man This interpretation destabilises the institution of marriage and undermines the moral and social foundation of our society.

It is significant that section 608 (2) (*b*) opens with the words "notwithstanding that no application had been made under subsection (1)". If appellant's submission represents the correct construction the clause "notwithstanding that no application had been made under subsection (1) would be superfluous and serves no purpose, for on that construction a separation for seven years simpliciter entitles a spouse to a divorce. In my view the presence of these words in this section tends to show that 608(*b*) has a link with section 608(1). A statute ought to be so construed that no part of it shall be treated as a surplusage. An interpretation which renders any provision of the Act redundant should be avoided. Effect must be given, if possible to all the words used in the statutory provision for the legislature is deemed not to waste its words or to say anything in vain – *Quebec Railway v. Vandry* (9) - per Lord Sumner.

In my view the phrase "notwithstanding that no application is made under subsection (1)" gives an insight into the mind of the legislature. Applications under subsection 608(1) for a judicial separation can be made only by the innocent spouse. A spouse who is responsible for the separation because of his unlawful conduct cannot apply for judicial separation. Hence section 608 (2) (*b*) will appear to ensure that even though the innocent spouse had not chosen to apply for a judicial separation, that circumstance will not bar that spouse from claiming a divorce on the ground of separation for 7 years. This construction fits into the scheme of the law. Where the innocent spouse has applied for decree of separation and obtained it, then he/she could move for a dissolution of the marriage after the expiry of a period of two years from entering of the decree for separation. But, where the innocent spouse has failed to apply under section 608(1) for decree of separation though entitled to and had thus failed to obtain a decree of separation to entitle him/her to avail of the provision of section 602(2)(*a*) to have the marriage dissolved, even then, if there had been separation for a period of seven years, then also, he/she will be able to apply for dissolution of marriage.

I agree with the following reasoning of Atukorale, J. in the judgment appealed from:

> "This subsection 608(2) enabled, for the first time, either spouse to apply to the appropriate District Court by way of summary procedure for a decree of dissolution of the marriage without proceeding by way of plaint in the course of regular procedure. It also prescribed in paragraphs (*a*) and (*b*) aforesaid the

circumstances under which such an application by way of summary procedure may be made by either spouse. The circumstances specified in paragraph (*a*) or (*b*) must be shown to pre-exist before a spouse can have recourse to summary procedure for the dissolution of his or her marriage. In the instant case the circumstances set out in paragraph (*b*) have been established to exist prior to the respondent's application for a decree for divorce. *The crucial and decisive words in so far as the* instant case is concerned are therefore the following:

> 'the court may.....upon the proof of the matters stated in the application made under the circumstances referred to in paragraph (*h*), enter judgment accordingly.' What then are the matters that are required to be stated in such an application and which have to be proved to entitle the petitioner to judgment dissolving the marriage? Learned counsel for the respondent maintained in effect that they refer to the fact of marriage and the fact that the spouses had been living in separation a mensa et thoro for a period of 7 years prior to the application. If these are proved, the court, learned counsel urged, is obliged to enter judgment dissolving the marriage. I cannot agree. As set out by me above proof of the matters specified in paragraph (*b*) above would only warrant recourse to summary procedure which is a speedy and inexpensive form of procuring relief. The matters stated in the application are in my view a reference to the matters that have to be set out in terms of section 374(*d*) of the Code, namely, a plain and concise statement of the facts constituting the ground of the application and its circumstances upon proof of which the petitioner is entitled to relief or order prayed for."

The view of Atukorale, J. in the present case is preferable to that of Tambiah, J. in *Muthuranee v. Thuraisingham (supra)* and hence the latter should be overruled on this point. The correct legal position is that only a spouse who has lived in separation a mensa et thoro for seven years and who can establish a separation a mensa et thoro on any ground on which by our law such separation may be granted can

avail himself/herself of the procedure set out in section 608(2)(*b*) of the Civil Procedure Code to obtain a decree of dissolution of marriage under that section.

I dismiss the appeal with costs.

COLIN-THOMÉ, J. – I agree.

RANASINGHE, J. – I agree.

DE ALWIS, J. – I agree.

TAMBIAH, J.

I have read the judgment of the Hon. the Chief Jstice. I regret, I am unable to agree.

The plaintiff-appellant (the husband) filed actio by way of petition against the defendant-respondent, his wife, and payed for a divorce a vinculo matrimonii on the sole ground that the had been living in separation a mensa et thoro for a period of seva years prior to the institution of the action, in terms of section 08(2) of the Civil Procedure Code.

S. 608 reads:

"608(1) Application for a separation a mena et thoro on any ground on which by the law applicabi to Ceylon such separation may be granted, may be made b either husband or wife by plaint to the District Court, within thocal limits of the jurisdiction of which he or she, as the case ma be, resides, and the court on being satisfied on due trial c the truth of the statements made in such plaint, and thathere is no legal ground why the application should not be gnted, may decree separation accordingly.

(2) Either spouse may–

(*a*) after the expiry of a period of two yearfrom the entering of a decree of separation under susection (1) by a District Court, whether entered tepre or after the relevant date; or

(*b*) notwithstanding that no applicatio has been made under subsection (1) but where here has been a separation a mensa et thoro for a perd of seven years.

apply to the District Court by way of summary procedure for a decree of dissolution of marriage, and the court may, upon being satisfied that the spouses have not resumed cohabitation in any case referred to in paragraph (*a*), or upon the proof of the matters stated in an application made under the circumstances referred to in paragraph (*b*), enter judgment accordingly:

Provided that no application under this subsection shall be entertained by the court pending the determination of any appeal taken from such decree of separation. The provisions of section 604 and 605 shall apply to such a judgment.

In this subsection 'relevant date' means the date on which the Civil Courts Procedure (Special Provisions) Law, 1977, comes into operation."

The wife filed answer denying that they lived in separation and maintained that there has been no separation a mensa et thoro between the parties.

After trial, the learned trial Judge rejected the evidence of the wife and arrived at the finding that the parties had been living in separation a mensa et thoro for a period of seven years prior to the filing of the action. He took the view that on proof of separation a mensa et thoro for such period, the Court was obliged to grant a divorce at the instance of either spouse under s. 608 (2), and that it was unnecessary for him to decide whether the spouse suing for divorce was an innocent / guilty party. He entered judgment for the plaintiff as prayed for in his petition.

The wife appealed to the Court of Appeal and the Court of Appeal by its judgment dated 05.09.84 set aside the judgment of the trial Judge and dismissed the application of the plaintiff with costs in both the Courts. The Court of Appeal was of the view that s. 608 (2) for the first time enabled either spouse to apply for a decree of dissolution of marriage by way of summary procedure without proceeding by way of plaint in the course of regular procedure; that the matters specified in paragraph (*a*) and (*b*) must be shown to pre-exist before a spouse can have recourse to summary procedure for the dissolution of his or her marriage; that proof of the matters specified in paragraph (*b*) would only warrant recourse to summary procedure which is a speedy and inexpensive form of procuring relief. The judgment states –

"In my opinion a spouse seeking a divorce by way of summary procedure must not only justify the procedure invoked by him or her but must further plead and prove to the satisfaction of court that he or she is entitled to a dissolution of the marriage upon any ground which by the law applicable to his or her marriage such dissolution may be decreed. In the instant case therefore the husband could not have succeeded in his claim for divorce by mere proof of a seven-year separation a mensa et thoro but it was incumbent on him to establish further one of the three grounds of divorce prescribed in s. 19 of the Marriage Registration Ordinance. It is my view that the primary objective of s. 608 (2) of the Code is to make provision for a quicker and cheaper procedure for obtaining relief in matrimonial cases and not to alter the substantive law upon which marriages can be dissolved."

The Court of Appeal granted leave to appeal to the Supreme Court ex mere motu on the following substantial questions of law:–

(i) Whether separation a mensa et thoro for a period of seven years constitutes a valid ground for divorce under s. 608 (2) of the Civil Procedure Code; and

(ii) If so, whether it is incumbent on the plaintiff seeking a divorce under that sub-section on such ground to establish a matrimonial fault on the part of the defendant to such application.

In the written submissions filed in this Court on behalf of the defendant-respondent, it was sought to justify the view taken by the Court of Appeal that the primary objective of s. 608 (2) of the Code is to make provision for a cheaper and quicker procedure for obtaining relief in matrimonial cases and not to alter the substantive law of divorce; that the grounds for divorce are still only those that are contained in s. 19 of the Marriage Registration Ordinance and a petitioner seeking a divorce under s. 608 (2) (*b*) of the Code must establish one of the three grounds specified in s. 19 of the Ordinance. Reliance also was placed on a passage in *Maxwell* on *Interpretation of Statutes* that statutes dealing with procedure should, where possible, be limited in their construction to procedure only.

Before this Court, however, learned President's Counsel appearing for the defendant-respondent did not support the above view taken by the Court of Appeal. Instead, he confined his arguments to the 2nd

ground of appeal, namely, that the petitioner seeking a divorce under s. 608(2)(*b*) must establish a matrimonial fault on the part of the defendant. There is no doubt, then, that s. 608(2)(*a*) of the Code created a new valid ground of divorce.

Learned President's Counsel for the defendant-respondent cited certain passages from *Benion* on *"Statutory Interpretation"* (1984 Ed.), *Craies* on *"Statute Law"* (5th Ed.), and *Maxwell* on *"Interpretation of Statutes"* (12th Ed.) which are to the following effect:

"It is a principle of legal policy that law should be altered deliberately rather than casually, and that Parliament should not change either common law or Statute law by a side wind, but only by measured and considered provisions. The Court, when considering which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle ..... as Lord Devlin said *National Assistance Board v. Wilkinson (supra)*, 'It is a well established principle of construction that a Statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion'." – (*Benion* p. 317).

"It is presumed that the legislature does not intend to make any change in the existing law beyond that which is expressly stated therein, or follows by necessary implication from, the language of the statute in question ..... If the arguments on a question of interpretation are 'fairly evenly balanced, that interpretation should be chosen which involves the least alteration of the existing law' ..... Statutes dealing with procedure should, where possible, be limited in their construction to procedure only." – (*Maxwell* pp. 116, 118).

"It must be remembered that it is a sound rule to construe a Statute in conformity with the common law rather than against it, except where or in so far as the statute is plainly intended to alter the course of the common law. The general rule in exposition is this, that in all doubtful matters, and where the expression is in general terms, the words are to receive such a construction as may be agreeable to the rules of common law in cases of that nature, for statutes are not presumed to make any alteration in the common law further or otherwise than the Act does expressly declare ..... If

it is clear that it was the intention of the legislature in passing a new Statute to abrogate the previous common law on the subject, the common law must give way and the Statute must prevail."–(*Craies* pp. 175, 310).

S. 608 (2) (*b*) was introduced into the Civil Procedure Code by the Civil Procedure (Amendment) Law No. 20 of 1977. It would appear that the Bill that was presented by the Minister of Justice, in its original form, contained only sections 608 (1) and 608 (2), which is now s. 608 (2) (*a*). Learned President's Counsel for the defendant-respondent informs us that the Bill had passed its second reading and at the Committee stage, some interested party sponsored the amendment which resulted in the present s. 608 (2) (*b*) of the Code. It was his submission that an important change in the Common Law as embodied in s. 19 of the Marriage Registration Ordinance has been effected "by a side-wind".

S. 597 (1) of the Code states–

"Any husband or wife may present a plaint to the District Court praying that his or her marriage may be dissolved on any ground for which marriage may, by the law applicable in Ceylon to his or her case, be dissolved."

S. 607 (1) states–

"Any husband or wife may present a plaint to the District Court praying that his or her marriage may be declared null and void."

"(2) Such decree may be made on any ground which renders the marriage contract between the parties void by the law applicable to Ceylon."

S. 608 (1) states–

"Application for a separation a mensa et thoro on any ground on which by the law applicable to Ceylon such separation may be granted may be made by either husband or wife by plaint to the District Court and the Court, on being satisfied on due trial of the truth of the statements made in such plaint, and that there is no legal ground why the application should not be granted, may decree separation accordingly."

Learned President's Counsel for the defendant-respondent also submitted that the words "either spouse" in s.608(1), (2) should be given the same meaning as the words "husband or wife" in ss.597(1), 607(1) and 608(1), that is, a husband or wife who can establish a "ground" in order to obtain a decree of divorce or of nullity or of separation; that s.608(2) must be read with s.608(1) and not in isolation. In other words, it is only an innocent spouse free from matrimonial fault who has obtained a decree for separation under s.608(1), who can apply under s.608(2)(*a*) to convert it into a decree for divorce. So too, he argued, in regard to s. 608 (2) (*b*). The words "notwithstanding that no application has been made under subsection (1)" in s.608(2)(*b*) mean, he said, that although no application has been made under sub-section (1), the applicant must be a person who would be able to satisfy a ground of separation in terms of s.608(1), but who has nevertheless not made such an application. In other words, the applicant must prove the conditions sufficient to obtain a decree of separation, although he has not obtained a decree of separation plus a seven-year separation a mensa et thoro. Here too, only an innocent spouse free of matrimonial fault can obtain a decree of divorce under s.608(2)(*b*). The words "application made under the circumstances referred to in paragraph (*b*)" in s.608(2) indicate the circumstances in which the application is made as stated in s.608(2)(*b*) read with s.608(1).

Learned President's Counsel further submitted that in s.608(2)(*b*) the meaning to be attributed to the words "a separation a mensa et thoro" (for 7 years) must be the meaning given to the same words in s.608(1), that is, a separation of the type recognised by law, and not merely a physical separation. The same words cannot have two different meanings in the same section.

Learned President's Counsel finally submitted that the meaning of s.608(2)(*b*) is ambiguous and by no means clear. If so, the presumption is against an intention to change the common law or the statutes embodying the common law.

Learned President's Counsel for the appellant, on the other hand, argued that the whole exercise of interpretation only arises in cases of ambiguity. The words of s.608(2) are clear and there is no place for interpretation. The Court has to give effect to the plain meaning of the words used in s.608(2)(*b*). Firstly, either spouse could make the

application, irrespective of who is responsible for the seven-year separation. There must secondly be a factual separaion a mensa et thoro for a period of seven years. The expression "separation a mensa et thoro" contemplates a physical situation of a separation from bed, board, cohabitation and goods and carries no connotation of a matrimonial fault. Thirdly, upon proof of the said two matters, the Court must enter judgment accordingly.

Article 80(3) of our Constitution precludes the canvassing of the validity of any statute law. It states that–

> "Where a Bill becomes law upon the Certificate of the President or the Speaker, as the case may be, being endorsed thereon, no Court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever."

It matters not, then, whether s. 608(2) of the Code was introduced by a "side wind" or a change in the substantive law of divorce was effected in a Statute dealing with procedure. Have not the basic principles of the law of res judicata been written into our Civil Procedure Code? Did not the old Civil Prodecure, in sections 600, 601 and 602, contain important provisions regarding the dismissal of a suit upon connivance, condonation or collusion, and give the Court a discretion to refuse a dissolution of marriage upon the proof of adultery, delay, cruelty, desertion, neglect or misconduct on the part of the plaintiff? If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it. So long as it remains on the Statute Book it is good and valid law, and the task of the Court is to interpret the Act.

> "Strictly speaking, there is no place for interpretation or construction except where the words of a Statute admit of two meanings. As Scott, L. J. said:
>
> > 'where the words of an Act of Parliament are clear, there is no room for applying any of the principles of interpretation which are merely presumption in cases of ambiguity in the Statute.'
>
> Rules of construction have been laid down because of the obligation imposed on the Courts of attaching an intelligible meaning to confused and unintelligible sentences.

The cardinal rule for the construction of the Acts of Parliament is that they should be construed according to the intention of Parliament which passed them. The tribunal that has to construe an Act of a Legislature, or indeed any other document, has to

determine the intention as expressed by the words used. If the words of the statute are themselves precise and unambiguous, then no more can be necessary then to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the law giver.

Where the language is explicit, its consequences are for Parliament, and not for the Courts, to consider. In such a case the suffering citizen must appeal for relief to the law giver and not to the lawyer." – (*Craies* 5th Ed. pp. 63, 64, 85).

"Where the language is plain and admits of but one meaning, the task of interpretaton can hardly be said to arise. Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. The interpretation of a Statute is not to be collected from any notions which may be entertained by the Court as to what is just and expedient. The duty of the Court is to expound the law as it stands, and to leave the remedy to others.

But where the words of a Statute are plain and unambiguous, an intention to alter the common law is evident from the words of the Act, there is no place for the application of the presumption." (the presumption against changes in the common law) – (*Maxwell* pp. 29, 122).

I cannot accept the contention of Learned President's Counsel for the defendant-respondent that it is only an innocent spouse, devoid of matrimonial fault, who can seek a divorce under s. 608(2). In sections 597(1) and 607(1), the words used are "any husband or wife may present a plaint to the District Court". The word "ground" is also used. Obviously, then, it is the spouse who has a cause of action who can sue for divorce or a nullity of marriage. Similarly, the words in s. 608(1) are "application for a separation a mensa et thoro may be made by either husband or wife by plaint to the District Court." The word "ground" is also found. Here too, only the spouse who has a cause of action can sue for judicial separation. In all three sections, the draftsman employed language which made his meaning manifest that it is only the innocent spouse who could file action seeking a divorce or nullity of marriage or a decree of separation. It is significant that these words are not reproduced in s. 608(2) and the bare words "either spouse" are used, qualifying both paragraphs (*a*) and (*b*) of s. 608(2).

If the contention of learned President's Counsel is correct, then, I must read into s. 608 (2) the following words or some such words:–

(2) Either spouse –

(*a*) who has obtained a decree of separation may after the expiry of two years etc.; or

(*b*) notwithstanding that no application has been made under sub-section (1) but where such an application could have been made and there has been a separation a mensa et thoro etc.

It is a well settled rule of construction that if the language of the enactment is clear and unambiguous, it would not be legitimate for the Courts to add words thereto and evolve therefrom some sense which may be said to carry out the supposed intentions of the legislature (*Bindra* on *Interpretation of Statutes*, 6th Ed. p. 412).

Further, if the submission that a spouse, in addition to a seven-year separation a mensa et thoro, must also prove the conditions sufficient to obtain a decree of separation is correct, the legislature need not have enacted s. 608 (2) (*b*). Sections 608 (1) and 608 (2) (*a*) would suffice. A spouse could obtain a decree of separation under s. 608 (1), and two years later, convert same into a decree of divorce under s. 608 (2) (*a*).

I have no difficulty in construing the words "notwithstanding that no application has been made under sub-section (1)". They mean in spite of the absence of a decree of separation. The words "application made under the circumstances referred to in paragraph (*b*), clearly refer to the circumstances" in paragraph (*b*), that is no decree of separation and a separation for seven years.

What is the meaning of the expression "a separation a mensa et thoro"?

S. 608 (1) states that a decree of separation may be granted on any ground on which by the law applicable to Ceylon such separation may be granted. The case law shows that our Courts have introduced the Roman Dutch Law grounds for separation into our system.

"Maarsdorp's Institutes, Vol. 1, p. 75, sums up the Roman Dutch Law and states that, among other grounds, continuous quarrels and dissensions or other equally valid reasons, which render the living together of the spouses insupportable, will justify a judicial

separation, and that although a wife or husband may reasonably be expected to bear with occasional outbursts of ill temper, yet occasional assaults, however light, accompanied by habitual intemperance, will make cohabitation insupportable ..... It is well known that a judicial separation may be obtained on the same grounds as divorce." – (*Orr v. Orr* (10)).

"Separation may be by the Court, or by consent, in certain cases. The former of these is called divorce a mensa et thoro, i.e., a judicial separation from bed, board, cohabitation, and goods; and this separation may be prayed for by the party, even where a divorce a vinculo might have been asked ..... Besides, the law loves to leave a door ajar for reconciliation, and will prefer to decree judicial separation rather than a divorce a vinculo. Judicial separation may, therefore be decreed for adultery subsequent to marriage, and malicious desertion, and also when for other reasons the continuance of the cohabitation would become dangerous or insupportable. So that judicial separation may be decreed on account of cruelty, or protracted differences or for gross, dangerous and unsupportable conduct in either spouse." – (*Keerthiratne v. Karunawathie (supra)*)

The expression "separation a mensa et thoro" means separation from bed and board. Judicial separation is a separation of husband and wife from bed and board by a judicial order. The Court by decree authorises the parties to live apart from each other. There can be an extra-judicial separation. Parties may voluntarily agree to separate from bed and board and may even enter into a notarially executed deed of separation setting out the terms on which they agree to live apart which will be binding on the parties. (*See Frugtneit v. Frugtneit* (11). What is contemplated in s. 608 (2) (*b*) is a private de facto separation from bed and board for seven years.

Plain words must be given their plain meaning. There is no ambiguity by learned President s Counsel for the defendant-respondent; nor will a Court be justified in reading into s. 608 (2) words which are not the presumption against changes in the common law as contended for in the words of s. 608 (2) and there is no room for the application of there so as to arrive at an interpretation that s. 608 (2) is only available to an innocent spouse devoid of matrimonial fault.

S. 608(2) plainly enacts that on an application of either spouse, whether innocent or guilty of a matrimonial offence, a decree of separation may be converted to one of divorce after the lapse of two years. In addition, it declares that despite the absence of a decree of separation, a de facto separation a mensa et thoro (from bed or board) for seven years is sufficient to obtain a dissolution of marriage, on the application of either the innocent or the guilty spouse. In the latter case, the Court in effect is only conferring de jure recognition on a de facto state of affairs.

The Civil Courts Procedure (Special Provisions) Law, No. 19 of 1977, retained s. 597 of the old Code. The husband or wife could have their marriage dissolved on any ground for which it may, by the law applicable in Ceylon, be dissolved. The substantive grounds on which a marriage may be dissolved are contained in s. 19 of the Marriage Registration Ordinance: adultery subsequent to marriage, malicious desertion or incurable impotency at the time of marriage. The common law grounds of divorce are founded on the doctrine of matrimonial offence. To obtain a divorce, one spouse must establish that the other is at fault and has committed a matrimonial offence known to the law.

Law No. 19 of 1977 retained s. 608 of the old Code and re-numbered it as s. 608(1). It repealed s. 627(1) of the Administration of Justice (Amendment) Law, No. 25 of 1975 which enacted that a judicial separation could only be obtained on any ground on which a divorce may be sought. Law No. 19 of 1977 restored the old position.

Law No. 19 of 1977 also retained s. 627(2) of Law No. 25 of 1975 which enabled either spouse to convert a decree of separation into a decree of divorce after the lapse of two years from the entering of decree of separation.

Why was this new ground of divorce in s. 608(2)(*a*) enacted by the legislature? Parties seek a judicial separation rather than a dissolution of marriage for several reasons – on account of their religious beliefs that a marriage is sacred and indissoluble, or in the interests of the children; but, the main reason is the hope that time will be a great healer of the wounds of the original parting and that the erring spouse would return soon. Where reconciliation had failed and there was no hope of resumption of cohabitation, the legislature thought that rather than compel parties to continue to be married, provision should be

made for the conversion of a decree of separation into a decree of divorce, after the lapse of two years. The legislature thought that the provision of a two-year period after judicial separation was sufficient to enable parties to resolve their differences and resume cohabitation. If after the expiry of two years, spouses are still living apart, the indication is that the marriage has irretrievably broken down.

Law No. 19 of 1977 went further and enacted an additional ground of divorce in s. 608(2)(*b*) – that a de facto separation from bed and board for seven years should be a ground for divorce. The underlying principle is clear. The fact of a long separation was sufficient proof that the marriage had irretrievably broken down and that it was futile to continue the form of marriage without its substance. In such a situation, the parties should be given an opportunity of rehabilitating and refashioning his or her life.

Thus we find that the general law of divorce contains features of the doctrine of matrimonial offence and of the doctrine of the breakdown of marriage. This was not something unknown to the other systems of divorce law in our country – The Kandyan Law and the Muslim Law. S. 32 of the Kandyan Marriage and Divorce Act, (Cap. 113) sets out the grounds for the dissolution of a Kandyan Marriage as adultery by the wife after marriage, adultery by the husband, coupled with incest or gross cruelty, complete and continued desertion by the wife or husband for two years, inability to live happily together, of which actual separation from bed and board for a period of one year shall be the test, and mutual consent. The Kandyan Law therefore contains features of the doctrine of the matrimonial offence when it enables a spouse to seek a divorce for the matrimonial offences of adultery and desertion committed by the other spouse, and also allows divorce on the last two grounds (inability to live together and mutual consent) which are based on the doctrine of the breakdown of marriage.

The Muslim Law, too, contains features of both doctrines. A husband may divorce his wife without assigning reasons by the pronouncement of Talaq. It provides for divorce by mutual consent (Mubarat) and also for divorce at the instance of the wife on the ground of ill-treatment or an account of an act or omission on the husband's part amounting to a fault (Fasah Divorce).

How often in our trial Courts, have parties, having realised that their marriage had broken down and having mutually agreed as regards custody of children and alimony to the wife, engaged in collusive litigation? Cases have proceeded undefended and ex parte and

decrees of divorce obtained at the instance of one spouse. In other instances, cases, hotly contested on the pleadings, have been compromised at the trial stage because parties have realised there was no hope of reconciliation. Having agreed on custody of children and alimony to the wife, one side has allowed the other side to lead evidence and obtain a divorce without contesting the evidence, and sometimes, on evidence which only supported a case for judicial separation. Decrees of divorce were thus obtained, though s.602 required the Court to be satisfied on evidence that the plaintiff's case has been proved before entering a decree of divorce and even though in the old Code (s.602(1)), a collusive proceeding was an absolute bar to the dissolution of marriage. By enacting s.608(2), the legislature was only giving statutory recognition to an established practice in our trial Courts.

There is another matter. According to s.19 of the Marriage Registration Ordinance, the grounds for divorce are adultery, malicious desertion and incurable impotency at the time of marriage. These grounds, except incurable impotency, are based on the theory of matrimonial fault. The old Civil Procedure Code, in s.602(1), enacted that the Court shall dismiss the plaint if it finds that the plaintiff has been an accessory to or conniving at the act or conduct which constitutes the ground upon which the dissolution of marriage is prayed for, or has condoned the same or that the plaint is presented or prosecuted in collusion with the defendant. Thus, a finding of connivance, collusion or condonation was an absolute bar to the dissolution of marriage. This provision in the old Code was consistent with the theory of matrimonial fault which is the basis on which a marriage is dissolved.

The old Code in the proviso to s.602(1) also provided that the Court shall not be bound to pronounce a decree for divorce if it finds that the plaintiff has, during the marriage, been guilty of adultery or been guilty of unreasonable delay in presenting or prosecuting his plaint or of cruelty to the other party to the marriage or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of and without reasonable excuse, or of such wilful neglect of or misconduct towards the other party, or has conduced to the adultery. Thus, plaintiff's adultery, his delay in filing action, cruelty, desertion or wilful neglect or misconduct conducive to adultery, are discretionary bars to the dissolution of marriage. This proviso contains the principle that he or she who comes to Court for

relief must himself or herself come with clean hands. This is also consistent with the theory of matrimonial fault which is the basis on which a marriage is dissolved.

The Administration of Justice (Amendment) Law, No. 25 of 1975, did not re-enact s. 602 of the old Code, but it enacted a new ground of divorce in s. 627(2). S. 602 of the old Code was also not reintroduced by Law No. 20 of 1977, which went further and enacted an additional ground of divorce in s. 608(2)(*b*). Which means, today, a divorce could be obtained notwithstanding that the plaintiff has been guilty of connivance, condonation or collusion. What was the reason for the omission of the absolute and discretionary bars both in Law No. 25 of 1975 and Law No. 20 of 1977?

To my mind the reason is clear. The retention of the provisions dealing with absolute and discretionary bars would operate against the principle of irretrievably broken down marriage contained in s. 608(2). They were, therefore, omitted by the legislature to enable parties whose marriages have irretrievably broken down to seek a dissolution of their marriage.

I see no reason to change the view I have taken of s. 608(2)(*b*) in my judgment in *Kuthuranee v. Thuraisingham (supra)* even after hearing fresh arguments, except in regard to one matter. I have stated in my judgment (p. 392). "S. 608(2)(*b*) enables spouses to permanently end their marital relationship on the mere proof of a de facto separation for a period of seven years." This statement of mine might suggest that spouses who have parted from each other for seven years for reasons of employment abroad, medical treatment, jail sentence etc., are entitled to a dissolution of marriage by mere proof of separation for seven years.

In England, the sole ground on which a petition for divorce may be presented to the Court by either party to a marriage is that the marriage has broken down irretrievably (Matrimonial Causes Act, 1973, S. 1(1)). The Court hearing a petition for divorce must not hold the marriage to have broken down irretrievably unless the petitioner satisfies the Court of one or more of the following facts, that is to say: (1) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent; (2) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent; (3) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition; (4) that the

parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted; (5) that the parties to the marriage have lived apart for a continuous period of at least five years immediatley preceding the presentation of the petition (s. 1 (2)). On a petition for divorce it is the duty of the Court to inquire, so far as it reasonably can, into the facts alleged by the petitioner and in to any facts alleged by the respondent. If the Court is satisfied on the evidence of any such fact as is mentioned in subsection (2), then, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall, subject to section 3(3) and 5, grant a decree of divorce (s. 1 (3), (4)). S. 5 relates to refusal of a decree of divorce where there would be grave financial or other hardship to the respondent and it would in all the circumstances be wrong to dissolve the marriage.

The English Law requires proof of an irretrievable broken down marriage as a pre-requisite for the award of a decree of divorce.

In *Chapman v. Chapman* (12), the defendant presented a petition for divorce on the ground that the marriage had irretrievably broken down. She prayed for costs and in the petition suggested that the husband was responsible for the separation. Lord Denning, M.R. observed:

> "I think it altogether wrong for a petitioner (who seeks a divorce on the ground of five years living apart) to charge the respondent with a matrimonial offence. If the petitioner seeks to make such a charge, she should proceed on one of the other grounds, such as adultery, intolerable behaviour or desertion. She should only proceed on the five-year ground alone when that is the only fact on which she is entitled to rely..... The result is, in my opinion, that in these five-year cases, the Court should not enquire into whose fault it was that the marriage has broken down. If the petitioner starts making allegations of fault, in order to recover costs, then the respondent will be entitled to cross-examine her and to call evidence himself in answer and we shall be back to the bad old days of mutual recrimination in open Court..... So I am firmly of opinion that the petition, in a five-year case, should not contain any allegation of fault against the respondent. In most five-year cases the fault is on the part of the petitioner, or is the fault of both, or as I would prefer to say, the misfortune of both."

In South Africa, the four grounds of divorce were adultery, malicious desertion, incurable insanity which has existed for not less than seven years, and imprisonment for five years after the defendant spouse has been declared a habitual criminal. The first two grounds are based on common law, the other two on statute (*See Hahlo on the South African Law of Husband and Wife*, p. 295). Commenting on this Hahlo says:

> "The statutory grounds of divorce are based on the idea that it is the function of divorce to dissolve the marriage tie when the consortium has been destroyed. The common law grounds of divorce are based on the guilt principle."

It would seem that in South Africa at present, there is the Divorce Act, No. 70 of 1979 (not available). In *Kruger v. Kruger* (13) the plaintiff, a medical practitioner and 76 years of age, was married in 1940, and whilst working in the Orange Free State started an intimate relationship with Mrs. H. In 1951, he took a job in Johannesburg and Mrs. H. joined him there. The defendant wife stayed on in the Orange Free State to look after the plaintiff's mother who was terminally ill with cancer. After the mother died, the defendant and her son joined the plaintiff in Johannesburg. In 1953, the plaintiff left the defendant and ever since, he has been living with Mrs. H. The plaintiff has asked the defendant many times to divorce him but she refused. In 1964, she obtained a decree of judicial separation against her husband. In 1977 the plaintiff suffered a serious brain haemorrhage and the defendant visited him at the Nursing Home on a number of occasions and offered to look after him at her home. He refused the offer. The defendant in her evidence stated that she still loved him. She had hopes of her husband's return, that she believed in the sanctity of marriage and she does not wish to break the vows she had made before God. The husband stated in evidence that he still thinks highly of the defendant and that she is an unselfish person who tries to express her life in the best Christian traditions. He did not want to return to her, he loves Mrs. H. and wishes to marry her if divorce is granted. Brink, J. said:

> "There are indications in some of the letters, written by the plaintiff, and also in the evidence, that there still is a particular bond between the parties. When the fact that the plaintiff has chosen to live apart from the defendant for almost 27 years and has said that he wishes to marry Mrs. H. if an order for divorce is granted is, however, taken into account, it is quite clear that this bond does

not, as far as the plaintiff is concerned, have its origin in the love and affection which persons, happily married, normally have for each other and cannot be regarded as something which binds the parties to each other in such a manner that it has prevented their marriage from reaching a state of complete disintegration despite the many years of separation. The defendant's attitude towards marriage is praiseworthy. The manner in which she behaved towards the plaintiff shows that she does not refuse to divorce him out of spite but because of a genuine desire to have the marriage relationship between them restored. The marriage relationship can however only be restored with the co-operation of the plaintiff. And the plaintiff's adamant determination not to resume life with the defendant and the fact that he has lived with Mrs. H. for almost 27 years constrain me to come to the conclusion that the marriage has broken down irretrievably and that, even if I have a discretion in the matter, I am obliged in the particular circumstances of this case to grant an order for divorce..... There is, apart from the fact that the parties have not lived together as husband and wife..... ample proof that the marriage has reached a state of absolute disintegration."

This case was decided under the Divorce Act, No. 70 of 1979. It is clear from the judgment that an irretrievable breakdown of marriage is a ground of divorce in South Africa now. Divorce was granted in this case at the instance of the guilty spouse though it was opposed by the innocent spouse.

S. 608(2) states that the "Court *may* upon the proof of the matters stated in an application made under the circumstances referred to in paragraph (6), enter judgment accordingly." This means, that even if a spouse has proved a de facto separation from bed and board for seven years, the Court has a discretion, whether or not to enter a decree for divorce. As s. 608(2)(*b*) embodies the theory of breakdown of marriage, the trial Court will, therefore, only grant a dissolution of marriage if it is satisfied on the evidence that the marital union is dead for all intents and purposes.

One other matter. The trial Judge has not considered the payment of permanent alimony to the defendant-respondent. According to s. 615 of the old Civil Procedure Code, a court has no power, in a decree absolute for the dissolution of marriage entered at the suit of the husband, to award permanent alimony to the wife (*See, Ebert v. Ebert* (14)). Thus, only an innocent wife was entitled to permanent

alimony both on divorce and on separation. This was consistent with the theory of matrimonial fault which is the basis on which a marriage was dissolved. Law No. 20 of 1977 repealed s. 615 and has replaced it with the new s. 615, in terms of which, "the Court may, if it thinks fit, upon pronouncing a decree of divorce or of separation, make order for the benefit of *either spouse* or of the children or of both." Is it not to meet the new situation created by the enactment of s. 608(2), whereby even a guilty spouse who has wrecked the marriage could obtain a divorce, that the new section 615 was enacted, for, if the old s. 615 stood, the innocent spouse would have been deprived of support.

The learned trial Judge has correctly taken the view that in an application for divorce under s. 608(2)(*b*), the question whether the applicant is an innocent or guilty party does not arise for consideration

I set aside the judgment of the Court of Appeal dated 5.9.84, and restore the judgment of the learned trial Judge. The case is sent back for the limited purpose of enabling the trial Court to make an appropriate order for payment of alimony in terms of s. 615 of the Code, after due inquiry. There will be no costs of appeal.

Appeal dismissed.